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ON

VARIOUS BRANCHES OF THE LAW:

With Notes.

BY JOHN WILLIAM SMITH.

THE THIRD AND FOURTH EDITIONS BY

SIR JAMES SHAW WILLES & SIR HENRY SINGER KEATING,

JUSTICES OF THE COURT OF COMMON PLEAS,

THE FIFTH AND SIXTH EDITIONS BY

FRED. PHILIP MAUDE & THOS. EDWARD CHITTY,

BARRISTERS-AT-LAW,

THE SEVENTH, EIGHTH, AND NINTH EDITIONS BY

SIR RICHARD HENN COLLINS & ROBERT GEORGE ARBUTHNOT,

JUSTICE OF THE HIGH COURT OF JUSTICE. BARRISTER-AT-LAW.

THE TENTH EDITION

BY

THOMAS WILLES CHITTY,

JOHN HERBERT WILLIAMS, LL.B.,

AND

HERBERT CHITTY, M.A.,

BARRISTERS-AT-LAW.

"It is ever good to rely upon the book at large; for many times, *Compendia sunt dispendia*, and *Melius est petere fontes quam sectari rivulos*."—1 INST. 305 b.

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PREFACE TO THE TENTH EDITION.

THE first edition of Smith's Leading Cases was published in 1837. An interesting memoir of the author, Mr. John William Smith, who died in 1845, will be found in the first volume of Mr. Samuel Warren's Miscellanies. The Law Magazine (N. S., vol. iv., p. 177) also contains an account of him, written by Mr. J. G. Phillimore, whose translation of Siderfin's report of *Manby* v. *Scott* is given in Vol. II. of this work. The last three editions of the work were edited by the Hon. Sir Richard Henn Collins, who was raised to the Bench in 1891, and Mr. Robert George Arbuthnot, whose untimely death occurred in 1890.

The present editors, while preserving all the distinctive features of the work and interfering to the least possible extent with the notes of former editors, have endeavoured to make the notes to the present edition as concise as possible, and by some re-arrangement to make the work more methodical.

The brackets, which distinguished the notes of later editors, had become so numerous, and, in some instances, so confusing, that the editors considered that the time had come for omitting them altogether.

The cases which deal with cognate subjects have now been brought together. The notes to *Keech* v. *Hall* and *Moss* v. *Gallimore* have been combined. *Chandelor* v. *Lopus* has been placed next before *Pasley* v. *Freeman* in Vol. II., and the subject of "deceit" is dealt with entirely in the note to the latter case.

The cases on the Statute of Frauds, *Birkmyr* v. *Darnell*, *Peter* v. *Compton*, and *Wain* v. *Warlters*, will now be found together in Vol. I. The cases on evidence, *Price* v. *Torrington*, and *Higham* v. *Ridgway*, have been placed next to each other in Vol. II. And *Collins* v. *Blantern* and *Merryweather* v. *Nixan* are together in Vol. I.

A portion of the former notes to *Ashby* v. *White* has been expanded, and now appears in the notes to *Fletcher* v. *Rylands*, which has been added as a leading case.

The Indexes have been carefully revised, and the Indexes of Cases now contain references to all the reports.

Notwithstanding the additions, and the enlargement of the Indexes, the size of the volumes has been somewhat reduced. This desirable end has been attained to some extent by printing the text of the leading cases in smaller type.

The editors wish to express their obligation to Mr. G. H. Taylor-Whitehead, Mr. C. G. S. McAlester, and Mr. D. H. Crompton, for their valuable assistance in verifying references to reports, and in preparing the Indexes of Cases for the present edition.

T. W. C.
J. H. W.
H. C.

29th January, 1896.

PREFACE TO THE SECOND EDITION,

BY THE AUTHOR.

When this work was first published, it was hoped that it would be found to supply, in some degree, a want which was believed to have been felt, although on different occasions, both by the student and by the lawyer occupied in actual practice.

The student, when he devotes himself to the perusal of Law, is frequently advised by experienced friends, that he ought early to habituate himself to the perusal of Reports at large, instead of pinning his faith upon the commentaries and abridgments of the treatise writers—"*Melius est*," says Lord Coke, "*petere fontes quam sectari rivulos.*"—When, however, he attempts to follow this advice, he finds himself astray amid the masses of accumulated lore which the Reports present to him, the "*aliarum super alias acervatarum legum cumuli;*" he feels his judgment perplexed, his choice distracted, and his immediate wish is, that some guide would direct him to the *leading* cases, embodied in which he might discover those great principles of Law of which it is necessary that he should render himself thorough master before he can trace with accuracy the numerous ramifications into which those principles are expanded in the surrounding multitude of decisions.

The lawyer engaged in actual business frequently also feels the want of a portable collection of leading cases, but for a different reason. The leading cases are those with the names of which he is most familiar, which he has most frequently occasion to consult, and which, consequently, he would, if it were practicable, willingly carry into court or round the circuit with him.

It was therefore thought that this collection might prove of some utility to both the classes of Readers just described. The

cases it contains may all, it is believed, be properly denominated "*leading cases*." Each involves, and is usually cited to establish, some point or principle of real practical importance. In order that the consequences of each may be understood, and its authority estimated as easily as possible, notes have been subjoined, in which are collected subsequent decisions bearing on the points reported in the text, and in which doctrines having some obvious connection with them are occasionally discussed. This, though of course the least valuable part of the work, has cost its author by far the greatest labour and anxiety; care has been taken in executing it not to allow the notes to digress so far from the subject-matter of the text, as to distract the reader's mind from that to which they ought to be subsidiary. In perusing them, it will be found that the facts of some of the cases cited are set forth at considerable length, and portions of the judgments transcribed *verbatim*. This is done only when the case cited is itself of such importance as to merit the appellation of a *leading case*, with an abridgment of which the reader is thus furnished, where it could not, consistently with the plan of the work, be presented to him entire.

* * * * *

J. W. S.

12, King's Bench Walk,
Feb. 28, 1841.

LIST OF CASES REPORTED IN VOLUME 1.

ARMORY *v.* DELAMIRIE — PAGE
[*Title against wrong-doer—Master and servant*] 343

ASHBY *v.* WHITE
[*Ubi jus ibi remedium*] 231

BIRKMYR *v.* DARNELL
[*Guarantee—Statute of Frauds*] 287

CALYE'S CASE
[*Innkeeper's liability and lien*] 115

CARTER *v.* BOEHM
[*Insurance—Concealment of facts—Broker's opinion*] . . . 474

COGGS *v.* BERNARD
[*Bailments—Gratuitous undertakings*] 167

COLLINS *v.* BLANTERN
[*Illegality of bond pleadable*] 355

CREPPS *v.* DURDEN
[*Actions against justices—Several convictions for one offence—Summary convictions*] 632

CUMBER *v.* WANE
[*Accord and satisfaction*] 325

DUMPOR'S CASE
[*Conditions not to assign without licence—Forfeiture*] 31

FLETCHER *v.* RYLANDS
["*Sic utere tuo ut alienum non lædas*"] 789

KEECH *v.* HALL
[*Mortgagor's tenant by demise after mortgage*] 494

LAMPLEIGH *v.* BRATHWAIT
[*Consideration—Request*] 136

LICKBARROW *v.* MASON
[*Stoppage in transitu—Bills of lading—Factors*] 674

MASTER *v.* MILLER
[*Alteration of instrument*] 747

PAGE

MERRYWEATHER *v.* NIXAN
[*No contribution between joint tort-feasors*] 383

MILLER *v.* RACE
[*Negotiable instrument*] 447

MITCHEL *v.* REYNOLDS
[*Restraint of trade*] 391

MOSS *v.* GALLIMORE
[*Mortgagee's right to rent*] 497

MOSTYN *v.* FABRIGAS
[*Venue—Action against Governor of Colony for injury done there—Foreign cause of action*] 572

PETER *v.* COMPTON
[*Contracts not performable within year*] 303

SCOTT *v.* SHEPHERD
[*Squib-throwing—Trespass and case*] 438

SEMAYNE'S CASE
["*A man's house is his castle*"—*Sheriff*] 99

SIMPSON *v.* HARTOPP
[*Things privileged from distress*] 421

SIX CARPENTERS' CASE
[*Trespass ab initio*] 127

SPENCER'S CASE
[*Covenants running with land*] 52

TWYNE'S CASE
[*Fraudulent gifts and conveyances*] 1

WAIN *v.* WARLTERS
[*Guarantee—What is sufficient signature under Statute of Frauds*] . 310

WHITCOMB *v.* WHITING
[*Statute of Limitations—Acknowledgment by co-contractor*] . . . 561

WIGGLESWORTH *v.* DALLISON
[*Usages—Construction of written contracts by reference thereto*] . . 528

Note.—*Chandelor* v. *Lopus*, and *Price* v. *Earl of Torrington*, which were formerly printed in this volume, will now be found in vol. ii. *Waugh* v. *Carver* has been omitted from this edition, as the note became of less importance after the Partnership Act, 1890; and *Fletcher* v. *Rylands* has been inserted instead.

TABLE OF CASES TO VOLUME I.

A.

PAGE

ABBOT *v.* Rogers, 16 C. B. 277 ; 24 L. J. C. P. 158 ; 1 Jur. N. S. 804 ; 3 C. L. R. 862 ; 3 W. R. 522 373
——— *v.* Smith, 2 W. Bl. 947 152
Abbott *v.* Abbott, 29 L. J. Mat. 57 621
——— *v.* Bates, 43 L. J. C. P. 150 ; 30 L. T. 99 ; 33 Id. 491 ; 22 W. R. 488 ; 24 Id. 101 559
——— *v.* Macfie, 2 H. & C. 744 ; 33 L. J. Ex. 177 ; 10 Jur. N. S. 682 ; 9 L. T. 513 ; 12 W. R. 315 275
Abdy, *Re*, (1895) 1 Ch. 455 ; 64 L. J. Ch. 465 ; 12 R. ; 43 W. R. 323 368
Abouloff *v.* Oppenheimer, 10 Q. B. D. 295 ; 52 L. J. Q. B. 1 ; 47 L. T. 325 ; 30 W. R. 429 ; 31 Id. 57 608
Abrahams *v.* Deakin, (1891) 1 Q. B. 516 ; 60 L. J. Q. B. 238 ; 63 L. T. 690 ; 39 W. R. 183 ; 55 J. P. 212 352
Abrath *v.* N. E. R. Co., 11 Q. B. D. 440 ; 11 App. Cas. 247 ; 52 L. J. Q. B. 352, 620 ; 49 L. T. 618 ; 32 W. R. 50 ; 47 J. P. 692 . . 261
Acatos *v.* Burns, 3 Ex. D. 282 ; 47 L. J. Ex. 566 ; 26 W. R. 624 . 205
Ackroyd *v.* Smithies, 54 L. T. 130 ; 50 J. P. 538 332
Acraman, *Ex p.*, 31 L. J. Ch. 741 ; 7 L. T. 84 305
Acroyd *v.* Smith, 10 C. B. 164 ; 19 L. J. C. P. 315 ; 14 Jur. 1049 . 246
Acton *v.* Blundell, 12 M. & W. 324 ; 13 L. J. Ex. 289 . . 273, 812
Adames *v.* Hallett, 6 Eq. 468 ; 18 L. T. 789 15
Adams *v.* Clutterbuck, 10 Q. B. D. 403 ; 52 L. J. Q. B. 607 ; 48 L. T. 614 ; 31 W. R. 723 . . . . . 609, 622
——— *v.* Grane, 3 Tyrwh. 326 ; 1 C. & M. 380 ; 2 L. J. Ex. 105 427, 428
——— *v.* L. & Y. R. Co., L. R. 4 C. P. 739 ; 38 L. J. C. P. 277 ; 20 L. T. 850 ; 17 W. R. 884 276
——— *v.* Tapling, 4 Mod. 88 327
——— *v.* Wardley, 1 M. & W. 374 ; 2 Gale, 29 ; 1 T. & G. 620 ; 5 L. J. Ex. 158 554
Adamson, *Re*, L. R. 3 P. & D. 253 785
——— *v.* Jarvis, 4 Bing. 66 ; 12 Moore, 241 . . . . 154, 390
Aga Kurboolie Mahomed *v.* The Queen, 4 Moo. P. C. 237 . . . 106
Agar *v.* Athenæum Ass. Soc., 3 C. B. N. S. 725 ; 27 L. J. C. P. 95 ; 4 Jur. N. S. 211 ; 6 W. R. 277 . . . . . 379, 380
Agincourt, The, 2 P. D. 239 ; 47 L. J. A. 37 607
Agricultural Co. *v.* Fitzgerald, 16 Q. B. 432 ; 20 L. J. Q. B. 244 ; 15 Jur. 489 787
Aitkenhead *v.* Blades, 5 Taunt. 198 ; 1 Marsh. 17 . . . . 131, 132
Alabaster *v.* Harness, (1894) 2 Q. B. 897 ; (1895) 1 Q. B. 339 ; 64 L. J. Q. B. 76 ; 71 L. T. 740 ; 43 W. R. 196 ; 14 R. 371
Alchin *v.* Hopkins, 1 B. N. C. 99 ; 4 M. & Scott, 615 ; 3 L. J. C. P. 272 334
Alchorne *v.* Gomme, 2 Bing. 54 ; 9 Moore, 130 505
Alcock *v.* Leeuw, C. & E. 98 . . . . . 547, 560
——— *v.* Smith, (1892) 1 Ch. 238 ; 61 L. J. Ch. 161 ; 65 L. T. 335 ; 66 Id. 126 611
Alderson *v.* Langdale, 3 B. & Ad. 660 781
Aldin *v.* Latimer, (1894) 2 Ch. 437 ; 63 L. J. Ch. 601 ; 71 L. T. 119 ; 42 W. R. 553 ; 8 R. 352 161

PAGE
Aldous *v.* Cornwell, L. R. 3 Q. B. 573 ; 37 L. J. Q. B. 201 ; 16 W. R. 1045 783
Aldred's Case, 9 Co. Rep. 57 b 795, 796, 800
Aldridge *v.* Aldridge, 13 P. D. 210 ; 58 L. J. P. 8 ; 59 L. T. 896 ; 37 W. R. 240 367
——— *v.* G. W. R. Co., 3 M. & Gr. 515 ; 4 Scott, N. R. 156 ; 1 Dowl. N. S. 247 825
——— *v.* ———, 15 C. B. N. S. 582 ; 33 L. J. C. P. 161 200, 216
——— *v.* Haines, 2 B. & Ad. 395 641
Alexander *v.* Campbell, 41 L. J. Ch. 478 ; 27 L. T. 25 . . . 341
——— *v.* Vanderzee, L. R. 7 C. P. 530 ; 20 W. R. 871 . . . 541
——— *v.* Vane, 1 M. & W. 511 ; 2 Gale, 57 ; 1 T. & G. 865 ; 5 L. J. Ex. 187 147
Alhambra, The, 6 P. D. 68 ; 49 L. J. A. 73 ; 50 Id. 36 ; 43 L. T. 31 ; 4 Asp. M. C. 334, 410 ; 29 W. R. 215, 655 . . . . . 554, 555
Alivon *v.* Furnival, 4 Tyr. 751 ; 1 C. M. & R. 277 ; 3 Dowl. 202 ; 3 L. J. Ex. 241 616
Allan *v.* Sundius, 1 H. & C. 123 ; 31 L. J. Ex. 307 ; 6 L. T. 359 ; 10 W. R. 648 . . . . . 543, 558
Allbutt *v.* Medical Council, 23 Q. B. D. 400 ; 58 L. J. Q. B 606 ; 61 L. T. 585 ; 37 W. R. 771 262
Allday *v.* G. W. R. Co., 34 L. J. Q. B. 5 ; 5 B. & S. 903 ; 11 Jur. N. S. 12 ; 11 L. T. 267 ; 13 W. R. 43 . . . . . 213, 216
Allen *v.* Coltart, 31 W. R. 841 ; 11 Q. B. D. 782 ; 52 L. J. Q. B. 686 ; 48 L. T. 944 740
——— *v.* Hayward, 7 Q. B. 960 ; 15 L. J. Q. B. 99 ; 10 Jur. 92 . . 814
——— *v.* Jackson, 1 Ch. D. 399 ; 45 L. J. Ch. 310 ; 33 L. T. 713 ; 24 W. R. 306 367
——— *v.* Kemble, 6 Moo. P. C. 314 ; 13 Jur. 287 611
——— *v.* L. & S. W. R. Co., L. R. 6 Q. B. 65 ; 40 L. J. Q. B. 55 ; 23 L. T. 612 ; 19 W. R. 127 ; 11 Cox, C. C. 621 . . . 352
——— *v.* Milner, 2 Tyr. 113 ; 2 C. & J. 47 ; 1 L. J. Ex. 7 . . . 325
——— *v.* Smith, 12 C. B. N. S. 638 ; 31 L. J. C. P. 306 ; 9 Jur. N. S. 230, 1284 ; 6 L. T. 459 ; 10 W. R. 646 125
Alliance Bank of Simla *v.* Carey, 5 C. P. D. 429 ; 49 L. J. C. P. 781 ; 29 W. R. 306 ; 44 J. P. 735 616
Allies *v.* Probyn, 5 Tyr. 1079 ; 2 C. M. & R. 408 ; 4 Dowl. 153 ; 4 L. J. Ex. 227 336
Allport *v.* Nutt, 1 C. B. 974 ; 3 D. & L. 233 ; 14 L. J. C. P. 272 ; 9 Jur. 900 386
Allsop *v.* Allsop, 5 H. & N. 534 ; 29 L. J. Ex. 315 ; 6 Jur. N. S. 433 ; 2 L. T. 290 ; 8 W. R. 449 280
Allsopp *v.* Wheatcroft, 15 Eq. 59 ; 42 L. J. Ch. 12 ; 27 L. T. 372 ; 21 W. R. 102 411
Alner *v.* George, 1 Camp. 392 328
Alston, *Ex p.*, 4 Ch. 168 ; 19 L. T. 542 ; 17 W. R. 266 . . . 737
——— *v.* Herring, 11 Exch. 822 ; 25 L. J. Ex. 177 204
Alton *v.* Harrison, 4 Ch. 622 ; 38 L. J. Ch. 669 ; 20 L. T. 1001 ; 17 W. R. 1034 17
——— *v.* Mid. R. Co., 19 C. B. N. S. 213 ; 34 L. J. C. P. 292 ; 11 Jur. N. S. 672 ; 12 L. T. 703 ; 13 W. R. 918 202
American Concentrated Must Co. *v.* Hendry, 68 L. T. 742 ; 62 L. J. Q. B. 388 ; 57 J. P. 521, 788 ; 5 R. 331 106
Amos *v.* Smith, 1 H. & C. 238 ; 31 L. J. Ex. 423 ; 7 L. T. 66 ; 10 W. R. 759 567
Ancona *v.* Marks, 7 H. & N. 686 ; 31 L. J. Ex. 163 ; 8 Jur. N. S. 516 ; 5 L. T. 753 ; 10 W. R. 251 . . . . . 350, 473
Anderson *v.* Gorrie, (1895) 1 Q. B. 668 ; 71 L. T. 382 ; 14 R. . 265, 631
——— *v.* Midland R. Co., 30 L. J. Q. B. 94 ; 3 E. & E. 614 ; 7 Jur. N. S. 411 ; 3 L. T. 809 516
——— *v.* Oppenheimer, 5 Q. B. D. 602 ; 49 L. J. Q. B. 456, 708 ; 14 J. P. 697 824

PAGE

Anderson *v.* Pitcher, 2 B. & P. 164; 3 Esp. 124; 1 Stark. 262; 5 R. R. 565 560
——— *v.* Ratcliffe, E. B. & E. 806, 819; 28 L. J. Q. B. 32; 29 Id. 128; 5 Jur. N. S. 704; 6 Id. 578; 1 L. T. 487; 6 W. R. 655; 8 Id. 283 . . . . . 371, 508
Anderton, *Re*, 45 Ch. D. 476; 59 L. J. Ch. 765; 63 L. T. 332; 39 W. R. 44 49
Andrée *v.* Fletcher, 3 T. R. 266; 2 Id. 161; 1 R. R. 701 . . . 384
Andrew *v.* Aitken, 22 Ch. D. 218; 52 L. J. Ch. 294; 48 L. T. 148; 31 W. R. 425 87
——— *v.* Boughay, Dyer, 75 337
——— *v.* Hancock, 1 B. & B. 37; 3 Moore, 278 . . . 163, 164
——— *v.* Pearce, 1 B. & P. N. R. 158 96
Andrews *v.* Nott Bower, (1895) 1 Q. B. 888; 64 L. J. Q. B. 536; 72 L. T. 530; 43 W. R. 582; 14 R. 262
Angus *v.* McLachlan, 23 Ch. D. 330; 52 L. J. Ch. 587; 48 L. T. 863; 31 W. R. 641 . . . . . 123, 126
Anon., 1 B. & Ad. 382 653
——, Godb. 109 348
——, 6 Mod. 105; Lofft, 390 106
——, 12 Mod. 564 . . . . . 192, 194
——, Moore, 21 47
——, Moore, 159 67
——, 1 Salk. 126 (5); 1 Ld. Raym. 738 449
——, 1 Salk. 280 304
——, 2 Salk. 522 191
——, Year Book, 7 H. 4, Hil. 34 b 348
Anscomb *v.* Shore, 1 Camp. 285; 1 Taunt. 261; 10 R. R. 686 . . 130
Anthony *v.* Haneys, 8 Bing. 186; 1 Moo. & S. 300; 1 L. J. C. P. 81 135
Apharry *v.* Bodingham, Cro. Eliz. 350 22
Aplin *v.* Pornitt, (1893) 2 Q. B. 57; 62 L. J. M. C. 144; 69 L. T. 433; 42 W. R. 95; 57 J. P. 456 432
Apollo, The, (1891) A. C. 499; 61 L. J. A. 25; 60 L. T. 112; 61 Id. 286; 65 Id. 590; 55 J. P. 820; 6 Asp. M. C. 356, 402 . . . 352
Apothecaries' Co. *v.* Jones, (1893) 1 Q. B. 89; 67 L. T. 677; 41 W. R. 267; 57 J. P. 56; 17 Cox, C. C. 588; 5 R. 101 640
Appleby *v.* Franklin, 17 Q. B. D. 93; 55 L. J. Q. B. 129; 54 L. T. 135; 34 W. R. 231; 50 J. P. 359 279
Appleton *v.* Braybrook, 2 Stark. 6; 6 M. & S. 34 621
Archer *v.* Bank of England, 2 Dougl. 637 457
——— *v.* Marsh, 6 A. & E. 959; 2 N. & P. 562; W. W. & D. 641 405, 406, 414
Arcot (Nabob of) *v.* East India Co., 3 Br. C. C. 291; 4 Id. 180; 1 Ves. 371; 2 Ves. 56 626
Argentina, The, L. R. 1 A. & E. 370; 16 L. T. 743 740
Arkwright *v.* Cantrell, 7 A. & E. 565; 2 N. & P. 582; 7 L. J. Q. B. 63; 2 Jur. 11 368
Arlett *v.* Ellis, 7 B. & C. 346; 9 Id. 671; 9 D. & R. 897 . . . 134
Armistead *v.* Wilde, 17 Q. B. 261; 15 Jur. 1010; 20 L. J. Q. B. 524. 121
Armory *v.* Delamirie, 1 Str. 504 . . . . . 343, 449
Armstrong *v.* L. & Y. R. Co., L. R. 10 Ex. 47 277
Arnsby *v.* Woodward, 6 B. & C. 519; 9 D. & R. 536 42
Artola Hermanos, *Re*, 24 Q. B. D. 640; 59 L. J. Q. B. 254; 62 L. T. 781; 7 M. B. R. 80 607
Ash *v.* Dawnay, 8 Exch. 237; 22 L. J. Ex. 59 132
Ashbury Co. *v.* Riche. See *Riche* v. *Ashbury*.
Ashby *v.* James, 11 M. & W. 542; 12 L. J. Ex. 295 566
——— *v.* White, 2 Ld. Raym. 938; 3 Id. 320; 1 Salk. 19; 3 Id. 17; Holt, 524; 6 Mod. 45; 1 Bro. P. C. 62; 14 How. St. Tr. 695 . 231
Ashcroft *v.* Bourne, 3 B. & Ad. 684; 1 L. J. K. B. 209 . . . 641

PAGE

Ashdown *v.* Curtis, 31 L. J. M. C. 216 ; 8 Jur. N. S. 511 ; 6 L. T. 331 ; 10 W. R. 667 671
Ashendon *v.* L. B. & S. C. R. Co., 5 Ex. D. 190 ; 42 L. T. 586 ; 28 W. R. 511 ; 44 J. P. 203 216
Ashford *v.* Redford, L. R. 9 C. P. 20 ; 43 L. J. C. P. 57 . . . 541
Ashley *v.* Harrison, 1 Esp. 48 ; 1 Peake, 256 ; 3 R. R. 686 . . 280
Ashpitel *v.* Bryan, 32 L. J. Q. B. 91 ; 33 Id. 328 ; 3 B. & S. 474 ; 5 Id. 723 ; 9 Jur. N. S. 791 ; 7 L. T. 706 ; 11 Id. 221 ; 11 W. R. 279 ; 12 Id. 1082 351
Ashton *v.* Heaven, 2 Esp. 533 ; 5 R. R. 750 200
Aspden *v.* Seddon, 1 Ex. D. 496 ; 46 L. J. Ex. 353 ; 34 L. T. 906 ; 24 W. R. 828 89
Aspinall *v.* Sutton, (1894) 2 Q. B. 349 ; 63 L. J. M. C. 205 ; 58 J. P. 622 ; 10 R. 465 671
Astley *v.* Reynolds, 2 Str. 916 326
Athenæum Soc., *Re*, 4 K. & J. 549 ; 27 L. J. Ch. 829 ; 4 Jur. N. S. 1140 ; 6 W. R. 779 380
Atkins *v.* Banwell, 2 East, 504 143
Atkinson *v.* Denby, 6 H. & N. 778 ; 7 Id. 934 ; 30 L. J. Ex. 361 ; 31 Id. 362 ; 7 Jur. N. S. 705 ; 8 Id. 1012 ; 4 L. T. 252 ; 7 Id. 93 ; 9 W. R. 539 ; 10 Id. 389 385
——— *v.* Hawdon, 2 A. & E. 628 ; 4 N. & M. 409 ; 4 L. J. K. B. 85 781
——— *v.* Maling, 2 T. R. 462 ; 1 R. R. 524 15
——— *v.* Newcastle Waterworks Co., 2 Ex. D. 441 ; L. R. 6 Ex. 404 ; 46 L. J. Ex. 775 ; 36 L. T. 761 ; 20 W. R. 35 ; 25 Id. 794 286
——— *v.* Stevens, 7 Exch. 567 ; 21 L. J. Ex. 329 219
Atkyns *v.* Kinnier, 4 Exch. 776 ; 19 L. J. Ex. 132 404
Atlee *v.* Backhouse, 3 M. & W. 633 ; 1 H. & H. 135 ; 7 L. J. Ex. 234 331
Attack *v.* Bramwell, 3 B. & S. 520 ; 32 L. J. Q. B. 146 ; 7 L. T. 740 ; 9 Jur. N. S. 892 ; 11 W. R. 309 132
Attoe *v.* Hemmings, 2 Bulst. 281 . . . . . 60, 68
Att.-Gen. *v.* Bouwens, 4 M. & W. 171 ; 1 H. & H. 319 ; 7 L. J. Ex. 297 . . . . . 455, 462, 468
——— *v.* Churchill, 8 M. & W. 171 ; 9 Dowl. 772 ; 10 L. J. Ex. 314 ; 5 Jur. 803 600
——— *v.* Conduit Co., (1895) 1 Q. B. 301 ; 64 L. J. Q. B. 207 ; 43 W. R. 366 ; 71 L. T. 771 ; 15 R. 271
——— to the Prince of Wales *v.* Crossman, L. R. 1 Ex. 381 ; 4 H. & C. 568 ; 35 L. J. Ex. 215 ; 12 Jur. N. S. 712 ; 14 L. T. 856 ; 14 W. R. 996 600
——— *v.* Dimond, 1 C. & J. 356 ; 1 Tyr. 243 468
——— of Victoria *v.* Ettershank, L. R. 6 P. C. 354 ; 44 L. J. P. C. 65 . . . . . 37, 43
——— *v.* G. E. R. Co., 5 App. Cas. 473 ; 49 L. J. Ch. 545 ; 42 L. T. 810 ; 28 W. R. 769 ; 44 J. P. 648 . . . . 378, 381
——— *v.* G. N. R. Co., 1 Drew. & Sm. 154 ; 29 L. J. Ch. 794 ; 2 L. T. 653 ; 8 W. R. 556 378
——— *v.* Hollingworth, 2 H. & N. 416 ; 27 L. J. Ex. 102 ; 5 W. R. 684 377
——— *v.* Hope, 1 C. M. & R. 530 ; 2 Cl. & F. 84 ; 8 Bligh, 44 ; 4 Tyr. 878 468
——— *v.* Jacobs-Smith, (1895) 1 Q. B. 472 ; (1895) 2 Q. B. 341 ; 64 L. J. Q. B. 270, 605 ; 43 W. R. 657 ; 72 L. T. 714 ; 15 [illegible] 29
——— *v.* Kent, 1 H. & C. 12 ; 31 L. J. Ex. 391 ; 6 L. T. 864 ; 10 W. R. 722 591
——— *v.* McLean, 1 H. & C. 750 ; 32 L. J. Ex. 101 ; 9 Jur. N. S. 338 ; 8 L. T. 113 ; 11 W. R. 292 640
——— *v.* Manchester, (1893) 2 Ch. 87 ; 62 L. J. Ch. 459 ; 68 L. T. 608 ; 41 W. R. 459 ; 57 J. P. 340 ; 3 R. 427 . . . 268

PAGE

Att.-Gen. *v.* Metr. R. Co., (1894) 1 Q. B. 384 ; 69 L. T. 811 ; 42 W. R. 381 ; 9 R. 598 ; 58 J. P. 348 829
——— *v.* Newcastle, (1892) A. C. 568 ; 62 L. J. Q. B. 72 ; 67 L. T. 728 378
——— *v.* Poulden, 3 Hare, 555 ; 8 Jur. 611 420
——— *v.* Pratt, L. R. 9 Ex. 140 ; 43 L. J. Ex. 108 ; 30 L. T. 531 ; 22 W. R. 615 468
——— *v.* Royal College of Physicians, 1 J. & H. 561 ; 30 L. J. Ch. 757 ; 7 Jur. N. S. 511 ; 4 L. T. 356 ; 9 W. R. 590 . 146
——— *v.* Sillem, 10 H. L. C. 704 ; 2 H. & C. 431, 581 ; 33 L. J. Ex. 92, 134, 209 ; 10 Jur. N. S. 262, 446 ; 9 L. T. 261, 835 ; 10 Id. 434 ; 12 W. R. 257, 478, 641 . . . 657
——— *v.* Sudeley, (1895) 2 Q. B. 526 . . . . . *Add.* 468
——— *v.* Tomline, 12 Ch. D. 214 ; 14 Id. 58 ; 48 L. J. Ch. 593 ; 49 Id. 377 ; 40 L. T. 775 ; 42 Id. 880 ; 28 W. R. 76, 870 ; 44 J. P. 617 . . . . . 266, 824
——— *v.* Windsor, Dean of, 24 Beav. 679 ; 27 L. J. Ch. 320 ; 4 Jur. N. S. 818 ; 6 W. R. 220 353
August, The, (1891) P. 328 ; 60 L. J. P. 57 608
Austerberry *v.* Oldham, 29 Ch. D. 750 ; 55 L. J. Ch. 633 ; 53 L. T. 543 ; 33 W. R. 807 ; 49 J. P. 532 . . . . . 85, 89
Austin, *Ex p.*, 50 L. J. M. C. 8 ; 44 L. T. 102 646
——— *v.* M. S. & L. R. Co., 16 Q. B. 600 ; 20 L. J. Q. B. 440 ; 15 Jur. 670 208
——— *v.* M. S. & L. R. Co., 10 C. B. 454 ; 21 L. J. C. P. 179 ; 16 Jur. 763 ; 7 Railw. Cas. 300 . . . . . 186, 208, 228
——— *v.* Dowling, L. R. 5 C. P. 534 ; 39 L. J. C. P. 260 ; 22 L. T. 721 ; 18 W. R. 1003 135
Austria (Emperor of) *v.* Day, 30 L. J. Ch. 690 ; 2 Giff. 628 ; 7 Jur. N. S. 483, 639 ; 4 L. T. 274, 494 ; 9 W. R. 568, 712 . . . 629
Aveline *v.* Whisson, 4 M. & Gr. 801 ; 12 L. J. C. P. 58 . . . 299
Avery *v.* Langford, 1 Kay, 663 ; 23 L. J. Ch. 837 ; 18 Jur. 905 ; 2 W. R. 615 410
Avon, The, (1891) P. 7 ; 63 L. T. 712 ; 39 W. R. 176 ; 6 Asp. M. C. 605 390
Ayerst *v.* Jenkins, 16 Eq. 275 ; 42 L. J. Ch. 690 ; 29 L. T. 126 ; 21 W. R. 878 377

B.

Babcock *v.* Lawson, 4 Q. B. D. 394 ; 5 Id. 284 ; 48 L. J. Q. B. 524 ; 49 Id. 408 ; 42 L. T. 289 ; 27 W. R. 886 ; 28 Id. 591 . . . 682
Baber *v.* Harris, 9 A. & E. 532 ; 1 P. & D. 360 ; 2 W. W. & H. 1 ; 8 L. J. Q. B. 153 . . . . . 147, 158
Backhouse *v.* Bishopwearmouth, 30 L. J. M. C. 118 ; 9 C. B. N. S. 315 ; 7 Jur. N. S. 338 ; 3 L. T. 626 ; 9 W. R. 162 . 664
——— *v.* Bonomi, 9 H. L. C. 503 ; E. B. & E. 622, 648 ; 27 L. J. Q. B. 378 ; 28 Id. 378 ; 34 Id. 181 ; 5 Jur. N. S. 1345 ; 9 W. R. 769 . . . 269, 446, 794, 799, 801, 815
——— *v.* Harrison, 5 B. & Ad. 1098 ; 3 N. & M. 188 . . . 469
Bacmeister *v.* Fenton, C. & E. 121 545
Badeley *v.* Vigurs, 4 E. & B. 71 ; 2 C. L. R. 1627 ; 23 L. J. Q. B. 377 ; 1 Jur. N. S. 159 60
Badische Fabrik *v.* Schott, (1892) 3 Ch. 447 ; 61 L. J. Ch. 698 ; 67 L. T. 281 . . . . . 411, 412
Baerselman *v.* Bailey, (1895) 2 Q. B. 301 . . . . . *Add.* 220
Bagnall *v.* L. & N. W. R. Co., 7 H. & N. 423 ; 1 H. & C. 544 ; 8 Jur. N. S. 16 ; 9 Id. 254 ; 31 L. J. Ex. 121, 480 ; 10 W. R. 232, 802 ; 5 L. T. 621 ; 9 Id. 419 . . . . . 794, 800, 813
Bagot *v.* Bagot, 2 Ir. L. R. 1 368
Bagshawe *v.* Goward, Cro. Jac. 147 131

PAGE

Bailey's Case, 3 E. & B. 607 ; 23 L. J. M. C. 161 ; 18 Jur. 930 . . 664
Bailey *v.* Appleyard, 8 A. & E. 161, 778, n. ; 3 N. & P. 257 ; 7 L. J. Q. B. 145 827
——— *v.* Stephens, 12 C. B. N. S. 91 ; 31 L. J. C. P. 226 ; 8 Jur. N. S. 1063 ; 6 L. T. 356 ; 10 W. R. 868 85
——— *v.* Sweeting, 9 C. B. N. S. 843 ; 30 L. J. C. P. 150 ; 9 W. R. 273 . . . . . 300, 302
Baily *v.* De Crespigny, L. R. 4 Q. B. 180 ; 38 L. J. Q. B. 98 ; 19 L. T. 681 ; 17 W. R. 494 47
Bain *v.* Whitehaven R. Co., 3 H. L. C. 1 ; 7 Bell's Appeal Cases, 79 621
Baines *v.* Ewing, L. R. 1 Ex. 320 ; 4 H. & C. 511 ; 35 L. J. Ex. 194 ; 14 L. T. 733 ; 14 W. R. 782 543
——— *v.* Geary, 35 Ch. D. 154 ; 56 L. J. Ch. 935 ; 56 L. T. 567 ; 36 W. R. 98 ; 51 J. P. 628 . . . . . 413, 414
——— *v.* Swainson, 4 B. & S. 270 ; 32 L. J. Q. B. 281 ; 8 L. T. 536 ; 11 W. R. 945 744
Baird *v.* Williamson, 15 C. B. N. S. 376 ; 33 L. J. C. P. 101 ; 9 L. T. 412 ; 10 Jur. N. S. 152 ; 12 W. R. 150 . 794, 799, 814, 815, 818, 820, 822, 823
Baker, *Ex p.*, 7 E. & B. 697 ; 26 L. J. M. C. 193 ; 3 Jur. N. S. 514 ; 5 W. R. 661 650
——, *Re*, 2 H. & N. 219 ; 26 L. J. M. C. 155 ; 3 Jur. N. S. 937 ; 5 W. R. 623 . . . . . 652, 665
——— *v.* Dening, 8 A. & E. 94 ; 3 N. & P. 228 ; 7 L. J. Q. B. 137 . 323
——— *v.* Gosling, 1 B. N. C. 19 ; 4 M. & Scott, 539 ; 3 L. J. C. P. 292 98
——— *v.* Greenhill, 3 Q. B. 148 ; 2 G. & D. 435 ; 11 L. J. Q. B. 161 ; 6 Jur. 710 157
——— *v.* Hedgecock, 39 Ch. D. 520 ; 57 L. J. Ch. 889 ; 59 L. T. 361 ; 36 W. R. 840 . . . . . 372, 413
——— *v.* Nottingham Bank, 60 L. J. Q. B. 542 471
——— *v.* Paine, 1 Ves. Sen. 457 541
Balfe *v.* West, 13 C. B. 466 ; 22 L. J. C. P. 175 ; 1 W. R. 335 . . 228
Balfour *v.* Ernest, 5 C. B. N. S. 601 ; 28 L. J. C. P. 170 ; 5 Jur. N. S. 439 ; 7 W. R. 207 380
——— *v.* Sea Fire & Life Ass. Co., 3 C. B. N. S. 300 ; 27 L. J. C. P. 17 ; 3 Jur. N. S. 1304 ; 6 W. R. 19 769
Ball, *Ex p.*, 10 Ch. D. 667 ; 9 Id. 704 ; 48 L. J. Bk. 57 ; 40 L. T. 141 ; 27 W. R. 563 ; 14 Cox, C. C. 237 279
——— *v.* Burnford, Pr. in Cha. 113 28
Ballard *v.* Tomlinson, 29 Ch. D. 115 ; 54 L. J. Ch. 454 ; 52 L. T. 942 ; 33 W. R. 533 ; 49 J. P. 692 826
Baller *v.* Delander, unreported 326
Ballister *v.* Johnson, unreported 575
Bally *v.* Wells, 3 Wils. 25 ; Wilmot's Notes, 341 . . . 67, 68, 90
Bamberger *v.* Commercial Co., 15 C. B. 676 ; 24 L. J. C. P. 115 ; 1 Jur. N. S. 500 ; 3 C. L. R. 568 785
Bamford *v.* Baron, 2 T. R. 594, n. ; 1 R. R. 551, n. 12
——— *v.* Turnley, 3 B. & S. 62, 66 ; 31 L. J. Q. B. 286 ; 9 Jur. N. S. 377 ; 10 W. R. 803 . . . . . 268, 816
Banco de Portugal *v.* Waddell, 5 App. Cas. 161 ; 11 Ch. D. 317 ; 49 L. J. Bk. 33 ; 42 L. T. 698 ; 28 W. R. 477 619
Bandy *v.* Cartwright, 8 Exch. 913 ; 22 L. J. Ex. 285 ; 1 W. R. 415 65, 161
Bane *v.* Methuen, 2 Bing. 63 ; 9 Moore, 161 652
Bank of Australasia *v.* Harding, 9 C. B. 661 ; 19 L. J. C. P. 345 ; 14 Jur. 1094 620
——— *v.* Nias, 16 Q. B. 717 ; 20 L. J. Q. B. 284 ; 15 Jur. 967 620
——— Bengal *v.* McLeod, 7 Moo. P. C. 35 ; 5 Moo. Ind. App. 1 ; 13 Jur. 945 469
——— N. S. Wales *v.* Owston, 4 App. Cas. 270 ; 48 L. J. P. C. 25 ; 40 L. T. 500 352

PAGE
Bank of Scotland *v.* Dominion Bank, (1891) A. C. 592 785
Banks *v.* Crossland, L. R. 10 Q. B. 97; 44 L. J. M. C. 8; 32 L. T. 226; 23 W. R. 414 301
—— *v.* Goodwin, 3 B. & S. 548; 32 L. J. M. C. 87; 9 Jur. N. S. 891; 7 L. T. 740; 11 W. R. 309 671
Banner, *Ex p.*, 17 Ch. D. 480; 51 L. J. Ch. 300; 44 L. T. 908; 30 W. R. 24 331
—— *v.* Berridge, 18 Ch. D. 254; 50 L. J. Ch. 630; 44 L. T. 680; 29 W. R. 844 570
Bannister *v.* Hyde, 2 E. & E. 627; 29 L. J. Q. B. 141; 1 L. T. 438; 6 Jur. N. S. 171 106
Banque Jacques-Cartier *v.* Banque D'Epargne, 13 App. Cas. 111; 57 L. J. P. C. 42 351
Barber *v.* Brown, 1 C. B. N. S. 121; 26 L. J. C. P. 41; 3 Jur. N. S. 18; 5 W. R. 79 . . . . . 142, 165
—— *v.* Lesiter, 7 C. B. N. S. 175; 29 L. J. C. P. 161; 6 Jur. N. S. 654 261
—— *v.* Meyerstein, L. R. 4 H. L. 317; L. R. 2 C. P. 38, 661; 36 L. J. C. P. 48, 289; 39 Id. 187; 15 L. T. 355; 16 Id. 569; 22 Id. 808; 15 W. R. 173, 998; 18 Id. 1041 . . 741
—— *v.* Nottingham & Grantham R. Co., 15 C. B. N. S. 726; 33 L. J. C. P. 193; 9 L. T. 829; 12 W. R. 376 801
Barbour *v.* S. E. R. Co., 34 L. T. 67 205
Barclay *v.* Pearson, (1893) 2 Ch. 154; 62 L. J. Ch. 636; 68 L. T. 709; 42 W. R. 74; 3 R. 388. 369
—— *v.* Raine, 1 S. & Stu. 449 79–81
Barker *v.* Green, 2 Bing. 317 273
Barkworth *v.* Young, 4 Drew. 1; 26 L. J. Ch. 153; 3 Jur. N. S. 34; 5 W. R. 156 300
Barling *v.* Bishopp, 29 Beav. 417; 6 Jur. N. S. 812; 2 L. T. 651; 8 W. R. 631 20
Barnard, *Re*, 56 L. T. 9 . . . . . 608, 609
—— *v.* Godscall, Cro. Jac. 309 69
Barnardiston *v.* Some, 2 Lev. 114; 6 Howell St. Tr. 1063; 3 Keb. 365, 389 . . . . . 236, 257, 283, 631
Barnett *v.* Guilford, 11 Exch. 19; 24 L. J. Ex. 281; 1 Jur. N. S. 1142; 3 W. R. 406 . . . . . 496, 508
Barrack *v.* M'Cullock, 3 K. & J. 110; 26 L. J. Ch. 105; 3 Jur. N. S. 180; 5 W. R. 38 23
Barratt *v.* Price, 9 Bing. 566; 2 M. & Scott, 634; 2 L. J. C. P. 56 . 112
Barrett *v.* Rolph, 14 M. & W. 348; 14 L. J. Ex. 308 . . . 96, 97
Barrow *Ex p.*, 6 Ch. D. 783; 46 L. J. Bk. 71; 36 L. T. 325; 25 W. R. 466 727
——————, 18 Ch. D. 464; 50 L. J. Ch. 821; 45 L. T. 197 . . 144
—— *v.* Coles, 3 Camp. 92; 13 R. R. 763 737
—— *v.* Dyster, 13 Q. B. D. 635; 51 L. T. 573; 33 W. R. 199 . 558
—— *v.* Isaacs, (1891) 1 Q. B. 417; 60 L. J. Q. B. 179; 64 L. T. 686; 39 W. R. 338; 55 J. P. 517 . . . . 49, 51
—— *v.* Wood, unreported 398
—— Mutual *v.* Ashburner, 54 L. J. Q. B. 377; 52 L. T. 898 . . 374
Barry *v.* Arnaud, 10 A. & E. 646; 2 P. & D. 633 231
—— *v.* Robinson, 1 B. & P. N. R. 293 414
Barter, *Ex p.*, 26 Ch. D. 510; 53 L. J. Ch. 802; 51 L. T. 811; 32 W. R. 809 370
Bartlett *v.* Pentland, 10 B. & C. 760 548
—— *v.* Vinor, Carth. 251 373
Barton *v.* Bricknell, 13 Q. B. 393; 20 L. J. M. C. 1; 15 Jur. 668 . 643
—— *v.* Vanheythuigsen, 11 Hare, 126; 1 W. R. 429 30
Bartonshill Co. *v.* Reid, 3 Macq. 266; 4 Jur. N. S. 767; 6 W. R. 664 351, 352
Barwis *v.* Keppel, 2 Wils. 314 630

PAGE

Basebé *v.* Matthews, L. R. 2 C. P. 684 ; 36 L. J. M. C. 93 ; 16 L. T. 417 ; 15 W. R. 839 261
Basten *v.* Carew, 3 B. & C. 649 ; 5 D. & R. 558 . . . 641, 649, 654
Batard *v.* Hawes, 2 E. & B. 287 ; 22 L. J. Q. B. 443 ; 17 Jur. 1154 . 152
Batchellor *v.* Lawrence, 9 C. B. N. S. 543 ; 30 L. J. C. P. 39 ; 6 Jur. N. S. 1306 ; 3 L. T. 508 ; 9 W. R. 373 183
Batcheloure *v.* Gage, 2 Sir W. Jones, 223 70
Bateman *v.* Ashton-under-Lyne, 3 H. & N. 323 ; 27 L. J. Ex. 458 ; 6 W. R. 829 378
——— *v.* Bluck, 18 Q. B. 870 ; 21 L. J. Q. B. 406 ; 17 Jur. 386 . 276
——— *v.* Freston, 30 L. J. Q. B. 133 ; 7 Jur. N. S. 391 ; 3 L. T. 806 ; 9 W. R. 311 114
——— *v.* Mid-Wales R. Co., L. R. 1 C. P. 499 ; 35 L. J. C. P. 205 ; 12 Jur. N. S. 453 ; 14 W. R. 672 467
——— *v.* Phillips, 15 East, 272 ; 4 Taunt. 157 . . 293, 297, 300
——— *v.* Pinder, 3 Q. B. 574 ; 2 G. & D. 790 ; 11 L. J. Q. B. 281 ; 6 Jur. 714 564
Bates *v.* Hewitt, L. R. 2 Q. B. 595 ; 36 L. J. Q. B. 282 ; 15 W. R. 1172 478
Bath's Case, 8 Ch. D. 334 ; 47 L. J. Ch. 601 ; 38 L. T. 267 ; 26 W. R. 441 379
Bathe *v.* Taylor, 15 East, 412 783
Batson *v.* Donovan, 4 B. & Ald. 21 . . . . . 202, 205
——— *v.* King, 4 H. & N. 739 ; 28 L. J. Ex. 327 290
Batten, *Re*, 22 Q. B. D. 685 ; 58 L. J. Q. B. 333 ; 60 L. T. 271 ; 37 W. R. 303, 499 784
Battersbee *v.* Farrington, 1 Swanst. 106 ; 1 Wils. 88 20
Battersey's Case, Winch, 48 155
Batthyany *v.* Walford, 36 Ch. D. 269 ; 56 L. J. Ch. 881 ; 57 L. T. 206 ; 35 W. R. 814 . . . . . 603, 607
Baxendale *v.* Bennett, 3 Q. B. D. 525 ; 47 L. J. C. P. 624 ; 40 L. T. 23 ; 26 W. R. 899 472
——— *v.* E. Counties R. Co., 4 C. B. N. S. 63 ; 27 L. J. C. P. 137 203
——— *v.* G. E. R. Co., L. R. 4 Q. B. 244 ; 38 L. J. Q. B. 137 ; 17 W. R. 412 . . . . . 207, 210, 218
——— *v.* L. C. & D. R. Co., L. R. 10 Ex. 35 ; 44 L. J. Ex. 20 ; 32 L. T. 330 ; 23 W. R. 167 150
——— *v.* L. & S. W. R. Co., L. R. 1 Ex. 137 ; 4 H. & C. 130 ; 35 L. J. Ex. 108 ; 12 Jur. N. S. 274 ; 14 L. T. 26 ; 14 W. R. 458 203
Bayley *v.* Ashton, 12 A. & E. 493 ; 4 P. & D. 204 ; 9 L. J. Q. B. 376 ; 4 Jur. 890 569
——— *v.* Homan, 3 B. N. C. 915 ; 3 Scott, 384 ; 6 L. J. C. P. 309 336, 339
——— *v.* M. S. & L. R. Co., L. R. 8 C. P. 148 ; 7 Id. 415 ; 41 L. J. C. P. 278 ; 42 Id. 78 ; 28 L. T. 366 . . . . . 351, 352
Bayliffe *v.* Butterworth, 1 Exch. 425 ; 17 L. J. Ex. 78 ; 5 Railw. Cas. 282 . . . . . 548, 549
Baylis *v.* Le Gros, 4 C. B. N. S. 537 ; 2 Id. 316 ; 4 Jur. N. S. 513 . 43
——— *v.* Lintott, L. R. 8 C. P. 345 ; 42 L. J. C. P. 119 ; 28 L. T. 666 223
——— *v.* Strickland, 1 M. & Gr. 591 ; 1 Scott, N. R. 540 ; 10 L. J. M. C. 61 ; 4 Jur. 823 642
Bayne *v.* Stone, 4 Esp. 13 152
Baynes *v.* Lloyd, (1895) 1 Q. B. 820 ; (1895) 2 Q. B. 610 ; 64 L. J. Q. B. 411 ; 72 L. T. 505 ; 73 Id. 250 ; 43 W. R. 524 . . . 161, 496
Baynton *v.* Morgan, 21 Q. B. D. 101 ; 22 Id. 74 ; 57 L. J. Q. B. 465 ; 58 Id. 139 ; 59 L. T. 478 ; 37 W. R. 148 70
Bayspoole *v.* Collins, 6 Ch. 228 ; 40 L. J. Ch. 289 ; 22 L. T. 650 ; 19 W. R. 363 30
Bazeley *v.* Forder, L. R. 3 Q. B. 559 ; 37 L. J. Q. B. 237 ; 18 L. T. 756 ; 9 B. & S. 599 145

PAGE

Beal *v.* S. Devon R. Co., 5 H. & N. 875 ; 3 H. & C. 337 ; 29 L. J. Ex. 441 ; 2 L. T. 665 ; 11 Id. 184 ; 8 W. R. 651 ; 12 Id. 1115 . . . . . 186, 213, 216
Beard *v.* Knight, 8 E. & B. 865 ; 27 L. J. Q. B. 359 ; 6 W. R. 226 . 432
——— *v.* Westcott, 5 B. & Ald. 801 ; 5 Taunt. 393 418
Beardman *v.* Wilson, L. R. 4 C. P. 57 ; 38 L. J. C. P. 91 ; 19 L. T. 282 ; 17 W. R. 54 . . . . . 46, 98
Beardmore *v.* Tredwell, 3 Giff. 683 ; 31 L. J. Ch. 892 ; 9 Jur. N. S. 272 ; 7 L. T. 207 826
Beaucé *v.* Muter, 5 Moo. P. C. 69 618
Beauchamp *v.* Powley, 1 M. & Rob. 38 . . . . . 183, 225
Beaumont *v.* Reeve, 8 Q. B. 483 ; 15 L. J. Q. B. 141 ; 10 Jur. 284 . . . . . 144, 376
Beavan *v.* Oxford, 6 De G. M. & G. 507 ; 25 L. J. Ch. 299 ; 2 Jur. N. S. 121 ; 4 W. R. 275 26
Beck *v.* Denbigh, 29 L. J. Ch. 273 ; 2 L. T. 154 ; 8 W. R. 392 . . 427
Becher *v.* G. E. R. Co., L. R. 5 Q. B. 241 ; 39 L. J. Q. B. 122 ; 22 L. T. 299 ; 18 W. R. 627 202
Beckford *v.* Crutwell, 1 M. & Rob. 187 ; 5 C. & P. 242 . . . 413
Beckwaite *v.* Nalgrove, 3 Taunt. 41 485
Beckwith *v.* Corrall, 3 Bing. 444 ; 11 Moore, 335 ; 2 C. & P. 261 . 469
Beddall *v.* Maitland, 17 Ch. D. 174 ; 50 L. J. Ch. 401 ; 44 L. T. 248 ; 29 W. R. 484 134
Bedford *v.* British Museum, 2 M. & K. 552 . . . . . 84, 88
Beely *v.* Parry, 3 Lev. 154 70
Beer *v.* London Co., 20 Eq. 412 ; 32 L. T. 715 . . . . . 321, 322
Beeston *v.* Beeston, 1 Ex. D. 13 ; 45 L. J. Ex. 230 ; 33 L. T. 700 ; 24 W. R. 96 383
Begbie *v.* Phosphate Co., L. R. 10 Q. B. 491 ; 1 Q. B. D. 679 ; 44 L. J. Q. B. 233 ; 33 L. T. 470 ; 35 Id. 350 ; 24 W. R. 115 ; 25 Id. 85 387
Behrens *v.* G. N. R. Co., 6 H. & N. 366 ; 7 Id. 950 ; 30 L. J. Ex. 153 ; 31 Id. 299 ; 8 Jur. N. S. 567 ; 3 L. T. 863 ; 8 Id. 328 ; 9 W. R. 338 ; 10 Id. 389 207
Belcher *v.* Collins, unreported 495
Belfast & B. R. Co. *v.* Keys, 9 H. L. C. 556 ; 8 Jur. N. S. 367 ; 4 L. T. 841 ; 9 W. R. 793 . . . . . 201, 204
Bell *v.* Buckley, 11 Exch. 631 ; 25 L. J. Ex. 163 ; 4 W. R. 251 . 326
——*v.* Frankis, 4 M. & Gr. 446 ; 5 Scott, N. R. 460 ; 11 L. J. C. P. 300 354
Bellamont's Case, 2 Salk. 625 . . . . . 581, 588
Bellamy *v.* Debenham, 45 Ch. D. 481 ; (1891) 1 Ch. 412 ; 60 L. J. Ch. 166 ; 39 W. R. 257 ; 63 L. T. 220 ; 64 Id. 478 . . 302
——— *v.* Majoribanks, 7 Exch. 389 ; 21 L. J. Ex. 70 ; 16 Jur. 106. 458
Belshaw *v.* Bush, 11 C. B. 191 ; 22 L. J. C. P. 24 ; 17 Jur. 67 . . 338
Benett *v.* P. & O. Co., 6 C. B. 775 ; 6 D. & L. 387 ; 18 L. J. C. P. 85 ; 13 Jur. 347 199
Benham *v.* Keane, 31 L. J. Ch. 129 ; 8 Jur. N. S. 604 ; 5 L. T. 439 ; 10 W. R. 67 26
Bennett *v.* Bayes, 5 H. & N. 391 ; 29 L. J. Ex. 224 ; 2 L. T. 156 ; 8 W. R. 320 . . . . . 130, 131
——— *v.* Brumfit, L. R. 3 C. P. 28 ; 37 L. J. C. P. 25 ; 17 L. T. 213 ; 16 W. R. 131 323
——— *v.* Herring, 3 C. B. N. S. 370 ; 6 W. R. 37 45
——— *v.* Mellor, 5 T. R. 273 ; 2 R. R. 593 124
Bennington *v.* Taylor, 2 Lutw. 1517 531
Bennion *v.* Davison, 3 M. & W. 179 ; 1 H. & H. 46 ; 7 L. J. Ex. 116 137
Bentham *v.* Cooper, 5 M. & W. 621 ; 9 L. J. Ex. 114 294
Bentley *v.* Hore, 1 Lev. 86 236
Bentinck *v.* London Bank, (1893) 2 Ch. 120 ; 62 L. J. Ch. 358 ; 68 L. T. 315 ; 42 W. R. 140 ; 3 R. 120 . . . . . 462, 466, 471

PAGE
Benwell *v.* Inns, 24 Beav. 307 ; 26 L. J. Ch. 663 . . 403, 414
Bergheim *v.* G. E. R. Co., 3 C. P. D. 221 ; 47 L. J. C. P. 318 ; 38 L. T. 160 ; 26 W. R. 301 201
Berkley *v.* Shafto, 15 C. B. N. S. 79 270
Bernstein *v.* Baxendale, 6 C. B. N. S. 251 ; 28 L. J. C. P. 265 ; 5 Jur. N. S. 1056 ; 7 W. R. 396 206
Bernina, The, 12 P. D. 58 ; 11 Id. 31 ; 13 App. Cas. 1 ; 56 L. J. A. 17 ; 57 Id. 65 ; 56 L. T. 258 ; 58 Id. 423 ; 6 Asp. M. C. 267 ; 35 W. R. 314 ; 36 Id. 870 ; 52 J. P. 212 278
Berwick *v.* Oswald, 1 E. & B. 295 ; 22 L. J. Q. B. 129 ; 17 Jur. 1148 ; 1 W. R. 113 341
Berntdson *v.* Strang, 4 Eq. 481 ; 3 Ch. 588 ; 36 L. J. Ch. 879 ; 37 Id. 665 ; 16 L. T. 583 ; 19 Id. 40 ; 15 W. R. 1168 ; 16 Id. 1025 . . 729
Berry *v.* Taunton, Cro. Eliz. 331 47
Berridge *v.* Berridge, 44 Ch. D. 168 ; 59 L. J. Ch. 533 ; 63 L. T. 101 ; 38 W. R. 599 152
Berthon *v.* Loughman, 2 Stark. 258 . . . . . 490, 492
Bessell *v.* Wilson, 1 E. & B. 489 ; 22 L. J. M. C. 94 . . . 642, 643
Bessey *v.* Windham, 6 Q. B. 166 ; 14 L. J. Q. B. 7 15
Besslauer *v.* Brown, 3 App. Cas. 672 ; 2 C. P. D. 314 ; 47 L. J. C. P. 729 ; 46 Id. 593 ; 36 L. T. 18 ; 37 L. T. 34 ; 39 Id. 67 ; 26 W. R. 536 ; 25 Id. 815 340
Best *v.* Yates, 1 Vent. 268 198
Bethell, *In re*, 34 Ch. D. 561 ; 56 L. J. Ch. 334 ; 56 L. T. 92 . . 570
——— *v.* Clark, 20 Q. B. D. 615 ; 19 Id. 553 ; 57 L. J. Q. B. 302 ; 57 L. T. 627 ; 59 Id. 808 ; 36 W. R. 185, 611 . . 728, 729
Bettesworth *v.* Allingham, 16 Q. B. D. 44 ; 34 W. R. 296 ; 50 J. P. 55 641
Betts *v.* De Vitre, 3 Ch. 429 ; 37 L. J. Ch. 325 ; 18 L. T. 165 ; 16 W. R. 529 352
—— *v.* Gibbins, 2 A. & E. 57 ; 4 N. & M. 64 ; 4 L. J. K. B. 1...154, 390, 731
Bevan *v.* Gething, 3 Q. B. 740 ; 3 G. & D. 59 ; 12 L. J. Q. B. 37 ; 6 Jur. 971 569
Bibby *v.* Carter, 4 H. & N. 153 ; 28 L. J. Ex. 182 ; 7 W. R. 193...270, 347
Bickford *v.* Parson, 5 C. B. 920 ; 17 L. J. C. P. 192 ; 12 Jur. 377 . 60
Biddell *v.* Leeder, 1 B. & C. 327 372
Bidder *v.* Bridges, 37 Ch. D. 406 ; 57 L. J. Ch. 300 ; 58 L. T. 656 326, 332, 337
Biddle *v.* Bond, 6 B. & S. 225 ; 34 L. J. Q. B. 137 ; 12 L. T. 178 ; 11 Jur. N. S. 425 ; 13 W. R. 561 195
Biddulph *v.* Goald, 11 W. R. 882 13
Bill *v.* Bament, 9 M. & W. 36 ; 11 L. J. Ex. 81 302
—— *v.* Darenth Vale R. Co., 1 H. & N. 305 ; 26 L. J. Ex. 81 ; 2 Jur. N. S. 595 ; 4 W. R. 684 380
Billiter *v.* Young, 6 E. & B. 1 ; 25 L. J. Q. B. 169 ; 2 Jur. N. S. 438 ; 4 W. R. 369 19
Bindon's Case, Moore, 213 425
Binstead *v.* Buck, 2 W. Bl. 1117 431
Birch *v.* Depeyster, 4 Camp. 385 ; 1 Stark. 210 541
——— *v.* Liverpool, 9 B. & C. 392 ; 4 M. & Ry. 380 304
——— *v.* Wright, 1 T. R. 378 ; 1 R. R. 223 509
Bird *v.* Boulter, 4 B. & Ad. 443 ; 1 N. & M. 313 321
—— *v.* Brown, 4 Exch. 786 ; 19 L. J. Ex. 154 ; 14 Jur. 132...350, 726, 732
—— *v.* Gammon, 3 B. N. C. 883 ; 5 Scott, 213 ; 3 Hodges, 224 ; 6 L. J. C. P. 258 . . . . . 289, 570
Birmingham Co., *Re*, 11 Eq. 615 ; 40 L. J. Bkcy. 52 ; 24 L. T. 639 ; 19 W. R. 603 434
——— *v.* Allen, 6 Ch. D. 284 ; 46 L. J. Ch. 673 ; 37 L. T. 207 ; 25 W. R. 810 272
——— Co. *v.* Cartwright, 11 Ch. D. 421 ; 48 L. J. Ch. 552 ; 40 L. T. 784 ; 27 W. R. 597 418

PAGE

Birkmyr *v.* Darnell, 1 Salk. 27 ; 3 Salk. 15 ; 6 Mod. 248 ; 2 Ld. Raym. 1085 ; Holt, 606 . . . . . 287, 306
Birrell *v.* Dryer, 9 App. Cas. 345 ; 51 L. T. 130 547
Biscop *v.* White, Cro. Eliz. 759 105
Bishop *v.* Chambre, 1 M. & M. 116 ; 3 C. & P. 55 784
Bissell *v.* Beard, 28 L. T. 740 547
——— *v.* Fox, 51 L. T. 663 ; 53 Id. 193 ; C. & E. 395 458
Black *v.* Braybrook, 2 Stark. 7 ; 6 M. & S. 39 621
——— *v.* Christchurch Co., (1894) A. C. 48 ; 63 L. J. P. C. 32 ; 70 L. T. 77 ; 58 J. P. 332 ; 6 R. 394 . . . . . 352, 825, 830
Blackall *v.* Heal, Comyn, Rep. 12 326
Blackburn *v.* Mackey, 1 C. & P. 1 145
Blackett *v.* Royal Exchange Ins. Co., 2 Tyr. 266 ; 2 Cr. & J. 244 . 554
Blacklock *v.* Dobie, 1 C. P. D. 265 ; 45 L. J. C. P. 498 ; 35 L. T. 338 ; 24 W. R. 674 370
Blades *v.* Higgs, 30 L. J. C. P. 347 ; 31 Id. 151 ; 34 Id. 286 ; 10 C. B. N. S. 713 ; 12 Id. 501 ; 13 Id. 844 ; 11 H. L. C. 621 ; 4 L. T. 551 ; 12 Id. 615 ; 7 Jur. N. S. 1287 ; 10 W. R. 318 ; 11 Id. 439 . 134, 135
Blain, *Ex p.*, 12 Ch. D. 522 ; 41 L. T. 46 ; 28 W. R. 334 607
Blake's Case, 6 Co. Rep. 44 341
Blake *v.* Beech, 1 Ex. D. 320 ; 45 L. J. M. C. 111 ; 34 L.T. 764...649, 652
——— *v.* Blake, 18 W. R. 944 603
——— *v.* G. W. R. Co., 7 H. & N. 987 ; 31 L. J. Ex. 346 ; 8 Jur. N. S. 1113 ; 7 L. T. 94 ; 10 W. R. 388 . . . . 182, 200, 224
——— *v.* Mid. R. Co., 18 Q. B. 93 ; 21 L. J. Q. B. 233 ; 16 Jur. 562 . 267
Blakemore *v.* Bristol & E. R. Co., 8 E. & E. 1035 ; 27 L. J. Q. B. 167 ; 4 Jur. N. S. 657 ; 6 W. R. 336 228
Blanchet *v.* Powell Collieries, L. R. 9 Ex. 74 ; 43 L. J. Ex. 50 ; 30 L. T. 28 ; 22 W. R. 490 711
Bland *v.* Haselrig, 2 Ventr. 151 561
Blanshard, *Re*, 8 Ch. D. 601 ; 47 L. J. Bkcy. 113 ; 38 L. T. 619 ; 26 W. R. 636 551
Blaymire *v.* Haley, 6 M. & W. 55 ; 9 L. J. Ex. 147 ; 4 Jur. 107. . 263
Bleakley *v.* Smith, 11 Sim. 150 320
Blewitt, Goods of, 5 P. D. 116 ; 49 L. J. P. 31 ; 42 L. T. 329 ; 28 W. R. 520 322
Bliss *v.* Hall, 4 B. N. C. 183 ; 5 Scott, 500 ; 6 Dowl. 442 ; 7 L. J. C. P. 122 ; Arn. 19 ; 2 Jur. 110 268
Blower *v.* G. W. R. Co., L. R. 7 C. P. 655 ; 41 L. J. C. P. 268 . 204, 205
Bloxam *v.* Sanders, 4 B. & C. 941 ; 7 D. & R. 396 720
Blyth *v.* Birmingham Waterworks Co., 11 Exch. 781 ; 25 L. J. Ex. 212 ; 2 Jur. N. S. 333 ; 4 W. R. 594 828
——— *v.* Dennett, 13 C. B. 178 ; 22 L. J. C. P. 79 . . . . 39, 40
——— *v.* Smith, 5 M. & Gr. 405 ; 6 Scott, N. R. 360 ; 12 L. J. C. P. 203 ; 7 Jur. 948 149
Boden *v.* Roscoe, (1894) 1 Q. B. 608 ; 63 L. J. Q. B. 767 ; 70 L. T. 450 ; 42 W. R. 445 ; 58 J. P. 368 ; 10 R. 173 340
Bodger *v.* Arch, 10 Exch. 333 ; 2 C. L. R. 1491 ; 24 L. J. Ex. 19 . 567, 568
Bodily *v.* Long, unreported 256
Bohtlingk *v.* Inglis, 3 East, 381 ; 7 R. R. 490 721
Bolch *v.* Smith, 7 H. & N. 736 ; 31 L. J. Ex. 201 ; 8 Jur. N. S. 197 ; 6 L. T. 158 ; 10 W. R. 387 347
Bold *v.* Rayner, 1 M. & W. 343 ; 2 Gale, 44 ; 1 T. & G. 820 ; 5 L. J. Ex. 172 547
Boldero *v.* L. & Westminster Discount Co., 5 Ex. D. 47 ; 42 L. T. 56 ; 28 W. R. 154 17
Bolingbrooke *v.* Swindon, L. R. 9 C. P. 575 ; 43 L. J. C. P. 287 ; 30 L. T. 723 ; 23 W. R. 47 352
Bolland, *Ex p.*, 17 Eq. 115 ; 43 L. J. Bkcy. 16 ; 29 L. T. 525 ; 22 W. R. 152 19
Bolton *v.* Carlisle, 2 H. Bl. 260 786

PAGE

Bolton *v.* L. & Y. R. Co., L. R. 1 C. P. 431; 35 L. J. C. P. 137; 12 Jur. N. S. 317; 13 L. T. 764; 14 W. R. 430 . . . 731, 732
——— *v.* Lambert, 41 Ch. D. 295; 58 L. J. Ch. 425; 60 L. T. 687; 37 W. R. 236, 434 . . . . . 302, 350
——— *v.* Tomlin, 5 A. & E. 856; 1 N. & P. 247; 6 L. J. K. B. 45 . 787
Bonelli, *Re*, 1 P. D. 69; 45 L. J. P. 42; 34 L. T. 32; 24 W. R. 255 . 623
Bonion's Case, Fitzh. *Detinue*, 59 171
Bonner *v.* Lushington, 68 L. T. 91; 57 J. P. 168; 5 R. 180 . . 670
Bonnewell *v.* Jenkins, 8 Ch. D. 70; 47 L. J. Ch. 758; 38 L. T. 581; 26 W. R. 294 302
Bonomi *v.* Backhouse. See *Backhouse* v. *Bonomi*.
Bonzi *v.* Stewart, 4 M. & Gr. 295; 5 Scott, N. R. 1; 11 L. J. C. P. 228 744
Boodle *v.* Cambell, 8 Scott, N. R. 104; 7 M. & Gr. 386; 2 D. & L. 66; 13 L. J. C. P. 142; 8 Jur. 475 157
Boothbey *v.* Snowden, 3 Camp. 175 335
Bott *v.* Acroyd, 28 L. J. M. C. 207; 5 Jur. N. S. 1053; 7 W. R. 420. 643, 654
——— *v.* Smith, 21 Beav. 511 18
Bottomley *v.* Brooke, 1 T. R. 621 770
——— *v.* Forbes, 5 B. N. C. 121; 6 Scott, 866; 1 Arn. 431; 8 L. J. C. P. 85; 2 Jur. 1016 . . . . . 541, 559
——— *v.* Nuttall, 5 C. B. N. S. 122; 28 L. J. C. P. 110; 5 Jur. N. S. 315 336
Boulston's Case, 5 Co. Rep. 104 a 237, 826
Bourdin *v.* Greenwood, 13 Eq. 281; 41 L. J. Ch. 73; 25 L. T. 782; 20 W. R. 166 281
Bourke *v.* Blake, 7 Ir. C. L. R. 348 372
Bourne *v.* Diggles, 2 Chit. 311 185
——— *v.* Fosbrooke, 18 C. B. N. S. 515; 34 L. J. C. P. 164; 11 Jur. N. S. 202; 13 W. R. 497 344
——— *v.* Gatliff, 5 Scott, 667; 3 Scott, N. R. 1; 8 Id. 604; 4 B. N. C. 314; 1 Arn. 120; 3 M. & Gr. 643; 11 Cl. & F. 45 204, 226, 559
——— *v.* Seymour, 16 C. B. 337; 24 L. J. C. P. 202; 1 Jur. N. S. 1001; 3 W. R. 511 560
Bousfield *v.* Wilson, 16 M. & W. 185; 16 L. J. Ex. 44 . . . 386
Bovy's Case, 1 Vent. 193, 211, 217 131
Bowen *v.* Hall, 6 Q. B. D. 333; 50 L. J. Q. B. 305; 44 L. T. 75; 29 W. R. 367; 45 J. P. 373 281
Bower *v.* Peate, 1 Q. B. D. 321; 45 L. J. Q. B. 446; 35 L. T. 321 . 830
Bowes *v.* Foster, 2 H. & N. 779; 27 L. J. Ex. 262; 4 Jur. N. S. 95; 6 W. R. 257 16
——— *v.* Shand, 2 App. Cas. 455; 1 Q. B. D. 470; 45 L. J. Q. B. 507; 46 Id. 561; 34 L. T. 795; 36 Id. 161, 857; 25 W. R. 730 . 541, 560
Bowling & Welby, *Re*, (1895) 1 Ch. 663; 64 L. J. Ch. 427; 72 L. T. 18, 411; 43 W. R. 216, 417; 12 R. 218 370
Bowman *v.* Horsey, 2 M. & Rob. 85 541
——— *v.* Nichol, 5 T. R. 537; 1 Esp. 81 781
Bowring *v.* Shepherd, L. R. 6 Q. B. 309; 40 L. J. Q. B. 129; 24 L. T. 721; 19 W. R. 852 . . . . . 147, 546
Bowser *v.* Colby, 1 Hare, 109; 1 Wms. Saund. 287; 11 L. J. Ch. 132 43
Bowyer's Case, Moore, 410 598
Boyd *v.* Hind, 1 H. & N. 938; 26 L. J. Ex. 164; 3 Jur. N. S. 566; 5 W. R. 361 334
Boydell *v.* Drummond, 11 East, 142; 2 Camp. 157; 10 R. R. 450 296, 305, 306, 307
Boys *v.* Pink, 8 C. & P. 361 206
Box *v.* Jubb, 4 Ex. D. 76; 48 L. J. Ex. 417; 41 L. T. 97; 27 W. R. 415 829
Bozon *v.* Farlow, 1 Meriv. 459 403
Brabant *v.* King, (1895) A. C. 632 . . . . . *Add.* 199
Bracegirdle *v.* Heald, 1 B. & Ald. 722 . . . . . 304, 305

PAGE
Bradburn *v.* Foley, 3 C. P. D. 129 ; 47 L. J. C. P. 331 ; 38 L. T. 421 ; 26 W. R. 423 559
Bradbee *v.* London, 4 M. & Gr. 714 ; 2 Dowl. N. S. 164 ; 5 Scott, N. R. 79 ; 11 L. J. C. P. 209 270
Bradford *v.* Pickles, (1895) 1 Ch. 145 ; (1894) 3 Id. 53 ; (1895) A. C. 587 ; 63 L. J. Ch. 587, 759 ; 64 Id. 101 ; 71 L. T. 319, 793 ; 42 W. R. 697 ; 59 J. P. 85 273
——— *v.* Roulston, 8 Ir. C. L. R. 468 141
——— Union *v.* Wilts, Clerk of the Peace, L. R. 3 Q. B. 604 ; 37 L. J. M. C. 129 ; 18 L. T. 514 ; 16 W. R. 1197 . . . 648, 655
Bradlaugh, *Ex p.*, 3 Q. B. D. 509 ; 47 L. J. M. C. 105 ; 38 L. T. 680 ; 26 W. R. 758 . . . . . 658, 667
——— *v.* De Rin, L. R. 3 C. P. 538 ; 5 Id. 473 ; 39 L. J. C. P. 254 ; 18 L. T. 904 ; 16 W. R. 1128 . 610, 613, 614, 622
——— *v.* Gossett, 12 Q. B. D. 271 ; 53 L. J. Q. B. 209 ; 50 L. T. 620 ; 32 W. R. 552 266
——— *v.* Newdegate, 11 Q. B. D. 1 ; 52 L. J. Q. B. 454 ; 31 W. R. 792 371
Bradley *v.* Baylis, 8 Q. B. D. 195, 210 ; 51 L. J. Q. B. 183 ; 46 L. T. 253 ; 30 W. R. 823 436
——— *v.* Bardsley, 14 M. & W. 873 ; 3 D. & L. 476 ; 15 L. J. Ex. 115 788
——— *v.* Gregory, 2 Camp. 383 ; 11 R. R. 742 335
——— *v.* James, 22 L. J. C. P. 193 ; 13 C. B. 822 ; 1 C. L. R. 449 ; 1 W. R. 388 569
Bradshaw *v.* Beard, 12 C. B. N. S. 344 ; 31 L. J. C. P. 273 ; 8 Jur. N. S. 1228 ; 6 L. T. 458 142
——— *v.* L. & Y. R. Co., L. R. 10 C. P. 189 ; 44 L. J. C. P. 148 ; 31 L. T. 847 267
——— *v.* Vaughton, 30 L. J. C. P. 93 ; 9 C. B. N. S. 103 ; 7 Jur. N. S. 468 ; 3 L. T. 373 ; 9 W. R. 120 670
Bragge *v.* Stanner, Palm. 172 394
Braithwaite *v.* Coleman, 1 H. & W. 229 ; 4 N. & M. 654 ; 4 L. J. K. B. 152 . . . . . 223, 354
Brandao *v.* Barnett, 1 M. & Gr. 909 ; 6 Id. 630 ; 2 Scott, N. R. 96 ; 12 Cl. & F. 787 ; 3 C. B. 519 . . . . . 455, 539
Brandon *v.* Brandon, 31 L. J. Ch. 47 ; 10 W. R. 287 63
Brandram *v.* Wharton, 1 B. & Ald. 463 566
Brass *v.* Maitland, 6 E. & B. 470 ; 26 L. J. Q. B. 49 ; 2 Jur. N. S. 710 ; 6 W. R. 647 204
Braunstein *v.* Accidental Co., 1 B. & S. 782 ; 31 L. J. Q. B. 17 ; 8 Jur. N. S. 506 ; 5 L. T. 550 341
Brest *v.* Lever, 7 M. & W. 593 ; 9 Dowl. 246 ; 10 L. J. Ex. 337 . 345
Bretherton *v.* Wood, 3 B. & B. 54 200
Brett *v.* Cumberland, Cro. Jac. 521 69
Brewer *v.* Eaton, 3 Dougl. 230 ; 6 T. R. 220, n. ; 3 R. R. 161 . . 40
Brewster *v.* Kitchell, 1 Ld. Raym. 317 ; Holt, 175, 669 ; Carth. 438 ; Comb. 424, 466 ; 1 Salk. 198 ; 2 Id. 615 ; 3 Id. 340 ; 5 Mod. 368 ; 12 Id. 166 . . . . . 76—78, 79, 85
Briant *v.* Pilcher, 16 C. B. 354 ; 1 Jur. N. S. 1020 ; 3 W. R. 483 . 158
Brice *v.* James, unreported 708
Briddon *v.* G. N. R. Co., 28 L. J. Ex. 51 204
Bridge *v.* Grand Junction R. Co., 3 M. & W. 244 . . . 275, 277
——— *v.* Quicke, 67 L. T. 54 ; 61 L. J. Q. B. 375 ; 56 J. P. 696 . 51
Bridger *v.* Savage, 15 Q. B. D. 363 ; 54 L. J. Q. B. 464 ; 53 L. T. 129 ; 33 W. R. 891 ; 49 J. P. 725 386
Bridges *v.* Hawkesworth, 21 L. J. Q. B. 75 ; 15 Jur. 1079 . . . 344
——— *v.* N. London R. Co., L. R. 7 H. L. 213 ; L. R. 6 Q. B. 377 ; 40 L. J. Q. B. 188 ; 43 Id. 151 ; 24 L. T. 835 ; 30 Id. 844 ; 19 W. R. 824 ; 23 Id. 62 276
Bridgman *v.* Dean, 7 Exch. 199 ; 21 L. J. Ex. 90 332

PAGE

Briggs *v.* Sowry, 8 M. & W. 729 ; 11 L. J. Ex. 193 434
Brind *v.* Dale, 2 M. & Rob. 80 ; 8 C. & P. 207 200
Brindley *v.* Cilgwyn Co., 55 L. J. Q. B. 67 728
Bringloe *v.* Morrice, 1 Mod. 210 ; 3 Salk. 271 190
Bristol *v.* Westcott, 12 Ch. D. 461 ; 41 L. T. 117 ; 27 W. R. 841 . 46
——— Bank *v.* Mid. R. Co., (1891) 2 Q. B. 653 ; 61 L. J. Q. B. 115 ; 65 L. T. 234 ; 40 W. R. 148 739
——— Co. *v.* Maggs, 44 Ch. D. 616 ; 59 L. J. Ch. 472 ; 62 L. T. 416 ; 38 W. R. 393 302
——— & Exeter R. Co. *v.* Collins, 7 H. L. C. 194 ; 11 Exch. 790 ; 1 H. & N. 517 ; 25 L. J. Ex. 185 ; 26 Id. 103 ; 29 Id. 41 ; 3 Jur. N. S. 141 ; 5 Id. 1367 ; 4 W. R. 395 ; 5 Id. 89 . . . . 204, 224
Bristow *v.* Sequeville, 5 Exch. 275 ; 19 L. J. Ex. 289 ; 14 Jur. 674 . 623
Britain *v.* Rossiter, 11 Q. B. D. 123 ; 48 L. J. Ex. 362 ; 40 L. T. 240 ; 27 W. R. 482 . . . . . 301, 304, 305, 308, 622
British Insulated Co. *v.* Prescot, (1895) 2 Q. B. 463, 538 . *Add.* 379
——— Linen Co. *v.* Drummond, 10 B. & C. 903 615
——— Nation Ass., *Ex p.*, 8 Ch. D. 679 ; 48 L. J. Ch. 118 ; 39 L. T. 136 ; 27 W. R. 88 381
——— S. Africa Co. *v.* Companhia de Mocambique, (1893) A. C. 602 ; (1892) 2 Q. B. 358 ; 61 L. J. Q. B. 663 ; 63 Id. 70 ; 66 L. T. 773 ; 69 Id. 604 ; 40 W. R. 650 ; 6 R. 1 . . . . . 594, 602, 603
Brittain *v.* Kinnaird, 1 B. & B. 432 641
——— *v.* Lloyd, 14 M. & W. 762 ; 15 L. J. Ex. 43 161
Britton *v.* G. W. Cotton Co., L. R. 7 Ex. 130 ; 41 L. J. Ex. 99 ; 27 L. T. 125 ; 20 W. R. 525. 275
Broad *v.* Jollyfe, Cro. Jac. 596 ; Noy, 98 ; W. Jones, 13 394
Broadbent *v.* Imperial Gas Co., 7 De G. M. & G. 436 ; 7 H. L. C. 600 ; 3 Jur. N. S. 221 ; 5 Id. 1319 ; 26 L. J. Ch. 276 ; 29 Id. 377 . . . . . 816, 826
——— *v.* Ramsbotham, 11 Exch. 602 ; 25 L. J. Ex. 115 ; 4 W. R. 290 273
Broadwater *v.* Blot, Holt, N. P. 547 198
Broadwood *v.* Granara, 10 Exch. 417 ; 24 L. J. Ex. 1 ; 1 Jur. N. S. 19 ; 3 W. R. 25 125
Brocklehurst *v.* Law, 26 L. J. Q. B. 107 ; 3 Jur. N. S. 436 ; 5 W. R. 311 433
Broder *v.* Saillard, 2 Ch. D. 692 ; 45 L. J. Ch. 414 ; 24 W. R. 1011 . 823
Brook *v.* Hook, L. R. 6 Ex. 89 ; 40 L. J. Ex. 50 ; 24 L. T. 34 ; 19 W. R. 508 351
Brooke *v.* Pickwick, 4 Bing. 218 ; 12 Moore, 447 199
Brooks, *Ex p.*, 23 Ch. D. 261 ; 48 L. T. 32, 453 ; 31 W. R. 833 ; 47 J. P. 470 551
——— *v.* Cock, 3 A. & E. 138 ; 4 N. & M. 652 ; 4 L. J. K. B. 144 . 381
——— *v.* Glencross, 2 M. & Rob. 62 640
Broom *v.* Batchelor, 1 H. & N. 255 ; 25 L. J. Ex. 299 296
——— *v.* Hall, 7 C. B. N. S. 503 150
Broughton's Case, 5 Co. Rep. 24a 158
Brown *v.* Arundell, 10 C. B. 54 428
——— *v.* Brine, 1 Ex. D. 5 ; 45 L. J. Ex. 129 ; 33 L. T. 703 ; 24 W. R. 177 365
——— *v.* Brown, 7 Eq. 185 ; 38 L. J. Ch. 153 ; 19 L. T. 594 ; 17 W. R. 98 367
——— *v.* Byrne, 3 E. & B. 703 ; 2 C. L. R. 1599 ; 23 L. J. Q. B. 313 ; 18 Jur. 700 ; 2 W. R. 471 . . . . . 541, 542
——— *v.* Carter, 5 Ves. 862 ; 5 R. R. 191 28
——— *v.* Crump, 1 Marsh. 567 147
——— *v.* Glenn, 16 Q. B. 254 ; 20 L. J. Q. B. 205 ; 15 Jur. 189 . 106
——— *v.* Hawkes, (1891) 2 Q. B. 718 ; 60 L. J. Q. B. 332 ; 61 Id. 151 ; 65 L. T. 108 ; 55 J. P. 823 . . . . . 261, 262
——— *v.* Hodgson, 2 Camp. 36 ; 4 Taunt. 189 221
——— *v.* Jones, 1 Atk. 188 27

PAGE

Brown *v.* Metropolitan Soc., 1 E. & E. 832 ; 28 L. J. Q. B. 236 ; 5 Jur. N. S. 1028 ; 7 W. R. 477 . . . . . 520, 521
——— *v.* Perkins, 1 Hare, 564 ; 11 L. J. Ch. 307 ; 6 Jur. 727 . . 336
——— *v.* Powell Coal Co., L. R. 10 C. P. 562 ; 44 L. J. C. P. 289 ; 32 L. T. 621 ; 23 W. R. 549 741
——— *v.* Shevill, 2 A. & E. 138 ; 4 N. & M. 277 ; 4 L. J. K. B. 50 . 428
——— *v.* Storey, 1 Scott, N. R. 9 ; 1 M. & Gr. 117 ; 4 Jur. 319 . . 506
——— *v.* Thornton, 6 A. & E. 185 ; 1 N. & P. 339 621
——— *v.* Robins, 4 H. & N. 186 ; 28 L. J. Ex. 250 . . 269, 270, 271
Browne *v.* Dawson, 12 A. & E. 624 ; 4 P. & D. 355 ; 10 L. J. Q. B. 7 134
——— *v.* Hare, 3 H. & N. 484 ; 4 Id. 822 ; 27 L. J. Ex. 372 ; 7 W. R. 619 729
——— *v.* Lee, 6 B. & C. 689 ; 9 D. & R. 701 . . . . . 151, 152
Browning *v.* Beston, 1 Plowd. 130 . . . . . 40, 41
——— *v.* Morris, 2 Cowp. 790 . . . . . 384, 385
Brucklesbank *v.* Smith, 2 Burr. 657 635
Bruckshaw *v.* Hopkins, 1 Cowp. 409 600
Brudenell *v.* Boughton, 2 Atk. 268 26
Brummell *v.* Macpherson, 14 Ves. 173 ; 7 Id. 237 34
Brunsden *v.* Staines L. B., C. & E. 272 341
Brunswick (Duke of) *v.* King of Hanover, 6 Beav. 1 ; 13 L. J. Ch. 107 ; 8 Jur. 253 625
——— *v.* Slowman, 8 C. B. 317 ; 18 L. J. C. P. 299 . . . 113
Brunt *v.* Mid. R. Co., 2 H. & C. 889 ; 33 L. J. Ex. 187 ; 10 Jur. N. S. 181 ; 9 L. T. 690 ; 12 W. R. 380 206
Bryant *v.* Banque du Peuple, (1893) A. C. 170 ; 62 L. J. P. C. 68 ; 68 L. T. 546 ; 41 W. R. 600 ; 1 R. 336 472
——— *v.* Busk, 4 Russ. 1 80
Brydges *v.* Lewis, 3 Q. B. 603 ; 2 G. & D. 763 ; 6 Jur. 837 ; 11 L. J. Q. B. 268 59
Bubb *v.* Yelverton, 9 Eq. 471 ; 39 L. J. Ch. 428 ; 22 L. T. 258 ; 18 W. R. 512 . . . . . 369, 372
Buckle *v.* Mitchell, 18 Ves. 100 ; 11 R. R. 155 . . . . 24, 25
——— *v.* Knoop, L. R. 2 Ex. 125 ; 36 L. J. Ex. 49 ; 16 L. T. 571 ; 15 W. R. 999 . . . . . 541, 548
Buckley *v.* Gross, 3 B. & S. 566 ; 32 L. J. Q. B. 129 ; 9 Jur. N. S. 986 ; 7 L. T. 743 ; 11 W. R. 465 344
——— *v.* Hull Docks Co., (1893) 2 Q. B. 93 ; 62 L. J. Q. B. 449 ; 69 L. T. 347 ; 5 R. 547 601
Buenos Ayres R. Co. *v.* N. R. Co. of Buenos Ayres, 2 Q. B. D. 210 ; 46 L. J. Q. B. 224 ; 36 L. T. 148 ; 25 W. R. 367 603
Bullock *v.* Caird, L. R. 10 Q. B. 276 ; 44 L. J. Q. B. 124 ; 32 L. T. 814 ; 23 W. R. 827 620
Bulmer *v.* Hunter, 8 Eq. 46 ; 38 L. J. Ch. 543 ; 20 L. T. 942 . . 18
Bunbury *v.* Fuller, 9 Exch. 111 666
Bunch *v.* Kennington, 1 Q. B. 679 ; 4 P. & D. 509 ; 10 L. J. Q. B. 203 430
Bunn *v.* Guy, 4 East, 190 ; 1 Smith, 1 ; 7 R. R. 210 . . . 403, 407
Bunney *v.* Poyntz, 4 B. & Ad. 570 ; 1 N. & M. 229 ; 2 L. J. K. B. 55 730
Burchfield *v.* Moore, 3 E. & B. 683 ; 23 L. J. Q. B. 261 ; 18 Jur. 727 ; 2 W. R. 454 782
Burdett, *Re*, 20 Q. B. D. 310 ; 57 L. J. Q. B. 263 ; 58 L. T. 708 ; 36 W. R. 128, 345 372
——— *v.* Abbot, 14 East, 1 ; 4 Taunt. 401 ; 5 Dowl. 165 ; 12 R. R. 450...109
Burdick *v.* Sewell, 10 Q. B. D. 363 ; 13 Id. 159 ; 10 App. Cas. 74 ; 5 Asp. 79, 298, 376 ; 52 L. J. Q. B. 428 ; 53 Id. 399 ; 54 Id. 156 ; 48 L. T. 705 ; 51 Id. 453 ; 52 Id. 445 ; 31 W. R. 796 ; 32 Id. 740 ; 33 Id. 461 . . . . . 192, 193, 684, 702, 705, 739, 740
Burford *v.* Unwin, C. & E. 494 48
Burgess *v.* Clements, 4 M. & S. 306 ; Holt, N. P. 211, n. ; 1 Stark. 251, n. 120, 121, 122

PAGE
Burghall *v.* Howard, 1 H. Bl. 366, n. ; 6 East, 27, n. . . . 698, 713
Burke, *v.* S. E. R. Co., 5 C. P. D. 1 ; 49 L. J. C. P. 107 ; 41 L. T. 554 ; 28 W. R. 306 ; 44 J. P. 283 209
Burley *v.* Bethune, 5 Taunt. 580 ; 1 Marsh. 220. 642
Burling *v.* Read, 11 Q. B. 904 ; 19 L. J. Q. B. 291 ; 14 Jur. 395 . 134
Burn *v.* Boulton, 2 C. B. 476 ; 15 L. J. C. P. 97 . . . . 565, 566
Burnell *v.* Minot, 4 Moore, 340 152
Buron *v.* Denman, 2 Exch. 167 ; 12 Jur. 82 . . . . 350, 629
Burrel's Case, 6 Co. Rep. 72 . . . . . 24, 27
Burridge *v.* Nicholetts, 6 H. & N. 383 ; 30 L. J. Ex. 145 ; 3 L. T. 703 ; 9 W. R. 345 135
Burroughes *v.* Clarke, 1 Dowl. 48 146
Burrowes *v.* Gradin, 1 D. & L. 213 ; 12 L. J. Q. B. 333 ; 7 Jur. 942 503, 505, 506
Burrows *v.* March Gas Co., L. R. 5 Ex. 67 ; 7 Id. 96 ; 39 L. J. Ex. 33 ; 41 Id. 46 ; 22 L. T. 24 ; 26 Id. 318 ; 18 W. R. 348 ; 20 Id. 493 278
Burt *v* Gray, (1891) 2 Q. B. 98 ; 60 L. J. Q. B. 664 ; 65 L. T. 229 ; 39 W. R. 429 51
Burton *v.* Hughes, 2 Bing. 173 344
Bush *v.* Coles, Carth. 232 ; 1 Salk. 196 ; 1 Show. 388. 65
Butcher *v.* Butcher, 7 B. & C. 399 ; 1 M. & Ry. 220 ; 1 B. & P. N. R. 113. . . . . 133, 134
——— *v.* Harrison, 4 B. & Ad. 129 ; 1 N. & M. 677 ; 2 L. J. K. B. 189. 23
——— *v.* L. & S. W. R. Co., 16 C. B. 13 ; 3 C. L. R. 805 ; 24 L. J. C. P. 137 ; 1 Jur. N. S. 427 ; 3 W. R. 409 201
——— *v.* Steuart, 11 M. & W. 857 ; 1 D. & L. 308 ; 12 L. J. Ex. 391 ; 7 Jur. 774 288
Butler *v.* Archer, 12 Ir. C. L. R. 104 . . . . . 59, 90
——— *v.* Hunter, 7 H. & N. 826 ; 31 L. J. Ex. 214 ; 10 W. R. 214...800, 814
——— *v.* Waterhouse, 2 Show. 46 25
Butt *v.* G. W. R. Co., 11 C. B. 140 ; 20 L. J. C. P. 241 . 205, 209, 222
Butterfield *v.* Forrester, 11 East, 60 ; 10 R. R. 276 275
——— *v.* Heath, 15 Beav. 408 ; 22 L. J. Ch. 270. . . . 25, 27
Buttigieg *v.* Booker, 9 C. B. 689 ; 19 L. J. C. P. 330 336
Buxton *v.* N. E. R. Co., L. R. 3 Q. B. 549 ; 9 B. & S. 824 ; 37 L. J. Q. B. 258 ; 18 L. T. 795 ; 16 W. R. 1124 224
——— *v.* Rust, L. R. 7 Ex. 279 ; 41 L. J. Ex. 1, 173 ; 25 L. T. 502 ; 27 Id. 210 ; 20 W. R. 100, 1014 300
Byrom *v.* Thompson, 11 A. & E. 31 ; 3 P. & D. 71 ; 9 L. J. Q. B. 26 ; 3 Jur. 1121 783

C.

Cadell *v.* Palmer, 10 Bing. 140 . . . . . 417, 418
Cadge, *Re*, L. R. 1 P. & D. 543 ; 37 L. J. P. & M. 15 ; 17 L. T. 484 ; 16 W. R. 406 785
Cadogan *v.* Kennett, 2 Cowp. 432 . . . . . 14, 30
Cahill *v.* L. & N. W. R. Co., 10 C. B. N. S. 154 ; 13 Id. 818 ; 30 L. J. C. P. 289 ; 31 Id. 271 ; 7 Jur. N. S. 1164 ; 8 Id. 1063 ; 4 L. T. 246 ; 9 W. R. 653 ; 10 Id. 391 . . . . . 201, 204
Cairns *v.* Robbins, 8 M. & W. 258 ; 10 L. J. Ex. 452. . 187, 224, 225
Caldecott, *Ex p.*, 4 Ch. D. 150 ; 46 L. J. Bkcy. 14 ; 35 L. T. 172, 503 ; 25 W. R. 103 ; 13 Cox, C. C. 374 . . . . . 365, 386
Calder *v.* Halket, 3 Moo. P. C. 28 631
——— Navigation *v.* Pilling, 14 M. & W. 76 ; 14 L. J. Ex. 223 ; 9 Jur. 377 ; 3 Railw. Cas. 735. 415
Caldwell *v.* Ball, 1 T. R. 205 ; 1 R. R. 187 . 680, 682, 687, 700, 706, 734
——— *v.* Parker, Ir. Rep. 3 Eq. 549 ; 17 W. R. 955 . . 782, 788

PAGE

Caledonian Ins. Co. *v.* Gilmour, (1893) A. C. 85 ; 57 J. P. 228 ; 1 R. 110 341
Callaghan *v.* Dolwin, L. R. 4 C. P. 288 ; 38 L. J. M. C. 110 ; 17 W. R. 733 672
Callender *v.* Howard, 10 C. B. 290 ; 1 L. M. & P. 755 ; 20 L. J. C. P. 66 ; 15 Jur. 130 332
Calliope, The, (1891) A. C. 11 ; 14 P. D. 138 ; 58 L. J. A. 76 ; 60 Id. 28 ; 61 L. T. 656 ; 63 Id. 781 ; 38 W. R. 155 ; 39 Id. 641 ; 6 Asp. M. C. 359, 440, 585 ; 55 J. P. 357 198
Callisher *v.* Bischoffsheim, L. R. 5 Q. B. 449 ; 39 L. J. Q. B. 181 ; 18 W. R. 1137 331
Calvert *v.* Baker, 4 M. & W. 417 ; 7 Dowl. 17 ; 1 Horn & H. 404 ; 8 L. J. Ex. 40 ; 2 Jur. 1020 782
Cameron, *Re*, 37 Ch. D. 32 ; 57 L. J. Ch. 69 ; 57 L. T. 645 ; 36 W. R. 5 . . . . . 28, 29
——— *v.* Kyte, 3 Knapp, 332 351
Cammell *v.* Sewell, 5 H. & N. 728 ; 3 Id. 617 ; 27 L. J. Ex. 447 ; 29 Id. 350 ; 4 Jur. N. S. 978 ; 6 Id. 918 ; 8 W. R. 639 608
Camoys *v.* Scurr, 9 C. & P. 383 190
Campbell *v.* Campbell, 7 Cl. & F. 166, 179 156
——— *v.* Im Thurn, 1 C. P. D. 267 ; 45 L. J. C. P. 482 ; 24 W. R. 675 335
——— *v.* Lewis, 3 B. & Ald. 392 ; 3 Moore, 35 . . . . 65, 72
——— *v.* Rickards, 5 B. & Ad. 840 ; 2 N. & M. 542 ; 2 L. J. K. B. 204 . . . . . 490, 491, 492
——— *v.* Spottiswoode, 32 L. J. Q. B. 185 ; 9 Jur. N. S. 1069 ; 8 L. T. 201 ; 11 W. R. 569 262
Cannan *v.* Wood, 2 M. & W. 465 ; 6 L. J. Ex. 112 ; 1 Jur. 498 . . 336
Canterbury *v.* A.-G., 1 Phillips, 306 273
Cardwell *v.* Martin, 9 East, 190 ; 1 Camp. 79, 180 b. . . . 781, 784
Cariss *v.* Tattersall, 2 M. & Gr. 890 ; 3 Scott, N. R. 257 ; 10 L. J. C. P. 187 783
Carle *v.* Elkington, 67 L. T. 374 656
Carleton *v.* Brightwell, 2 P. Wms. 462 532
Carlon *v.* Ireland, 5 E. & B. 765 ; 25 L. J. Q. B. 113 ; 2 Jur. N. S. 39 ; 4 W. R. 200 . . . . . 457, 470
Carnaby *v.* Welby, 8 A. & E. 872 ; 1 P. & D. 98 ; 1 W. W. & H. 597 ; 8 L. J. K. B. 22 ; 2 Jur. 1065 345
Carnes *v.* Nisbett, 31 L. J. Ex. 273 ; 7 H. & N. 158, 778 ; 7 Jur. N. S. 1250 ; 4 L. T. 558 412
Carpenter *v.* Mason, 12 A. & E. 629 ; 4 P. & D. 439 ; 10 L. J. M. C. 1 649
——— *v.* Parker, 3 C. B. N. S. 206 ; 27 L. J. C. P. 78 ; 6 W. R. 98 507
Carpue *v.* L. & B. R. Co., 5 Q. B. 747 ; D. & M. 608 ; 3 Railw. Cas. 692 ; 13 L. J. Q. B. 133 ; 8 Jur. 464 200
Carr *v.* Burdiss, 5 Tyr. 309 ; 1 C. M. & R. 782 ; 4 L. J. Ex. 60 . . 13
—— *v.* L. & Y. R. Co., 7 Exch. 707 ; 21 L. J. Ex. 261 ; 7 Railw. Cas. 426 ; 17 Jur. 397 . . . . . 208, 210
—— *v.* Stringer, E. B. & E. 123 ; 4 Jur. N. S. 439 644
Carrington *v.* Roots, 2 M. & W. 248 ; Mur. & H. 14 ; 6 L. J. Ex. 95 ; 1 Jur. 85 301
Carstairs *v.* Taylor, L. R. 6 Ex. 217 ; 40 L. J. Ex. 129 ; 19 W. R. 723 824
Carter *v.* Boehm, 3 Burr. 1905 ; 1 W. Bl. 593 474
——— *v.* Carter, 5 Bing. 406 ; 2 M. & P. 723 . . . . 157, 164
——— *v.* Crick, 4 H. & N. 412 ; 28 L. J. Ex. 238 ; 7 W. R. 507 . 560
——— *v.* Wake, 4 Ch. D. 605 ; 46 L. J. Ch. 841 . . . 192, 193
——— *v.* Williams, 9 Eq. 678 ; 39 L. J. Ch. 560 ; 23 L. T. 183 ; 18 W. R. 593 87
Carteret *v.* Petty, 2 Swanst. 323, n. 603
Cartwright *v.* Cartwright, 26 W. R. 684 623
Carvalho *v.* Burn, 4 B. & Ad. 382 ; 1 A. & E. 883 ; 1 N. & M. 700 ; 4 Id. 889 520

PAGE
Carvick *v.* Blagrave, 1 B. & B. 531 ; 4 Moore, 303 . . . 91, 95
Cashill *v.* Wright, 6 E. & B. 891 ; 2 Jur. N. S. 1072 . . . 123, 187
Cassaboglou *v.* Gibb, 11 Q. B. D. 797 ; 9 Id. 220 ; 51 L. J. Q. B. 593 ; 52 Id. 538 ; 47 L. T. 98 ; 48 Id. 850 ; 32 W. R. 138 ; 46 J. P. 568 725
Castellan *v.* Hobson, 10 Eq. 47 ; 39 L. J. Ch. 490 ; 22 L. T. 575 ; 18 W. R. 731 . . . . . 166, 546
Castrique *v.* Behrens, 30 L. J. Q. B. 163 ; 7 Jur. N. S. 1028 ; 4 L. T. 52 261
Caswell *v.* Worth, 5 E. & B. 849 ; 25 L. J. Q. B. 121 ; 2 Jur. N. S. 116 ; 4 W. R. 231 275
Caterham R. Co., *In re*, 1 C. B. N. S. 410 ; 26 L. J. C. P. 161 . . 203
Catford, *Re*, 71 L. T. 584 ; 43 W. R. 159 560
Cathcart *v.* Hardy, 2 M. & S. 534 651
Catling, *Ex p.*, 29 L. T. 431 731
——— *v.* King, 5 Ch. D. 660 ; 46 L. J. Ch. 384 ; 36 L. T. 526 ; 25 W. R. 550 298
Caton *v.* Caton, L. R. 2 H. L. 127 ; 1 Ch. 137 ; 35 L. J. Ch. 292 ; 36 Id. 886 ; 12 Jur. N. S. 171 ; 12 L. T. 532 ; 14 Id. 34 ; 13 W. R. 801 ; 14 Id. 267 . . . . . 299, 320
Catton *v.* Simpson, 8 A. & E. 136 ; 3 N. & P. 248 ; 1 W. W. & H. 157 ; 2 Jur. 888 . . . . . 782, 783
Cave *v.* Mountain, 1 M. & Gr. 257 ; 1 Scott, N. R. 132 ; 9 L. J. M. C. 90 . . . . . 649, 652
—— *v.* Hastings, 7 Q. B. D. 125 ; 50 L. J. Q. B. 575 ; 45 L. T. 348 297
Cawthorne *v.* Cordrey, 13 C. B. N. S. 406 305
Chadburn *v.* Moore, 67 L. T. 257 ; 61 L. J. Ch. 674 ; 41 W. R. 39 . 322
Chaddock *v.* Wilbraham, 5 C. B. 645 ; 17 L. J. M. C. 79 ; 12 Jur. 136 ; 3 New Sess. Cas. 226 654
Chadwick *v.* Trower. See *Trower* v. *Chadwick*.
Chalmers, *Ex p.*, 8 Ch. 289 ; 42 L. J. Bkcy. 2, 37 ; 28 L. T. 325 ; 21 W. R. 138, 349 . . . . . 723, 730
Chamberlain *v.* Boyd, 11 Q. B. D. 407 ; 52 L. J. Q. B. 277 ; 48 L. T. 328 ; 31 W. R. 572 ; 47 J. P. 372 280
———— *v.* Napier, 15 Ch. D. 614 ; 49 L. J. Ch. 628 ; 29 W. R. 194 609
Chambers *v.* Donaldson, 11 East, 65 ; 10 R. R. 435 . . . 344, 345
——— *v.* Manchester R. Co., 5 B. & S. 588 ; 33 L. J. Q. B. 268 ; 10 Jur. N. S. 700 ; 12 W. R. 980 . . . . . 373, 378
Chaney *v.* Payne, 1 Q. B. 712 ; 1 G. & D. 348 ; 6 Jur. 79 . . . 646
Chanter *v.* Money, 12 Ir. C. L. R. 161. 185
Chapleo *v.* Brunswick Building Soc., 6 Q. B. D. 696 ; 5 C. P. D. 331 ; 50 L. J. Q. B. 372 ; 42 L. T. 741 ; 44 Id. 449 ; 29 W. R. 153 . 380
Chaplin, *Ex p.*, 26 Ch. D. 319 ; 53 L. J. Ch. 732 17
Chapman, *In re*, 1 Manson, 415 . . . . . 413, 415, 551
——— *v.* Beecham, 3 Q. B. 723 ; 3 G. & D. 71 ; 12 L. J. Q. B. 42 ; 6 Jur. 968 520
——— *v.* Emery, 1 Cowp. 278. 25
——— *v.* G. W. R. Co., 5 Q. B. D. 278 ; 49 L. J. Q. B. 420 ; 42 L. T. 252 ; 28 W. R. 566 ; 44 J. P. 363 . . . 225
——— *v.* Pickersgill, 2 Wils. 145 258
——— *v.* Robinson, 1 E. & E. 25 ; 28 L. J. M. C. 30 ; 5 Jur. N. S. 434 ; 7 W. R. 12 671
——— *v.* Rothwell, E. B. & E. 168 ; 27 L. J. Q. B. 315 ; 4 Jur. N. S. 1180 267
——— *v.* Sutton, 2 C. B. 634 ; 3 D. & L. 646 ; 15 L. J. C. P. 166 . 295
——— *v.* Walton, 10 Bing. 57 ; 3 M. & Scott, 389 ; 2 L. J. C. P. 210 . . . . . 484, 491
Charkieh, The, L. R. 4 A. & E. 59 ; L. R. 8 Q. B. 197 ; 42 L. J. A. 17 ; 28 L. T. 513 626
Charleston *v.* London Trams., 36 W. R. 367 352
Chartered Bank *v.* Henderson, L. R. 5 P. C. 501 ; 30 L. T. 578. . 735

PAGE

Chartered Bank of India *v.* Netherlands Co., 10 Q. B. D. 521 ; 9 Id. 118 ; 51 L. J. Q. B. 393 ; 52 Id. 220 ; 46 L. T. 530 ; 48 Id. 546 ; 4 Asp. M. C. 523 ; 5 Id. 65 ; 31 W. R. 445 ; 47 J. P. 260 . 220, 605, 609

Chasemore *v.* Richards, 7 H. L. C. 349 ; 2 H. & N. 168 ; 26 L. J. Ex. 393 ; 29 Id. 81 ; 3 Jur. N. S. 984 ; 5 Id. 873 ; 5 W. R. 780 ; 7 Id. 685 . . . . . 273, 812

——— *v.* Turner, L. R. 10 Q. B. 500 ; 45 L. J. Q. B. 66 ; 33 L. T. 323 ; 24 W. R. 70 570

Chatenay *v.* Brazilian Submarine Telegraph Co., (1891) 1 Q. B. 79 ; 60 L. J. Q. B. 295 ; 63 L. T. 739 ; 39 W. R. 65 622

Chatterton *v.* Secretary of State for India, (1895) 2 Q. B. 189 ; 72 L. T. 858 ; 14 R. 262

Chauntler *v.* Robinson, 4 Exch. 163 ; 19 L. J. Ex. 170 795

Chaurand *v* Angerstein, 1 Peake, 43 492

Cheesman *v.* Exall, 6 Exch. 341 ; 20 L. J. Ex. 209 195

Cherry *v.* Heming, 4 Exch. 631 ; 19 L. J. Ex. 63 . . . 299, 307

Cheslyn *v.* Dalby, 4 Y. & C. 238 ; 10 L. J. Ex. in Eq. 21 . . . 570

Chesman *v.* Nainby, 2 Str. 739 ; 1 Bro. P. C. 234 . . . . 402, 403

Chichester *v.* Hill, 52 L. J. Q. B. 160 ; 48 L. T. 364 ; 31 W. R. 245 ; 47 J. P. 324 ; 15 Cox, C. C. 258 473

Child *v.* Hearn, L. R. 9 Ex. 176 ; 43 L. J. Ex. 100 ; 22 W. R. 864 . 277

——— *v.* Morley, 8 T. R. 610 141

Chinery *v.* Viall, 5 H. & N. 288 ; 29 L. J. Ex. 180 ; 2 L. T. 466 ; 8 W. R. 629 . . . . . 191, 228

Chippendale *v.* L. & Y. R. Co., 21 L. J. Q. B. 22 ; 7 Railw. Cas. 824 ; 15 Jur. 1106 208

Cholmeley School *v.* Sewell, (1894) 2 Q. B. 906 ; 63 L. J. Q. B. 820 ; 71 L. T. 88 ; 58 J. P. 591 ; 10 R. 368 51

Chowne *v.* Baylis, 31 Beav. 351 ; 31 L. J. Ch. 757 ; 8 Jur. N. S. 1028 ; 6 L. T. 739 ; 11 W. R. 5 18

Christchurch *v.* Buckingham, 17 C. B. N. S. 391 ; 33 L. J. C. P. 322 ; 10 Jur. N. S. 749 ; 10 L. T. 575 ; 12 W. R. 986 504

Christiansborg, The, 10 P. D. 141 ; 54 L. J. A. 84 ; 53 L. T. 612 ; 5 Asp. M. C 491 623

Christie *v.* Griggs, 2 Camp. 79 ; 11 R. R. 666 200

——— *v.* St. Luke's, Guardians of, 8 E. & B. 992 ; 27 L. J. M. C. 153 ; 4 Jur. N. S. 734, n. ; 6 W. R. 333 672

——— *v.* Unwin, 11 A. & E. 373 ; 3 P. & D. 204 ; 9 Dowl. 294 ; 10 L. J. Ex. 129 ; 4 Jur. 363 649

Christmas *v.* Whinyates, 3 Sw. & Tr. 81 ; 32 L. J. P. 73 ; 9 Jur. N. S. 283 ; 7 L. T. 801 ; 11 W. R. 371 784

Christopherson *v.* Burton, 3 Exch. 160 ; 18 L. J. Ex. 60 23

Church *v.* Barnett, L. R. 6 C. P. 116 ; 40 L. J. C. P. 138 ; 23 L. T. 705 ; 19 W. R. 411 601

——— *v.* Brown, 15 Ves. 258 ; 10 R. R. 74 49

——— *v.* Dalton, 2 Ir. C. L. R. 249 93

Churchill *v.* Siggers, 3 E. & B. 929 ; 2 C. L. R. 1509 ; 23 L. J. Q. B. 308 ; 18 Jur. 773 260

Churchward *v.* Johnson, 54 J. P. 326 435

City Bank *v.* Barrow, 5 App. Cas. 664 ; 43 L. T. 393 743

Clark, *Re*, (1894) 2 Q. B. 393 ; 63 L. J. Q. B. 806 ; 70 L. T. 751 ; 9 R. 498 ; 1 Manson, 207 344

——— *v.* Alexander, 8 Scott, N. R. 147 ; 13 L. J. C. P. 133 ; 8 Jur. 496. 566, 569

——— *v.* Chambers, 3 Q. B. D. 327 ; 47 L. J. Q. B. 427 ; 38 L. T. 454 ; 26 W. R. 613 . . . . . 275, 278, 446

——— *v.* Clark, 10 P. D. 188 ; 54 L. J. P. 57 ; 52 L. T. 234 ; 33 W. R. 405 ; 49 J. P. 516 367

——— *v.* Gaskarth, 8 Taunt. 431 ; 2 Moore, 491 426

——— *v.* Gilbert, 2 B. N. C. 343 ; 2 Scott, 520 ; 1 Hodges, 347 ; 5 L. J. C. P. 61 . . . . . 190, 193, 228

——— *v.* Hooper, 10 Bing. 480 ; 4 M. & Scott, 353 567

——— *v.* Molyneux, 3 Q. B. D. 237 ; 47 L. J. Q. B. 230 ; 36 L. T. 466 263

PAGE

Clarke, *Re*, 2 Q. B. 619 ; 2 G. & D. 780 ; 11 L. J. Q. B. 75 ; 6 Jur. 757 663
——— *v.* Adair, unreported 772
——— *v.* Ernshaw, 1 Gow. 30 198
——— *v.* Millwall Co., 17 Q. B. D. 494 ; 55 L. J. Q. B. 378 ; 54 L. T. 814 ; 34 W. R. 698 429
——— *v.* Roystone, 13 M. & W. 752 ; 14 L. J. Ex. 143 . . . 556
——— *v.* Shee, 1 Cowp. 197 ; 2 Dougl. 698, n. 468
——— *v.* Westrope, 18 C. B. 765 ; 25 L. J. C. P. 287 . . . 556
——— *v.* Willott, L. R. 7 Ex. 313 ; 41 L. J. Ex. 197. . . . 25
——— *v.* Wright, 5 H. & N. 401 ; 6 Id. 849 ; 29 L. J. Ex. 150 ; 30 Id. 113 ; 7 Jur. N. S. 1032 ; 2 L. T. 155 ; 4 Id. 21 ; 8 W. R. 418 ; 9 Id. 571 28
Claridge *v.* S. Staffordshire Tram. Co., (1892) 1 Q. B. 422 ; 61 L. J. Q. B. 503 ; 66 L. T. 655 ; 56 J. P. 408 . . . . . 190, 230
Clavering *v.* Clavering, 2 Vern. 473 ; 1 Abr. Eq. 24 26
Clay *v.* Harrison, 10 B. & C. 99 ; 5 M. & Ry. 17 720
Clayards *v.* Dethick, 12 Q. B. 439 276
Clayton *v.* Gregson, 5 A. & E. 302 ; 6 N. & M. 694 550
——— *v.* Wilton, 6 M. & S. 67, n. ; 3 Madd. 302, n. 28
Cleave *v.* Jones, 6 Exch. 573 ; 20 L. J. Ex. 238 ; 15 Jur. 515 . . 569
Clegg *v.* Hands, 44 Ch. D. 503 ; 59 L. J. Ch. 477 ; 62 L. T. 502 ; 38 W. R. 433 65
Clemence, *Ex p.*, 23 Ch. D. 154 ; 52 L. J. Ch. 472 ; 31 W. R. 397 . 433
Clements *v.* Welles, 1 Eq. 200 ; 35 L. J. Ch. 265 ; 13 L. T. 548 ; 14 W. R. 187 . . . . . 86, 87
Clerk *v.* Blackstock, Holt, N. P. 474 783
—— *v.* Comer, Cas. temp. Hardw. 53 403
—— *v.* Withers, 6 Mod. 290 113
Clifford *v.* Parker, 2 M. & Gr. 909 ; 3 Scott, N. R. 233 . . . 784
Clifton *v.* Hooper, 6 Q. B. 468 ; 14 L. J. Q. B. 1 ; 8 Jur. 958 . . 273
Cloete, *Re*, 65 L. T. 102 ; 55 J. P. 758 ; 8 M. B. R. 195 . 437, 630, 631
Clough *v.* Lambert, 10 Sim. 174 ; 5 Jur. 672 . . . . . 18, 366
Clowes *v.* Hughes, L. R. 5 Ex. 160 ; 39 L. J. Ex. 62 ; 22 L. T. 103 ; 18 W. R. 459 518
Clunnes *v.* Pezzey, 1 Camp. 8 354
Clyde Nav. Co. *v.* Barclay, 1 App. Cas. 790 ; 36 L. T. 379 ; 2 Court of Sessions Cases (4th series), 842 219
Coates *v.* Railton, 6 B. & C. 422 ; 9 D. & R. 593 727
——— *v.* Williams, 7 Exch. 205 ; 21 L. J. Ex. 116 18
Coats *v.* Chaplin, 3 Q. B. 483 ; 2 G. & D. 552 ; 11 L. J. Q. B. 315 ; 6 Jur. 1123 . . . . . 221, 301
Cocking *v.* Ward, 1 C. B. 858 ; 15 L. J. C. P. 245 308
Cochran *v.* Retberg, 3 Esp. 121 . . . . . 541, 546
Cochrane *v.* Green, 9 C. B. N. S. 448 ; 30 L. J. C. P. 97 ; 7 Jur. N. S. 548 ; 3 L. T. 475 ; 9 W. R. 124 . . . . . 140, 338
——— *v.* Moore, 25 Q. B. D. 57 ; 59 L. J. Q. B. 377 ; 63 L. T. 153 ; 38 W. R. 588 348
Cock *v.* Coxwell, 2 C. M. & R. 291 ; 4 Dowl. 187 ; 1 Gale, 177 ; 5 Tyr. 1077 781
Cocksedge *v.* Cocksedge, 14 Sim. 244 ; 13 L. J. Ch. 384 ; 8 Jur. 659 . 366
Cockson *v.* Cock, Cro. Jac. 125 65
Coggins *v.* Bennett, 2 C. P. D. 568 648
Coggs *v.* Bernard, 2 Ld. Raym. 909 ; 3 Id. 163 ; 1 Salk. 26 ; 3 Id. 11, 268 ; Holt, 13, 131, 528 ; 1 Comyns, 133 167
Coghil *v.* Freelove, 3 Mod. 325 ; 2 Vent. 209 69
Cohen *v.* Kittell, 22 Q. B. D. 680 ; 58 L. J. Q. B. 241 ; 60 L. T. 932 ; 37 W. R. 400 ; 53 J. P. 469 369
——— *v.* Mitchell, 25 Q. B. D. 262 ; 59 L. J. Q. B. 109 ; 63 L. T. 296 ; 38 W. R. 551 344
——— *v.* S. E. R. Co., 2 Ex. D. 253 ; 1 Id. 217 ; 45 L. J. Ex. 298 ; 46 Id. 298 ; 35 L. T. 213 ; 36 Id. 130 ; 24 W. R. 522 ; 25 Id. 475 . . . . . 200, 213, 221, 609

PAGE
Colam *v.* Pagett, 12 Q. B. D. 66 ; 53 L. J. M. C. 64 ; 32 W. R. 289 . 432
Colborne *v.* Stockdale, 1 Str. 493 369
Colburn *v.* Patmore, 1 C. M. & R. 73 ; 4 Tyr. 677 ; 3 L. J. Ex. 317 155, 156
Colchester *v.* Brooke, 7 Q. B. 339 ; 15 L. J. Q. B. 173 ; 9 Jur. 1090 . 276
Cole's Case. See *Bush* v. *Coles*.
Cole *v.* Davies, 1 Ld. Raym. 724. 13
—— *v.* Gibson, 1 Ves. sen. 503 367
—— *v.* Green, 6 M. & Gr. 872 ; 7 Scott, N. R. 682 ; 13 L. J. C. P. 30 382
—— *v.* N. W. Bank, L. R. 9 C. P. 470 ; 10 Id. 354 ; 43 L. J. C. P. 194 ; 44 Id. 223 ; 30 L. T. 684 ; 32 Id. 733 ; 22 W. R. 861 . 743, 744
Coleman *v.* Riches, 16 C. B. 104 ; 3 C. L. R. 795 ; 24 L. J. C. P. 125 ; 1 Jur. N. S. 596 ; 3 W. R. 453 351
Coles *v.* Bank of England, 10 A. & E. 437 ; 2 P. & D. 521 ; 9 L. J. Q. B. 36 ; 4 Jur. 266 275
—— *v.* Bristowe, 4 Ch. 3 ; 6 Eq. 149 ; 37 L. J. Ch. 737 ; 38 Id. 81 ; 19 L. T. 403 ; 18 Id. 459 ; 17 W. R. 105 545
—— *v.* Pack, L. R. 5 C. P. 65 ; 39 L. J. C. P. 63 ; 18 W. R. 292 295, 296
—— *v.* Peyton, (1893) 3 Ch. 238 ; 62 L. J. Ch. 991 ; 69 L. T. 738 . 151
—— *v.* Trecothick, 9 Ves. 234 ; 1 Smith, 233 ; 7 R. R. 167 . . 321
Collett *v.* L. & N. W. R. Co., 16 Q. B. 984 ; 20 L. J. Q. B. 411 ; 15 Jur. 1053 182
Collingbourne *v.* Mantell, 5 M. & W. 289 ; 7 Dowl. 518 ; 8 L. J. Ex. 251 ; 3 Jur. 847 336
Collingwood *v.* Berkeley, 15 C. B. N. S. 145 ; 8 L. T. 763 ; 12 W. R. 13 682
Collins, *Re*, 21 L. R. Ir. 508 434
——— *v.* Blantern, 2 Wils. 341. . 350, 355, 384, 389, 401, 767, 773
——— *v.* Castle, 36 Ch. D. 243 ; 57 L. J. Ch. 76 ; 57 L. T. 764 ; 36 W. R. 300 88
——— *v.* Plumb, 16 Ves. 454 ; 10 R. R. 214 84
——— *v.* Lock, 4 App. Cas. 674 ; 48 L. J. P. C. 68 ; 41 L. T. 292 ; 28 W. R. 189 . . . . . 340, 341, 415
——— *v.* Martin, 1 B. & P. 648 ; 2 Esp. 520 ; 4 R. R. 752 . 457, 468
Collinson *v.* Margesson, 27 L. J. Ex. 305 566
Colonial Bank *v.* Cady, 15 App. Cas. 267 ; 36 Ch. D. 659 ; 38 Id. 388 ; 57 L. J. Ch. 826 ; 60 Id. 131 ; 57 L. T. 188 ; 59 Id. 643 ; 63 Id. 27 ; 36 W. R. 625 ; 39 Id. 17 . 460, 466
———————— of Australasia *v.* Willan, L. R. 5 P. C. 417 ; 43 L. J. P. C. 39 ; 30 L. T. 237 ; 22 W. R. 516 . . . 641, 663, 667, 670
Colquhoun, *Ex p.*, 38 W. R. 688 146
Coltman, *Re*, 19 Ch. D. 64 ; 51 L. J. Ch. 3 ; 45 L. T. 392 ; 29 W. R. 923 ; 30 Id. 342 370
Columbine *v.* Penhall, 1 Sm. & Giff. 228 ; 19 L. J. Q. B. 302 ; 14 Jur. 460 18
Commins *v.* Scott, 20 Eq. 11 ; 44 L. J. Ch. 563 ; 32 L. T. 420 ; 23 W. R. 498 298
Comyn *v.* Sabine, unreported 581
Concha *v.* Murrieta, 40 Ch. D. 543 ; 60 L. T. 798 . . . 622, 623
Congleton *v.* Pattison, 10 East, 130 65
Conlan's Estates, *Re*, 29 L. R. Ir. 199 27
Connell *v.* McGorlich, 12 Ir. C. L. R. 153 142
Conran *v.* Pedder, 2 Ir. C. L. R. 200 70
Constitution, The, 4 P. D. 39 ; 48 L. J. P. 13 ; 40 L. T. 219 ; 27 W. R. 739 626
Cooch *v.* Goodman, 2 Q. B. 580 ; 11 L. J. Q. B. 225 ; 2 G. & D. 159 ; 6 Jur. 779 299
Cook *v.* Arundel, 1 Abr. Eq. 26, F. 1 ; Hardr. 87, pl. 5 . . 77, 78
—— *v.* Guerra, L. R. 7 C. P. 132 ; 41 L. J. C. P. 89 ; 26 L. T. 97 ; 20 W. R. 367 503
—— *v.* Lister, 13 C. B. N. S. 543 ; 32 L. J. C. P. 121 ; 9 Jur. N. S. 823 ; 7 L. T. 712 ; 11 W. R. 369 . . . . 337, 338

PAGE

Cook *v.* Wright, 1 B. & S. 559 ; 30 L. J. Q. B. 321 ; 7 Jur. N. S. 1121 ; 4 L. T. 704 331
Cooke *v.* Birt, 5 Taunt. 765 ; 1 Marsh. 333 ; 15 R. R. 652 . 105, 106, 107
—— *v.* Chilcott, 3 Ch. D. 694 ; 34 L. T. 207 87
Cookney *v.* Anderson, 31 Beav. 452 ; 1 De G. J. & S. 365 ; 32 L. J. Ch. 305, 427 ; 8 Jur. N. S. 1220 ; 9 Id. 736 ; 7 L. T. 491 ; 8 Id. 295 ; 11 W. R. 628 . . . . . 603, 604
Coombs *v.* Bristol & Exeter R. Co., 3 H. & N. 1, 510 ; 27 L. J. Ex. 269, 401 ; 6 W. R. 335, 725 . . . . . 221, 301
—— *v.* Wilkes, (1891) 3 Ch. 77 ; 61 L. J. Ch. 42 ; 65 L. T. 56 ; 40 W. R. 77 298
Cooper, *Ex p.*, 11 Ch. D. 68 ; 48 L. J. Bkcy. 49 ; 40 L. T. 105 ; 27 W. R. 518 . . . . . 729, 730, 731, 732
—— *v.* Blandy, 1 B. N. C. 45 ; 4 M. & Scott, 562 ; 3 L. J. C. P. 274 96
—— *v.* Bill, 3 H. & C. 722 ; 34 L. J. Ex. 161 ; 12 L. T. 466 . . . 727
—— *v.* Parker, 15 C. B. 822 ; 14 Id. 118 ; 2 C. L. R. 49 ; 3 Id. 710 ; 24 L. J. C. P. 68 ; 1 Jur. N. S. 281 ; 3 W. R. 245...331, 332, 337
—— *v.* Phillips, 5 Tyr. 166 ; 3 Dowl. 196 ; 1 C. M. & R. 649 . 334
—— *v.* Whittingham, 15 Ch. D. 501 ; 49 L. J. Ch. 752 ; 43 L. T. 16 ; 28 W. R. 720 285
—— *v.* Willomatt, 1 C. B. 672 ; 14 L. J. C. P. 219 ; 9 Jur. 598...191, 228
—— *v.* Waldegrave, 2 Beav. 282 618
—— *v.* Wandsworth District Board, 14 C. B. N. S. 180 ; 32 L. J. C. P. 185 ; 9 Jur. N. S. 1155 ; 11 W. R. 646 652
Cope *v.* Doherty, 4 K. & J. 367 ; 2 De G. & J. 614 ; 27 L. J. Ch. 600 ; 4 Jur. N. S. 451 ; 6 W. R. 537, 695 618
—— *v.* Rowlands, 2 M. & W. 149 ; 2 Gale, 231 ; 6 L. J. Ex. 63 . 374
Copeland *v.* Stephens, 1 B. & Ald. 593 47
Copin *v.* Adamson, 1 Ex. D. 17 ; L. R. 9 Ex. 345 ; 43 L. J. Ex. 161 ; 45 Id. 15 ; 31 L. T. 242 ; 33 Id. 560 ; 22 W. R. 658 ; 24 Id. 85 . 620
Coppock *v.* Bower, 4 M. & W. 361 ; 8 L. J. Ex. 9 365
Corbett *v.* Corbett, 13 P. D. 136 ; 14 Id. 7 ; 57 L. J. P. D. A. 97 ; 58 Id. 17 ; 60 L. T. 74 ; 37 W. R. 30, 114 417
—— *v.* Hill, 39 L. J. Ch. 547 ; 9 Eq. 671 ; 22 L. T. 263 . . . 273
—— *v.* Plowden, 25 Ch. D. 678 ; 54 L. J. Ch. 109 ; 50 L. T. 740 ; 32 W. R. 667 507
Corby *v.* Hill, 4 C. B. N. S. 556 ; 27 L. J. C. P. 318 ; 4 Jur. N. S. 512 ; 6 W. R. 575 347
Cork Distilleries Co. *v.* G. S. & W. R. Co., L. R. 7 H. L. 269 . . 222
—— R. Co., *Re*, 4 Ch. 748 ; 39 L. J. Ch. 277 ; 21 L. T. 47 ; 17 W. R. 873 . . . . . 373, 378
Cornick *v.* Trapaud, 6 Dow, 60 24
Cornbury *v.* Middleton, Ch. Cas. 208 78
Cornish *v.* Clark, 14 Eq. 184 ; 42 L. J. Ch. 14 ; 26 L. T. 494 ; 20 W. R. 897 19
—— *v.* Stubbs, L. R. 5 C. P. 334 ; 39 L. J. C. P. 202 ; 22 L. T. 21 ; 18 W. R. 547 60
Cornwell *v.* Sanders, 3 B. & S. 206 ; 32 L. J. M. C. 6 ; 9 Jur. N. S. 540 ; 7 L. T. 356 ; 11 W. R. 87 . . . . . 665, 666
Costa Rica (Republic of) *v.* Erlanger, 3 Ch. D. 62 ; 45 L. J. Ch. 145 ; 33 L. T. 632 ; 24 W. R. 151 628
Cotesworth *v.* Spokes, 10 C. B. N. S. 103 ; 30 L. J. C. P. 220 ; 7 Jur. N. S. 803 ; 4 L. T. 214 ; 9 W. R. 436 40
Cottam *v.* Partridge, 4 M. & Gr. 271 ; 4 Scott, N. R. 819 ; 11 L. J. C. P. 161 566
Cotterell *v.* Homer, 13 Sim. 506 ; 7 Jur. 544 29
—— *v.* Jones, 11 C. B. 713 ; 21 L. J. C. P. 2 ; 16 Jur. 88 . . 261
Cotterill *v.* Lempriere, 24 Q. B. D. 634 ; 59 L. J. M. C. 133 ; 62 L. T. 695 ; 54 J. P. 583 651
Cotton *v.* Thurland, 5 T. R. 405 386

PAGE
Couch *v.* Steel, 3 E. & B. 402 286
Coupe Co. *v.* Maddick (1891), 2 Q. B. 412; 60 L. J. Q. B. 676; 65 L. T. 489 191
Courtney *v.* Collett, 1 Ld. Raym. 272; 12 Mod. 164 444
Couturier *v.* Hastie, 8 Exch. 40; 9 Id. 102; 5 H. L. C. 673; 22 L. J. Ex. 95, 299; 25 Id. 253; 17 Jur. 1127; 2 Jur. N. S. 1241; 1 W. R. 495 291
Coventry *v.* Gladstone, 6 Eq. 44; 37 L. J. Ch. 492; 16 W. R. 837...729, 730, 739
Covington *v.* Willan, Gow. 115 204
Cowan *v.* Milbourn, L. R. 2 Ex. 230; 36 L. J. Ex. 124; 16 L. T. 290; 15 W. R. 750 368
Coward *v.* Gregory, L. R. 2 C. P. 153; 36 L. J. C. P. 1; 12 Jur. N. S. 1000; 15 L. T. 279; 15 W. R. 170 45
Cowas-jee *v.* Thompson, 5 Moo. P. C. 165; 3 Moo. Ind. App. 422 . 728
Cowell *v.* Edwards, 2 B. & P. 268 151
Cowie *v.* Halsall, 4 B. & Ald. 197; 3 Stark. 36 782
Cowles *v.* Potts, 34 L. J. Q. B. 247; 13 W. R. 858 262
Cowx *v.* Foster, 1 J. & H. 30; 29 L. J. Ch. 886; 6 Jur. N. S. 1051; 2 L. T. 797 18
Cox *v.* Bishop, 26 L. J. Ch. 389; 8 De G. M. & G. 815; 3 Jur. N. S. 499; 5 W. R. 437 89
—— *v.* Browne, Cha. Rep. 170 47
—— *v.* Burbidge, 13 C. B. N. S. 430; 32 L. J. C. P. 89; 9 Jur. N. S. 970; 11 W. R. 435 . . . . 431, 804, 806, 826, 827
—— *v.* Muncey, 6 C. B. N. S. 375 375
Coxhead *v.* Richards, 2 C. B. 569; 15 L. J. C. P. 278; 10 Jur. 984 . 263
Crabtree *v.* Robinson, 15 Q. B. D. 312; 54 L. J. Q. B. 544; 33 W. R. 936; 50 J. P. 70 108
Craft *v.* Boyte, 1 Saund. 246 b; 1 Vent. 22; Sir T. Raym. 181; 2 Keb. 496 599
Crampton *v.* Ridley, 20 Q. B. D. 48; 57 L. T. 809; 36 W. R. 554 . 146
Crane *v.* Powell, L. R. 4 C. P. 123; 38 L. J. M. C. 43; 20 L. T. 703; 17 W. R. 161 297
Cranley *v.* Hillary, 2 M. & S. 120 334
Craven *v.* Henley, Barnes, 255 326
Crawcour *v.* Salter, 18 Ch. D. 30; 51 L. J. Ch. 495; 45 L. T. 62; 30 W. R. 21 551
Crawley *v.* Price, L. R. 10 Q. B. 302; 33 L. T. 203; 23 W. R. 874 . 49
Crears *v.* Hunter, 19 Q. B. D. 341; 56 L. J. Q. B. 518; 57 L. T. 554; 35 W. R. 821 295
Crepps *v.* Durden, 2 Cowp. 640 632
Cremen *v.* Hawkes, 2 J. & L. 674 98
Cresswell *v.* Wood, 10 A. & E. 460 301
Creswell *v.* Davidson, 56 L. T. 811 51
Cripps *v.* Davis, 12 M. & W. 159; 13 L. J. Ex. 217 568
——— *v.* Hartnoll, 32 L. J. Q. B. 381; 2 B. & S. 697; 4 Id. 414; 10 Jur. N. S. 200; 8 L. T. 765; 11 W. R. 953 290
Crisp *v.* Anderson, 1 Stark. 35 353
Crispin, *Ex p.*, 8 Ch. 374; 42 L. J. Bk. 65; 28 L. T. 483; 21 W. R. 491 607
Critchley, *Ex p.*, 3 D. & L. 527; 15 L. J. Q. B. 124; 10 Jur. 112 . 364
Croft *v.* Lumley, 5 E. & B. 648, 682; 4 Id. 608; 6 H. L. C. 672; 24 L. J. Q. B. 78; 25 Id. 73, 223; 27 Id. 62; 1 Jur. N. S. 424; 2 Id. 62, 279; 4 Id. 904; 3 W. R. 234; 6 Id. 523 . 36, 38, 39, 47
—— *v.* Smallwood, 1 Esp. 121 287
Crofts *v.* Harris, Carth. 187 325
Crompton *v.* Lea, 19 Eq. 115; 44 L. J. Ch. 69; 31 L. T. 469; 23 W. R. 53 823
Cronin *v.* Rogers, 1 C. & E. 348 39
Croockewit *v.* Fletcher, 1 H. & N. 893; 26 L. J. Ex. 153; 5 W. R. 348 786

PAGE

Crook *v.* Jadis, 5 B. & Ad. 909 ; 3 N. & M. 257 ; 6 C. & P. 191 ; 3 L. J. K. B. 87 469
Cropp *v.* Tilney, 3 Salk. 226 256
Cropper *v.* Cook, L. R. 3 C. P. 194 ; 17 L. T. 603 ; 16 W. R. 596 . 542
Cross *v.* Eglin, 2 B. & Ad. 106 560
—— *v.* Watts, 13 C. B. N. S. 239 ; 32 L. J. M. C. 73 ; 9 Jur. N. S. 776 ; 7 L. T. 463 ; 11 W. R. 210 654
Crotty *v.* Hodges, 4 M. & Gr. 561 ; 5 Scott, N. R. 221 ; 11 L. J. C. P. 289 . . . . . 781, 782
Crouch *v.* Crédit Foncier, L. R. 8 Q. B. 374 ; 42 L. J. Q. B. 183 ; 29 L. T. 259 ; 21 W. R. 946 . 457, 462, 463, 465, 466, 467, 539, 553
——— *v.* L. & N. W. R. Co., 7 Exch. 705 ; 21 L. J. Ex. 207 . . 204
——— *v.* ———————, 14 C. B. 255 ; 7 Railw. Cas. 717 ; 2 C. L. R. 188 ; 23 L. J. C. P. 73 ; 18 Jur. 148 ; 2 W. R. 166 . 199, 200, 204
Crowhurst *v.* Amersham, 4 Ex. D. 5 ; 48 L. J. Q. B. 109 ; 39 L. T. 355 ; 27 W. R. 95 824
Crowther *v.* Boult, 13 Q. B. D. 680 ; 32 W. R. 150 ; 49 J. P. 135 . 672
——— *v.* Farrer, 15 Q. B. 677 ; 20 L. J. Q. B. 298 ; 15 Jur. 535 . 339
——— *v.* Ramsbottom, 7 T. R. 654 ; 4 R. R. 540 497
——— *v.* Solomons, 6 C. B. 758 ; 18 L. J. C. P. 92 . . . 353
Crusoe *v.* Bugby, 3 Wils. 234 ; 2 W. Bl. 766 . . . . . 45, 47
Cullen *v.* Morris, 2 Stark. 577 284
Cumber *v.* Wane, 1 Str. 426 . . . . . 325, 327
Cuming *v.* Brown, 9 East, 506 ; 1 Camp. 104 ; 9 R. R. 603 . . 737
Cumming *v.* Bedborough, 15 M. & W. 438 164
——— *v.* Shand, 5 H. & N. 95 ; 29 L. J. Ex. 129 559
Cunard *v.* Hyde, 2 E. & E. 1 ; 29 L. J. Q. B. 6 ; 6 Jur. N. S. 14 . 370
Cundell *v.* Dawson, 4 C. B. 376 ; 17 L. J. C. P. 311 373
Cunningham, *Re*, 29 L. J. P. 71 323
Curlewis *v.* Clark, 3 Exch. 375 ; 18 L. J. Ex. 144 337
——— *v.* Corfield, 1 Q. B. 814 ; 1 G. & D. 489 ; 6 Jur. 259 . . 354
Currie *v.* Nind, 1 My. & C. 17 ; 5 L. J. Ch. 169 30
Curtis, *Ex p.*, 3 Q. B. D. 13 ; 47 L. J. M. C. 35 ; 37 L. T. 533 ; 26 W. R. 210 673
——— *v.* Hubbard, 1 Hills' N. Y. Rep. 337 108
Curven *v.* Milburn, 42 Ch. D. 424 ; 62 L. T. 278 ; 38 W. R. 49 . . 570
Cusack *v.* Robinson, 1 B. & S. 299 ; 30 L. J. Q. B. 261 ; 7 Jur. N. S. 542 ; 4 L. T. 506 ; 9 W. R. 735 727
Cuthbert *v.* Cumming, 10 Exch. 809 ; 11 Id. 405 ; 3 C. L. R. 401 ; 24 L. J. Ex. 198, 310 ; 1 Jur. N. S. 686 ; 3 W. R. 244, 553 . 542, 547
Cuthbertson *v.* Irving, 4 H. & N. 742 ; 6 Id. 135 ; 28 L. J. Ex. 306 ; 29 Id. 485 ; 5 Jur. N. S. 740 ; 6 Id. 1211 ; 3 L. T. 335 ; 8 W. R. 704...91—96
Cutler *v.* N. London R. Co., 19 Q. B. D. 64 ; 56 L. J. Q. B. 648 ; 56 L. T. 639 ; 35 W. R. 575 ; 51 J. P. 774 216
—— *v.* Powell, 6 T. R. 320 ; 3 R. R. 185 336
Czech *v.* Gen. St. Nav. Co., L. R. 3 C. P. 14 ; 37 L. J. C. P. 3 ; 17 L. T. 246 ; 16 W. R. 130 220

D.

Daines *v.* Heath, 3 C. B. 938 ; 16 L. J. C. P. 117 ; 11 Jur. 185 . 784
Dakin *v.* Cope, 2 Russ. 170 43
Dale *v.* Hall, 1 Wils. 281 204
D'Allax *v.* Jones, 26 L. J. Ex. 79 ; 2 Jur. N. S. 979 373
Dalton *v.* Angus, 6 App. Cas. 740 ; 3 Q. B. D. 85 ; 4 Id. 162 ; 50 L. J. Q. B. 689 ; 44 L. T. 844 ; 30 W. R. 191 ; 46 J. P. 132...270, 830
—— *v.* S. E. R. Co., 4 C. B. N. S. 296 267
—— *v.* Whittem, 3 Q. B. 961 ; 3 G. & D. 260 ; 12 L. J. Q. B. 55 . 426
Daly *v.* Dublin R. Co., 30 L. R. Ir. 514 267
—— *v.* Thompson, 10 M. & W. 309 465
Dalyell *v.* Tyrer, 28 L. J. Q. B. 52 ; 1 E. B. & E. 899 ; 5 Jur. N. S. 335 353

PAGE
Dancer *v.* Hastings, 4 Bing. 2 ; 12 Moore, 34 . . . . . 93, 523
Dansey *v.* Richardson, 3 E. & B. 144 ; 2 C. L. R. 1449 ; 23 L. J. Q. B. 217 ; 18 Jur. 721 125
D'Aquila *v.* Lambert, 2 Eden, 75 ; Amb. 399 720
Darby *v.* Harris, 1 Q. B. 895 ; 1 G. & D. 234 ; 5 Jur. 988 . . 426
D'Arc *v.* L. & N. W. R. Co., L. R. 9 C. P. 325 ; 30 L. T. 763 ; 22 W. R. 919 218
D'Arcy *v.* Tamar R. Co., L. R. 2 Ex. 158 ; 36 L. J. Ex. 37 ; 14 L. T. 626 ; 4 H. & C. 463 379
Darnell *v.* Trott, 2 C. & P. 82 287
Dartnall *v.* Howard, 4 B. & C. 345 ; 6 D. & R. 438 . . . 185, 227
Darvill *v.* Terry, 6 H. & N. 807 ; 30 L. J. Ex. 355 . . . 13, 18
Daubuz *v.* Lavington, 13 Q. B. D. 347 ; 53 L. J. Q. B. 283 ; 51 L. T. 206 ; 32 W. R. 772 . . . . . 516, 524
Daun *v.* City Brewery, 8 Eq. 155 ; 38 L. J. Ch. 454 ; 20 L. T. 601 ; 17 W. R. 663 559
Davenport *v.* Bishopp, 2 Y. & C. 451 29
——— *v.* The Queen, 3 App. Cas. 115 ; 47 L. J. P. C. 8 ; 37 L. T. 727 . . . . . 38, 39, 41, 42
Davey *v.* Chamberlain, 4 Esp. 229 191
——— *v.* L. & S. W. R. Co., 12 Q. B. D. 70 ; 11 Id. 213 ; 52 L. J. Q. B. 665 ; 53 Id. 58 ; 49 L. T. 739 276
——— *v.* Shannon, 4 Ex. D. 81 ; 48 L. J. Ex. 459 ; 40 L. T. 628 ; 27 W. R. 599 305
David *v.* Ellice, 5 B. & C. 196 ; 7 D. & R. 690 ; 1 C. & P. 368 . . 333
Davidson *v.* Cooper, 11 M. & W. 778 ; 13 Id. 343 ; 1 D. & L. 377 ; 12 L. J. Ex. 467 ; 13 Id. 276 . . . . . 785, 786, 788
Davies *v.* Aston, 1 C. B. 746 ; 3 D. & L. 188 ; 14 L. J. C. P. 228 . 434
——— *v.* Davies, 36 Ch. D. 359 ; 56 L. J. Ch. 962 ; 58 L. T. 209 ; 36 W. R. 86 . . . . . 412, 414
——— *v.* Edwards, 7 Exch. 22 ; 21 L. J. Ex. 4 ; 15 Jur. 1014 . . 568
——— *v.* Humphreys, 6 M. & W. 153 ; 9 L. J. Ex. 263 ; 4 Jur. 250...151, 152
——— *v.* Jenkins, 11 M. & W. 745 ; 1 D. & L. 321 ; 12 L. J. Ex. 386 260
——— *v.* Lowen, 64 L. T. 655 413
——— *v.* Mann, 10 M. & W. 546 ; 12 L. J. Ex. 10 ; 6 Jur. 954 . 275, 276
——— *v.* Moreton, 2 Ch. Ca. 127 51
——— *v.* Powell, Willes, 46 . . . . . 430, 431
——— *v.* Snead, L. R. 5 Q. B. 608 ; 39 L. J. Q. B. 202 ; 23 L. T. 126 263
——— *v.* Solomon, L. R. 7 Q. B. 112 ; 41 L. J. Q. B. 10 ; 25 L. T. 799 ; 20 W. R. 167 280
——— *v.* Williams, 10 Q. B. 725 ; 16 L. J. Q. B. 369 ; 11 Jur. 750 . 266
——— *v.* ———, 16 Q. B. 546 ; 20 L. J. Q. B. 330 ; 15 Jur. 752 . 134
Davis, *Re*, 22 Q. B. D. 193 ; 60 L. T. 156 ; 37 W. R. 141 . . . 520
———, *Re*, 54 L. T. 304 ; 55 L. J. Q. B. 217 ; 34 W. R. 442 . . 432
——— *v.* Black, 1 Q. B. 900 ; 1 G. & D. 432 ; 10 L. J. Q. B. 338 ; 6 Jur. 55 231
——— *v.* Eyton, 7 Bing. 154 ; 4 M. & P. 820 . . . . . 46, 47
——— *v.* Garrett, 6 Bing. 716 ; 4 M. & P. 540 204
——— *v.* Howard, 24 Q. B. D. 691 ; 59 L. J. Q. B. 133 . . . 550
——— *v.* James, 5 Burr. 2680 221
——— *v.* L. & Blackwall R. Co., 1 M. & Gr. 799 ; 2 Scott, N. R. 74 ; 2 Railw. Cas. 308 270
——— *v.* Mason, 5 T. R. 118 ; 2 R. R. 562 . . . . . 403, 407
——— *v.* Nest, 6 C. & P. 167 650
——— *v.* Scrace, L. R. 4 C. P. 172 ; 38 L. J. M. C. 79 ; 19 L. T. 789 ; 17 W. R. 411 . . . . . 648, 651
——— *v.* Shepstone, 11 App. Cas. 187 ; 55 L. J. P. C. 51 ; 55 L. T. 1 ; 34 W. R. 722 ; 50 J. P. 709 264
——— *v.* Yale, 2 Lutw. 946 576
Davison *v.* Duncan, 7 E. & B. 229 ; 26 L. J. Q. B. 104 ; 3 Jur. N. S. 613 ; 5 W. R. 253 264

PAGE

Davison *v.* Gill, 1 East, 64 654
——— *v.* Wilson, 11 Q. B. 890 ; 17 L. J. Q. B. 196 ; 12 Jur. 647 . 134
Davys *v.* Douglas, 4 H. & N. 180 ; 28 L. J. M. C. 193 . . . 670
Dawes *v.* Peck, 8 T. R. 330 ; 3 Esp. 12 ; 4 R. R. 675 221
Dawkins *v.* Paulet, L. R. 5 Q. B. 94 ; 39 L. J. Q. B. 53 ; 21 L. T. 584 ; 18 W. R. 336 . . . . . 262, 284
——— *v.* Rokeby, L. R. 8 Q. B. 255 ; L. R. 7 H. L. 744 ; 42 L. J. Q. B. 63 ; 45 ld. 8 ; 28 L. T. 134 ; 33 Id. 196 ; 21 W. R. 544 ; 23 Id. 931 . . . . . 262, 284
Dawson *v.* Chamney, 5 Q. B. 164 ; 1 D. & M. 348 ; 13 L. J. Q. B. 33 ; 7 Jur. 1037 . . . . . 121, 123
——— *v.* Fitzgerald, 1 Ex. D. 257 ; L. R. 9 Ex. 7 ; 43 L. J. Ex. 19 ; 45 Id. 893 ; 29 L. T. 776 ; 35 Id. 220 ; 22 W. R. 162 ; 24 Id. 773 341
——— *v.* Linton, 5 B. & Ald. 521 ; 1 D. & R. 117 161
Day, *Ex p.*, 1 Ch. D. 699 ; 45 L. J. Bkcy. 53 ; 33 L. T. 867 ; 24 W. R. 492 370
—— *v.* Bather, 2 H. & C. 14 ; 32 L. J. Ex. 171 ; 9 Jur. N. S. 444 ; 8 L. T. 205 ; 11 W. R. 575 126
—— *v.* King, 5 A. & E. 359 ; 6 N. & M. 845 ; 2 H. & W. 178 . . 646
—— *v.* McLea, 22 Q. B. D. 610 ; 58 L. J. Q. B. 293 ; 60 L. T. 947 ; 37 W. R. 483 ; 53 J. P. 532 332
—— *v.* Muskett, 2 Ld. Raym. 985 ; 2 Salk. 640 ; 6 Mod. 80 . . 590
Dean *v.* Keate, 3 Camp. 4 ; 13 R. R. 735 191
De Begnis *v.* Armistead, 10 Bing. 107 ; 3 M. & Scott, 511 ; 2 L. J. C. P. 214 373
De Cosse Brissac *v.* Rathbone, 6 H. & N. 301 ; 30 L. J. Ex. 238 . 641
Deering *v.* Winchelsea, 2 B. & P. 270 ; 1 Cox, 318 ; 1 R. R. 41 . 151
De Gondouin *v.* Lewis, 10 A. & E. 117 ; 2 P. & D. 283 ; 9 L. J. Q. B. 148 ; 3 Jur. 1168 . . . . . 109, 112
De Greuchy *v.* Wills, 4 C. P. D. 362 ; 48 L. J. C. P. 726 ; 41 L. T. 345 ; 28 W. R. 169 609
De Haber *v.* Queen of Portugal, 17 Q. B. 171 ; 20 L. J. Q. B. 488 ; 16 Jur. 164 626
Delaney *v.* Fox, 1 C. B. N. S. 166 ; 2 Id. 268 ; 26 L. J. C. P. 5, 248 ; 2 Jur. N. S. 1233 ; 5 W. R. 148 . . . . . 134, 504, 507
De La Vega *v.* Vianna, 1 B. & Ad. 284 616
Demandray *v.* Metcalf, Prec. Cha. 419 ; 2 Vern. 690 193
De Medina *v.* Grove, 10 Q. B. 152 ; 15 L. J. Q. B. 284 ; 17 Id. 321 ; 10 Jur. 426 ; 11 Id. 145 260
De Mestre *v.* West, (1891) A. C. 264 ; 60 L. J. P. C. 66 ; 64 L. T. 375 ; 55 J. P. 613 28
Denby *v.* Moore, 1 B. & Ald. 123 163
Dendy *v.* Nicholl, 4 C. B. N. S. 376 ; 27 L. J. C. P. 220 ; 6 W. R. 502...39, 44
De Nicholls *v.* Saunders, L. R. 5 C. P. 589 ; 39 L. J. C. P. 297 ; 22 L. T. 661 ; 18 W. R. 1106 503
Dennis *v.* Loving, Hard. 424 48
Denny *v.* Thwaites, 2 Ex. D. 21 ; 46 L. J. M. C. 141 ; 35 L. T. 628 . 667
Dent *v.* Nickalls, 22 W. R. 218 ; 29 L. T. 536 ; 30 Id. 644 . . 559
—— *v.* Smith, L. R. 4 Q. B. 414 ; 38 L. J. Q. B. 144 ; 20 L. T. 868 ; 17 W. R. 646 608
Derby's (Countess of) Case, Keilwey, 202 579
Desbrowe *v.* Wetherby, 1 M. & Rob. 438 ; 6 C. & P. 758 . . . 782
Dever, *Ex p.*, 18 Q. B. D. 660 ; 56 L. J. Q. B. 552 ; 53 L. T. 131 . 609
Dewey *v.* Bayntun, 6 East, 257 ; 8 R. R. 475 13
Dickenson *v.* Hatfield, 1 M. & Rob. 141 ; 5 C. & P. 46 570
——— *v.* Jardine, L. R. 3 C. P. 639 ; 37 L. J. C. P. 321 ; 18 L. T. 717 ; 16 W. R. 1169 555
——— *v.* Watson, T. Jones, 205 442
Dickinson *v.* Grand Junction Canal Co., 7 Exch. 282 ; 21 L. J. Ex. 241 ; 16 Jur. 200 273

PAGE
Dickson *v.* G. N. R. Co., 18 Q. B. D. 176; 56 L. J. Q. B. 111; 55 L. T. 868; 35 W. R. 202 . . . . . 209, 213, 217, 218
——— *v.* Reuter Co., 3 C. P. D. 1; 2 Id. 62; 46 L. J. C. P. 197; 47 Id. 1; 35 L. T. 842; 37 Id. 370; 25 W. R. 272; 26 Id. 23 222
Dillon *v.* Balfour, 20 L. R. Ir. 600 266
Dimes *v.* Petley, 15 Q. B. 276; 19 L. J. Q. B. 449; 14 Jur. 1132 . 276
Dimsdale *v.* Clarke, unreported 646
Diss U. S. Authority *v.* Aldrich, 2 Q. B. D. 179; 46 L. J. M. C. 183; 36 L. T. 663 670
Dixon *v.* Baldwen, 5 East, 175; 7 R. R. 681 727
——— *v.* Bovill, 3 Macq. 1; 2 Jur. N. S. 933; 4 W. R. 813 . 455, 464
——— *v.* Farrer, 18 Q. B. D. 43; 17 Id. 658; 56 L. J. Q. B. 53; 55 L. T. 578; 6 Asp. M. C. 52; 35 W. R. 95 . . . 600
——— *v.* Fawcus, 30 L. J. Q. B. 137; 3 E. & E. 537; 7 Jur. N. S. 895; 3 L. T. 693; 9 W. R. 414 . . . . . 149, 155
——— *v.* Metrop. Board of Works, 7 Q. B. D. 418; 50 L. J. Q. B. 772; 45 L. T. 312; 30 W. R. 83; 46 J. P. 4 828
——— *v.* Smith, 5 H. & N. 450; 29 L. J. Ex. 125 281
——— *v.* Yates, 5 B. & Ad. 313; 2 N. & M. 177; 2 L. J. K. B. 198 148, 729, 733
Doble, *Ex p.*, 26 W. R. 407; 38 L. T. 183 26
Dobree *v.* Napier, 2 B. N. C. 781; 3 Scott, 201; 5 L. J. C. P. 273 347, 629
Dobson *v.* Collis, 1 H. & N. 81; 25 L. J. Ex. 267; 4 W. R. 512 . 304
——— *v.* Espie, 2 H. & N. 79; 26 L. J. Ex. 240; 3 Jur. N. S. 470; 5 W. R. 560 337
Dod *v.* Monger, 6 Mod. 215 132
Dodd *v.* Holme, 1 A. & E. 493; 3 N. & M. 739 270
Dodge *v.* Pringle, 29 L. J. Ex. 115 783
Dodson *v.* Wentworth, 4 M. & Gr. 1080; 5 Scott, N. R. 821; 12 L. J. C. P. 59; 6 Jur. 1066 727
Doe *v.* Adams, 2 Tyr. 289; 2 C. & J. 232; 1 L. J. Ex. 105 . . 512
——— *v.* Ball, 11 M. & W. 531; 12 L. J. Ex. 328 . . . 19, 23
——— *v.* Bancks, 4 B. & Ald. 401; Gow. 220 . . . . . 41, 42
——— *v.* Barton, 11 A. & E. 307; 3 P. & D. 194; 4 Jur. 432; 9 L. J. Q. B. 57 507
——— *v.* Bateman, 2 B. & Ald. 168 98
——— *v.* Batten, 1 Cowp. 243; 9 East, 314, n.; 9 R. R. 470, n. . 38, 44
——— *v.* Benson, 4 B. & Ald. 588 552
——— *v.* Bevan, 3 M. & S. 353; 2 Rose, 456 . . . . . 46, 47
——— *v.* Bingham, 4 B. & Ald. 672 786
——— *v.* Birch, 1 M. & W. 402; T. & G. 769; 5 L. J. Ex. 185 . 37, 42
——— *v.* Bliss, 4 Taunt. 735 . . . . . 34, 44, 45
——— *v.* Bottriell, 5 B. & Ad. 131; 2 N. & M. 64; 2 L. J. K. B. 158 29, 30
——— *v.* Bristol & Exeter R. Co., 6 M. & W. 320 649
——— *v.* Burdett, 9 A. & E. 936; 4 Id. 1; 6 N. & M. 259; 6 M. & Gr. 386; 1 P. & D. 670; 6 L. J. K. B. 73 321
——— *v.* Butcher, 1 Dougl. 51 41
——— *v.* Cadwallader, 2 B. & Ad. 473 509
——— *v.* Carter, 8 T. R. 57, 300; 4 R. R. 586 . . . . . 46, 47
——— *v.* Catomore, 16 Q. B. 745; 20 L. J. Q. B. 364 . . . 784, 785
——— *v.* Clarke, 8 East, 185; 9 R. R. 402 47
——— *v.* Cox, 11 Q. B. 122; 17 L. J. Q. B. 3; 11 Jur. 991 . . 517
——— *v.* Curwood, 1 H. & W. 140 . . . . . 37, 39
——— *v.* Davies, 7 Exch. 89; 16 Jur. 44; 21 L. J. Ex. 60 . . . 521
——— *v.* Day, 2 Q. B. 147; 6 Jur. 913; 2 G. & D. 757; 12 L. J. Q. B. 86 . . . . . 513, 514, 515
——— *v.* Durnford, 2 C. & J. 667; 1 L. J. Ex. 251 45
——— *v.* Edwards, 5 B. & Ad. 1065; 3 N. & M. 193; 6 C. & P. 208; 1 M. & Rob. 319 503

PAGE

Doe *v.* Evans, 9 A. & E. 719 ; 1 P. & D. 472 ; 8 L. J. Q. B. 212 . 47
—— *v.* Eykins, 1 C. & P. 154 ; R. & M. 29 37
—— *v.* Fallows, 2 C. & J. 481 ; 2 Tyr. 460 ; 1 L. J. Ex. 177 . . 22
—— *v.* Ford, 3 A. & E. 649 ; 5 N. & M. 209 ; 5 L. J. K. B. 25 . . 363
—— *v.* Giles, 5 Bing. 421 ; 2 M. & P. 749 . . . . . 504, 513
—— *v.* Gladwin, 6 Q. B. 953 ; 14 L. J. Q. B. 189 ; 9 Jur. 508 . . 45
—— *v.* Goldsmith, 2 Tyr. 710 ; 2 C. & J. 674 ; 1 L. J. Ex. 256 . 512
—— *v.* Goldwin, 2 Q. B. 143 ; 1 G. & D. 463 ; 10 L. J. Q. B. 275 . 350, 513, 514
—— *v.* Goodier, 10 Q. B. 957 ; 16 L. J. Q. B. 435 ; 11 Jur. 892 . 509, 519
—— *v.* Hales, 7 Bing. 322 ; 5 M. & P. 132 509
—— *v.* Hare, 4 Tyr. 29 ; 2 C. & M. 145 ; 3 L. J. Ex. 17 . . . 165
—— *v.* Hawke, 2 East, 481 46
—— *v.* Hogg, 4 D. & R. 226 ; 1 C. & P. 160 46
—— *v.* James, 16 East, 212 . . . . . 26, 30
—— *v.* Johnson, 1 Stark. 411 40
—— *v.* Jones, 5 Exch. 498 ; 19 L. J. Ex. 405 ; 2 C. & K. 743 . . 45
—— *v.* Kensington, 8 Q. B. 429 ; 15 L. J. Q. B. 153 ; 10 Jur. 305 . 514
—— *v.* Laming, 4 Camp. 73 ; R. & M. 36 ; 15 R. R. 728 . . 46, 125
—— *v.* Lea, 11 East, 312 552
—— *v.* Lewis, 5 A. & E. 277 ; 6 N. & M. 764 ; 2 Har. & W. 162 ; 5 L. J. K. B. 217 . . . . . 33, 36, 37
—— *v.* Lewis, 13 M. & W. 241 ; 2 D. & L. 667 ; 13 L. J. Ex. 200 ; 14 Id. 198 509
—— *v.* Lewis, 11 C. B. 1035 ; 20 L. J. C. P. 177 ; 15 Jur. 512 . 26, 27
—— *v.* Lightfoot, 8 M. & W. 553 ; 11 L. J. Ex. 151 ; 5 Jur. 966. 513, 514, 515
—— *v.* Lloyd, 5 B. N. C. 741 ; 8 Scott, 93 ; 9 L. J. C. P. 83; 3 Jur. 751 389
—— *v.* Maisey, 8 B. & C. 767 ; 3 M. & Ry. 107 504
—— *v.* Manning, 9 East, 59 ; 9 R. R. 503 24
—— *v.* Marchetti, 1 B. & Ad. 715 62
—— *v.* Martyr, 1 B. & P. N. R. 332 29
—— *v.* Meux, 4 B. & C. 606 ; 1 C. & P. 346 ; 7 D. & R. 98 . . 37
—— *v.* Olley, 12 A. & E. 481 ; 4 P. & D. 275 ; 9 L. J. Q. B. 379 ; 4 Jur. 1084 516
—— *v.* Palmer, 16 Q. B. 747 ; 20 L. J. Q. B. 367 ; 15 Jur. 836 . . 784
—— *v.* Peck, 1 B. & Ad. 428 . . . . . 40, 45
—— *v.* Powell, 5 B. & C. 308 ; 8 D. & R. 35 46
—— *v.* Pritchard, 5 B. & Ad. 765 ; 2 N. & M. 489 ; 3 L. J. K. B. 11 39, 41, 43, 44
—— *v.* Rees, 4 B. N. C. 384 ; 6 Scott, 161 ; Arn. 159 ; 7 L. J. C. P. 184 45
—— *v.* Roberts, 2 B. & Ald. 367 389
—— *v.* Rolfe, 8 A. & E. 650 ; 7 L. J. Q. B. 251 30
—— *v.* Rowe, 4 B. N. C. 737 26
—— *v.* Rugeley, 6 Q. B. 107 ; 13 L. J. M. C. 137 ; 8 Jur. 615 . . 47
—— *v.* Rusham, 17 Q. B. 723 ; 21 L. J. Q. B. 139 ; 16 Jur. 359 26, 27
—— *v.* Seaton, 2 C. M. & R. 728 ; Tyr. & G. 19 ; 1 Gale, 303 ; 5 L. J. Ex. 73 65
—— *v.* Smith, 5 Taunt. 795 ; 2 Rose, 280 ; 1 Marsh. 359 ; 15 R. R. 660 . . . . . 46, 47
—— *v.* Snowden, 2 W. Bl. 1224 535
—— *v.* Staple, 2 T. R. 684 ; 1 R. R. 565 496
—— *v.* Stidwell, 8 A. & E. 645 ; 6 Dowl. 305 ; 2 Jur. 591 . . . 551
—— *v.* Tom, 4 Q. B. 615 ; 3 G. & D. 637 ; 12 L. J. Q. B. 264 ; 7 Jur. 847 517
—— *v.* Williams, 7 C. & P. 322 . . . . . 40, 43
—— *v.* Wood, 2 B. & Ald. 724 43
—— *v.* Woodbridge, 9 B. & C. 376 ; 4 M. & Ry. 302 45
—— *v.* Worsley, 1 Camp. 19 45
Dolphin *v.* Aylward, L. R. 4 H. L. 486 25

PAGE
Don *v.* Lippmann, 5 Cl. & F. 1 617
Donald *v.* Suckling, L. R. 1 Q. B. 585 ; 7 B. & S. 783 ; 35 L. J. Q. B. 232 ; 12 Jur. N. S. 795 ; 14 L. T. 772 ; 15 W. R. 13 . . . 195
Donaldson *v.* Forster, Abb. on Shipp., part 3, cap. 1 541
Donellan *v.* Read, 3 B. & Ad. 899 ; 1 L. J. K. B. 269 . 305, 306, 307, 507
Donelly *v.* Popham, 1 Taunt, 1 ; 9 R. R. 887 350
Donovan *v.* Laing, (1893) 1 Q. B. 629 ; 63 L. J. Q. B. 25 ; 68 L. T. 512 ; 41 W. R. 455 ; 57 J. P. 583 ; 4 R. 317 353
Doolan *v.* Mid. R. Co., 2 App. Cas. 792 ; 37 L. T. 317 ; 25 W. R. 882 209, 213, 215, 221
Doorman *v.* Jenkins, 2 A. & E. 256 ; 4 N. & M. 170 ; 4 L. J. K. B. 29 174, 183, 184, 189
Doss *v.* Sec. of State for India, 19 Eq. 509 ; 32 L. T. 294 ; 23 W. R. 773 . . . . . 604, 626
Doughty *v.* Bowman, 11 Q. B. 444 ; 16 L. J. Q. B. 414 ; 17 Id. 111 ; 12 Jur. 182 66
Douglas *v.* Corbett, 6 E. & B. 511 ; 2 Jur. N. S. 1247 . . . 261
Douglasse *v.* Waad, 1 Cha. C. 99 25
Doulson *v.* Matthews, 4 T. R. 503 ; 2 R. R. 448 . . . . 594, 602
Douse, *Re*, 31 L. J. P. 172 ; 8 Jur. N. S. 723 ; 6 L. T. 789 . . . 324
Dowell *v.* General S. Navigation Co., 5 E. & B. 195 ; 26 L. J. Q. B. 59 ; 4 Jur. N. S. 800 ; 3 W. R. 492 276
Dowling *v.* Ford, 11 M. & W. 329 ; 12 L. J. Ex. 342 566
Down *v.* Halling, 4 B. & C. 330 ; 6 D. & R. 455 ; 2 C. & P. 11 . . 469
—— *v.* Hatcher, 10 A. & E. 121 ; 2 P. & D. 292 ; 3 Jur. 651 . . 331
Downes *v.* Richardson, 5 B. & Ald. 674 ; 1 D. & R. 332 . . . 784
Downing *v.* Chapman, 9 East, 414, n. 356
Dracachi *v.* Anglo-Egyptian Nav. Co., L. R. 3 C. P. 190 ; 37 L. J. C. P. 71 ; 17 L. T. 472 ; 16 W. R. 277 739
Drake, *Ex p.*, 1 M. D. & De G. 539 46
Drapers' Co. *v.* Hadder, 57 J. P. 200 672
Drewe *v.* Coulton, 1 East, 563, n. (*a*) ; 6 R. R. 346, n. . . . 284
Drinkwater *v.* Goodwin, 1 Cowp. 251 704
Duckworth *v.* Johnson, 4 H. & N. 653 ; 29 L. J. Ex. 25 ; 5 Jur. N. S. 630 267
Dudgeon *v.* Pembroke, 22 W. R. 914 370
Dudley, *In re*, 12 Q. B. D. 44 ; 53 L. J. Q. B. 16 ; 49 L. T. 737 ; 32 W. R. 264 109
Duero, The, L. R. 2 A. & E. 393 ; 38 L. J. A. 69 ; 22 L. T. 37 . 210, 220
Duffield *v.* Scott, 3 T. R. 374 150
Dugdale *v.* Lovering, L. R. 10 C. P. 196 ; 44 L. J. C. P. 197 ; 32 L. T. 155 ; 23 W. R. 391 155
Duignan *v.* Walker, Johns. 446 ; 28 L. J. Ch. 867 ; 5 Jur. N. S. 976 ; 7 W. R. 562 404
Dumper *v.* Syms, Cro. Eliz. 815 47
Dumpor's Case, 4 Co. Rep. 119 b. 31
Dunbar *v.* Roxburghe, 3 Cl. & Fin. 335 255
Duncan *v.* Hill, L. R. 8 Ex. 242 ; 6 Id. 255, 268, n. ; 40 L. J. Ex. 137 ; 42 Id. 179 ; 25 L. T. 59 ; 29 Id. 179 ; 19 W. R. 894 ; 21 Id. 797 550, 559
Dundas *v.* Dutens, 2 Cox, 235 ; 1 Ves. 196 ; 1 R. R. 112 . . . 27
Dungannon's Case, 12 Co. Rep. 120 248
Dunlop *v.* Lambert, 6 Cl. & F. 600 222
Dunn *v.* Birmingham Canal Co., L. R. 8 Q. B. 42 ; 42 L. J. Q. B. 34 ; 27 L. T. 683 ; 21 W. R. 266 828
Durie *v.* Hopwood, 7 C. B. N. S. 835 ; 29 L. J. C. P. 151 ; 6 Jur. N. S. 705 601
Durnford *v.* Messiter, 5 M. & S. 446 141
Durrell *v.* Bederley, Holt N. P. 283 . . . 485, 487, 490, 491, 492
—— *v.* Evans, 1 H. & C. 174 ; 31 L. J. Ex. 337 ; 9 Jur. N. S. 104 ; 7 L. T. 97 ; 10 W. R. 665 . . . . . 319, 322

PAGE
Dutchman *v.* Tooth, 5 B. N. C. 577 ; 7 Scott, 710 140
Dutton *v.* Howell, Show. Parl. Cases, 24 . . . . . 577, 580
——— *v.* Solomonson, 3 B. & P. 582 ; 7 R. R. 883 221
——— *v.* Thompson, 23 Ch. D. 278 ; 52 L. J. Ch. 661 ; 49 L. T. 109 ; 31 W. R. 596 16
Duvergier *v.* Fellowes, 10 B. & C. 826 ; 5 Bing. 248 ; 5 M. & P. 403 ; 1 Cl. & F. 39 367
Dye *v.* Leatherdale, 3 Wils. 20 132
Dyer *v.* Green, 1 Exch. 71 ; 16 L. J. Ex. 239 784
—— *v.* Munday, (1895) 1 Q. B. 742 ; 64 L. J. Q. B. 448 ; 72 L. T. 448 ; 43 W. R. 440 352
Dynevor *v.* Tennant, 13 App. Cas. 279 ; 32 Ch. D. 375 ; 33 Id. 420 ; 55 L. J. Ch. 817 ; 57 Id. 1078 ; 54 L. T. 640 ; 55 Id. 424 ; 59 Id. 5 ; 32 W. R. 737, 777 ; 37 Id. 193 65

E.

Eager *v.* Grimwood, 1 Exch. 61 ; 16 L. J. Ex. 236 266
Eagleton *v.* Gutteridge, 11 M. & W. 465 ; 2 Dowl. N. S. 1053 ; 12 L. J. Ex. 359 . . . . . 106, 775
Earle *v.* Maugham, 14 C. B. N. S. 626 ; 10 Jur. N. S. 208 ; 8 L. T. 637 ; 11 W. R. 911 164
Easley *v.* Crockford, 10 Bing. 243 ; 3 M. & Scott, 700 ; 3 L. J. C. P. 22 469
East India Co. *v.* Campbell, 1 Ves. sen. 246 575
———— *v.* Clavel, Pr. Ch. 377 . . . . . 27, 28
Eastcourt *v.* Weekes, 1 Lutw. 799 531
Easterby *v.* Sampson, 9 B. & C. 505 ; 6 Bing. 644 ; 4 M. & P. 601 ; 1 C. & J. 105 66
Eastern Counties R. Co. *v.* Broom, 6 Exch. 314 ; 20 L. J. Ex. 196 ; 15 Jur. 297 351
Eastwood *v.* Kenyon, 11 A. & E. 438 ; 3 P. & D. 276 ; 9 L. J. Q. B. 409 ; 4 Jur. 1081 . . . . . 143, 289
——— *v.* Saville, 9 M. & W. 615 ; 11 L. J. Ex. 383 . . . 569
Eaton *v.* Southby, Willes, 131 432
Ecclesiastical Commrs. *v.* Merral, L. R. 4 Ex. 162 ; 38 L. J. Ex. 93 ; 20 L. T. 573 ; 24 W. R. 252 . . . 309
———————— *v.* Treemer, (1893) 1 Ch. 166 ; 62 L. J. Ch. 119 ; 68 L. T. 11 ; 41 W. R. 166 ; 3 R. 136 62
Eddleston *v.* Francis, 7 C. B. N. S. 568 ; 3 L. T. 270 648
Edger *v.* Knapp, 6 Scott, N. R. 707 ; 5 M. & Gr. 753 ; 1 D. & L. 73 ; 7 Jur. 583 152
Edie *v.* East India Co., 2 Burr. 1216 ; 1 W. Bl. 295 . . . 464, 539
Edmunds *v.* Wallingford, 14 Q. B. D. 811 ; 54 L. J. Q. B. 305 ; 52 L. T. 720 ; 33 W. R. 647 . . . . . 142, 159
Edmundson, *Re*, 17 Q. B. 67 ; *sub nom.* R. *v.* Leeds & Bradford R. Co., 21 L. J. M. C. 193 ; 16 Jur. 817 656
Edwards *v.* Aberayron Soc., 1 Q. B. D. 563 ; 44 L. J. Q. B. 67 ; 31 L. T. 779 ; 34 Id. 457 ; 23 W. R. 304 341
——— *v.* Baugh, 11 M. & W. 641 ; 1 D. & L. 304 ; 12 L. J. Ex. 426 ; 7 Jur. 607 331
——— *v.* Brewer, 2 M. & W. 375 ; 6 L. J. Ex. 135 ; 1 Jur. 432 . 720, 724, 727
——— *v.* Chapman, 1 M. & W. 231 ; 4 Dowl. 732 ; 1 Gale, 376 ; 1 T. & G. 481 ; 5 L. J. Ex. 139 336
——— *v.* Cock, 58 J. P. 398 666
——— *v.* Coombe, L. R. 7 C. P. 519 ; 41 L. J. C. P. 202 ; 27 L. T. 315 ; 21 W. R. 107 . . . . . 335, 340
——— *v.* Hancher, 1 C. P. D. 111 ; 33 L. T. 575 . . 335, 336, 340
——— *v.* Harben, 2 T. R. 587 ; 1 R. R. 538 . . . . . 11, 12, 14

PAGE
Edwards *v.* Janes, 1 K. & J. 534 569
——— *v.* L. & N. W. R. Co., L. R. 5 C. P. 445; 39 L. J. C. P. 241; 22 L. T. 656; 18 W. R. 834 352
——— *v.* Roberts, (1891) 1 Q. B. 302; 60 L. J. M. C. 6; 55 J. P. 439 671
——— *v.* Sherratt, 1 East, 604 202
Edwick *v.* Hawkes, 18 Ch. D. 199; 50 L. J. Ch. 577; 45 L. T. 168; 29 W. R. 913 134
Egerton *v.* Brownlow, 4 H. L. C. 1; 1 Sim. N. S. 464; 20 L. J. Ch. 645; 23 Id. 348; 16 Jur. 26; 18 Id. 71 . . 136, 364
——— *v.* Mathews, 6 East, 307; 2 Smith, 389; 8 R. R. 489 . . 292
Egremont *v.* Keene, 2 Jones (Exch. Ir.) 307 90
Eicke *v.* Jones, 11 C. B. N. S. 631; 8 Jur. N. S. 843 369
Elderton *v.* Emmens, 4 H. L. C. 624; 4 C. B. 479; 6 Id. 160; 13 Id. 495; 16 L. J. C. P. 209; 11 Jur. 612; 18 Id. 21 . . . 147, 148
Eldridge *v.* Stacey, 15 C. B. N. S. 458; 10 Jur. N. S. 517; 9 L. T. 291; 12 W. R. 51 108
Eley *v.* Positive Assurance Co., 1 Ex. D. 20, 88; 45 L. J. Ex. 58; 33 L. T. 743; 24 W. R. 252 305
Ellesmere Co. *v.* Cooper, (1896) 1 Q. B. 75 . . . . *Add.* 786
Elliot, *Ex p.*, 2 Ch. D. 104; 45 L. J. Ch. 293 17
—— *v.* Johnson, L. R. 2 Q. B. 120; 36 L. J. Q. B. 44; 15 W. R. 253 59
—— *v.* Richardson, 39 L. J. C. P. 340; L. R. 5 C. P. 744; 22 L. T. 858; 18 W. R. 1157 136
Elliotson *v.* Feetham, 2 B. N. C. 134; 2 Scott, 174; 1 Hodges, 259 . 268
Elliott *v.* Kemp, 7 M. & W. 306; 10 L. J. Ex. 321 344
Ellis *v.* Bridgnorth, 15 C. B. N. S. 52; 32 L. J. C. P. 273; 9 Jur. N. S. 1078; 8 L. T. 668 85
—— *v.* Hunt, 3 T. R. 464; 1 R. R. 743 721
—— *v.* Loftus Iron Co., L. R. 10 C. P. 10; 44 L. J. C. P. 24; 31 L. T. 483; 23 W. R. 246 827
—— *v.* M'Henry, L. R. 6 C. P. 228; 40 L. J. C. P. 109; 23 L. T. 861; 19 W. R. 503 618
—— *v.* Taylor, 8 M. & W. 415; 10 L. J. Ex. 462 130
Elphinstone *v.* Bedreechund, 1 Knapp, P. C. 316 629
Elsee *v.* Gatewood, 5 T. R. 143 228
Elton *v.* Larkins, 5 C. & P. 385; 8 Bing. 198; 1 M. & Scott, 323 . 478, 492
Elves *v.* Crofts, 10 C. B. 241; 19 L. J. C. P. 385; 14 Jur. 855 . . 413
Elvis *v.* Archbishop of York, Hob. 315 243
Emery *v.* Clark, 2 C. B. N. S. 582 149
Empress Co., *Re*, 16 Ch. D. 125; 43 L. T. 742; 29 W. R. 342 . . 349
Empson *v.* Bathurst, Hutton, 52 256
Engel *v.* Stourton, 53 J. P. 535 784
England (Bank of) *v.* Anderson, 3 B. N. C. 589; 4 Scott, 50; 6 L. J. C. P. 158 255
——— *v.* Davidson, 11 A. & E. 856; 3 P. & D. 594; 9 L. J. Q. B. 287; 4 Jur. 1032 141
——— *v.* Marsden, L. R. 1 C. P. 529; 35 L. J. C. P. 259; 12 Jur. N. S. 706; 14 L. T. 405; 14 W. R. 650 . . . 142
English & Scottish Co. *v.* Flatau, 36 W. R. 238 152
Englishman, The, (1894) P. 239; (1895) P. 212; 63 L. J. P. 133; 64 Id. 74; 70 L. T. 846; 72 Id. 203; 43 W. R. 62, 670; 6 R. 743 . 390
Era Ass. Soc., *Re*, 2 J. & H. 400; 30 L. J. Ch. 137; 6 Jur. N. S. 1334; 3 L. T. 314; 9 W. R. 67 380
Erichsen *v.* Barkworth, 3 H. & N. 601, 894; 27 L. J. Ex. 472; 28 Id. 95; 5 Jur. N. S. 517; 7 W. R. 97 227
Ernest *v.* Nicholls, 6 H. L. C. 401; *sub nom. Re* Sea, Fire and Life Ass. Co., 5 De G. M. & G. 465; 24 L. J. Ch. 704; 2 W. R. 546; 6 Id. 24; 3 Jur. N. S. 919 375
Estwick *v.* Caillaud, 5 T. R. 420 17
European Mail Co. *v.* P. & O. Co., 14 W. R. 843; 14 L. T. 704 . . 15

PAGE

Evangelistria, The, 2 P. D. 241 ; 46 L. J. A. 1 ; 35 L. T. 410 ; 25 W. R. 255 607
Evans *v.* Davies, 4 A. & E. 840 ; 2 H. & W. 15 ; 3 N. & P. 464 ; 6 L. J. K. B. 268 566
—— *v.* Davis, 10 Ch. D. 747 ; 48 L. J. Ch. 223 ; 39 L. T. 391 ; 27 W. R. 285 . . . . . 37, 44, 49
—— *v.* Duncan, 1 Tyr. 283 ; 1 C. & J. 372 301
—— *v.* Elliot, 5 A. & E. 142 ; 9 Id. 342 ; 2 H. & W. 231 ; 1 P. & D. 256 ; 6 L. J. K. B. 259 ; 8 Id. 51 . . 130, 133, 505, 506
—— *v.* Hoare, (1892) 1 Q. B. 593 ; 61 L. J. Q. B. 470 ; 66 L. T. 345 ; 40 W. R. 442 ; 56 J. P. 664 . . . . . 299, 320
—— *v.* Jones, 3 H. & C. 423 ; 34 L. J. Ex. 25 ; 11 L. T. 636 ; 11 Jur. N. S. 784 17
—— *v.* M. S. & L. R. Co., 36 Ch. D. 626 ; 57 L. J. Ch. 153 ; 57 L. T. 194 ; 36 W. R. 328 828
—— *v.* Martlett, 1 Raym. 271 ; 12 Mod. 156...680, 682, 687, 697, 705, 734
—— *v.* Mathias, 7 E. & B. 590 ; 26 L. J. Q. B. 309 523
—— *v.* Powis, 1 Exch. 601 ; 11 Jur. 1043 . . . 334, 336, 337
—— *v.* Pratt, 3 M. & Gr. 759 ; 4 Scott, N. R. 378 ; 1 Dowl. N. S. 505 ; 11 L. J. C. P. 87 ; 6 Jur. 152 551
—— *v.* Rees, 12 A. & E. 167 ; 4 P. & D. 36 ; 9 L. J. Q. B. 317 ; 4 Jur. 1059 342
—— *v.* Smallcombe, L. R. 3 H. L. 249 ; 37 L. J. Ch. 793 ; 19 L. T. 207 350
—— *v.* Thomas, Cro. Jac. 172 515
—— *v.* Wyatt, 43 L. T. 176 ; 44 J. P. 767 44
Evelyn *v.* Templer, 2 Bro. Ch. C. 148 24
Evershed *v.* L. & N. W. R. Co., 3 Q. B. D. 134 ; 2 Id. 254 ; 3 App. Cas. 1029 ; 46 L. J. Q. B. 289 ; 47 Id. 284 ; 48 Id. 22 ; 36 L. T. 12 ; 37 Id. 623 ; 39 Id. 306 ; 25 W. R. 411 ; 26 Id. 102, 863 . . 203
Every *v.* Smith, 26 L. J. Ex. 344 344
Exall *v.* Partridge, 8 T. R. 308 ; 3 Esp. 8 ; 4 R. R. 658 . . 142, 159
Eyles *v.* Faikney, 1 Peake, 195, n. ; 8 East, 172, n. 390
Eyre *v.* Forbes, 12 C. B. N. S. 191 369
—— *v.* Shelley, 6 M. & W. 269 ; 10 L. J. Ex. 295 ; 5 Jur. 439 . . 375

F.

Fairlie *v.* Denton, 8 B. & C. 395 ; 2 M. & Ry. 353 ; 3 C. & P. 103 . 140
Falcke *v.* Scottish, &c., Co., 34 Ch. D. 234 ; 56 L. J. Ch. 707 ; 56 L. T. 220 ; 35 W. R. 143 142
Falk, *Ex p.*, 14 Ch. D. 446 ; 7 App. Cas. 573 ; 52 L. J. Ch. 167 ; 42 L. T. 780 ; 47 Id. 454 ; 28 W. R. 785 ; 31 Id. 125 ; 4 Asp. M. C. 280 ; 5 Id. 1 . . . . . 722, 730, 731, 732, 733, 739, 742
—— *v.* Fletcher, 18 C. B. N. S. 403 ; 34 L. J. C. P. 146 ; 11 Jur. N. S. 176 ; 13 W. R. 346 725
Falkner *v.* Earle, 32 L. J. Q. B. 124 ; 3 B. & S. 360 ; 7 L. T. 672 ; 9 Jur. N. S. 847 ; 11 W. R. 307 542
Falmouth *v.* Roberts, 9 M. & W. 469 ; 1 Dowl. N. S. 633 ; 11 L. J. Ex. 180 786
———— *v.* Thomas, 1 C. & M. 89 ; 3 Tyr. 26 ; 2 L. J. Ex. 57 . . 308
Fancam *v.* Foster, Skin. 326 304
Farley *v.* Danks, 4 E. & B. 493 ; 24 L. J. Q. B. 244 ; 1 Jur. N. S. 331 ; 3 W. R. 173 265
Farmeloe *v.* Bain, 1 C. P. D. 445 ; 45 L. J. C. P. 264 ; 34 L. T. 324 . 742
Farmer *v.* Russell, 1 B. & P. 296 386
Farnworth *v.* Packwood, 1 Stark. 249 ; Holt, N. P. 209 . . . 121
Farrant *v.* Barnes, 31 L. J. C. P. 137 ; 11 C. B. N. S. 553 ; 8 Jur. N. S. 868 . . . . . 204, 230

PAGE

Farrer *v.* Nelson, 15 Q. B. D. 258 ; 54 L. J. Q. B. 385 ; 52 L. T. 766 ; 33 W. R. 800 827
Farrington *v.* Donohoe, 1 Ir. R. C. L. 675 305
Faviell *v.* Gaskoin, 7 Exch. 273 ; 21 L. J. Ex. 85 538
Fawcett *v.* Fowlis, 7 B. & C. 394 641
——— *v.* Hall, Alc. & N. 248 97
——— & Holmes, *Re*, 42 Ch. D. 150 ; 58 L. J. Ch. 763 ; 61 L. T. 105 88
Fawkes *v.* Lamb, 31 L. J. Q. B. 98 ; 8 Jur. N. S. 385 ; 10 W. R. 348. 559
Fay *v.* Prentice, 1 C. B. 828 ; 14 L. J. C. P. 298 ; 9 Jur. 876 . . 273
Fearon *v.* Aylesford, 14 Q. B. D. 792 ; 12 Id. 539 ; 50 L. J. Q. B. 508 ; 54 Id. 33 ; 52 L. T. 954 ; 32 W. R. 718 ; 33 Id. 331 ; 49 J. P. 596 367
——— *v.* Bowers, 1 H. Bl. 364, n. 693, 696, 697, 705
Feather *v.* The Queen, 35 L. J. Q. B. 200 ; 6 B. & S. 257 ; 12 L. T. 114 630
Featherston *v.* Hutchinson, Cro. Eliz. 199 372
Feilden *v.* Slater, 7 Eq. 523 ; 38 L. J. Ch. 379 ; 20 L. T. 112 ; 17 W. R. 485 87
Feise *v.* Wray, 3 East, 93 ; 6 R. R. 551 . . . . . 724, 725
Fell *v.* Knight, 8 M. & W. 269 ; 10 L. J. Ex. 277 ; 5 Jur. 554 . . 125
Felthouse *v.* Bindley, 31 L. J. C. P. 204 ; 6 L. T. 157 ; 10 W. R. 423 301
Fenn *v.* Bittleston, 7 Exch. 152 ; 21 L. J. Ex. 41 . . . 191, 228
Fenner *v.* Meares, 2 W. Bl. 1269 . . . . . 771, 772
Fenton *v.* Emblers, 3 Burr. 1279 ; 1 W. Bl. 353 304
——— *v.* Logan, 9 Bing. 676 ; 3 M. & Scott, 82 ; 2 L. J. C. P. 102...429, 434
Fenwick *v.* Bell, 1 C. & K. 312 492
Feret *v.* Hill, 15 C. B. 207 ; 2 C. L. R. 1366 ; 23 L. J. C. P. 185 ; 18 Jur. 1014 ; 2 W. R. 493 374
Ferguson *v.* Kinnoull, 9 Cl. & F. 251 . . . . . 283, 284
Fergusson *v.* Norman, 5 B. N. C. 76 ; 6 Scott, 794 ; 3 Jur. 10 . . 373
Fernley *v.* Worthington, 1 M. & Gr. 491 ; 1 Scott, N. R. 432 ; 10 L. J. M. C. 81 ; 4 Jur. 918 640
Ferrall *v.* Shaen, 1 Wms. Saund. 292 369
Few *v.* Perkins, L. R. 2 Ex. 92 ; 36 L. J. Ex. 54 ; 16 L. T. 62 ; 15 W. R. 713 37
Ffytche *v.* Bishop of London, 1 East, 487 369
Field *v.* Adames, 12 A. & E. 649 ; 4 P. & D. 504 ; 4 Jur. 1033 . . 430
—— *v.* Lelean, 6 H. & N. 617 ; 30 L. J. Ex. 168 ; 7 Jur. N. S. 918 ; 4 L. T. 121 ; 9 W. R. 387 542
—— *v.* Megaw, L. R. 4 C. P. 660 140
Filburn *v.* People's Palace Co., 25 Q. B. D. 258 ; 59 L. J. Q. B. 471 ; 55 J. P. 181 ; 38 W. R. 706 . . . . . 827, 828
Filliter *v.* Phippard, 11 Q. B. 347 ; 17 L. J. Q. B. 89 ; 12 Jur. 202 . 273, 799, 825
Filow's case, 12 Hen. 8, 3, pl. 3 . . . . . 430, 431
Finch *v.* Throgmorton, Cro. Eliz. 221 41
Findon *v.* M'Laren, 6 Q. B. 891 ; 14 L. J. Q. B. 183 ; 9 Jur. 369 . 428
——— *v.* Parker, 11 M. & W. 675 ; 12 L. J. Ex. 444 ; 7 Jur. 903 . 769
Fine Art Society *v.* Union Bank, 17 Q. B. D. 705 ; 56 L. J. Q. B. 70 ; 55 L. T. 536 ; 35 W. R. 114 ; 51 J. P. 69 . . . . . 455, 466
Firth *v.* Bowling Iron Co., 3 C. P. D. 254 ; 47 L. J. C. P. 358 ; 38 L. T. 568 ; 26 W. R. 558 825
—— *v.* N. E. R. Co., 36 W. R. 467 201
—— *v.* Slingsby, 58 L. T. 481 570
Fish *v.* Kelly, 17 C. B. N. S. 194 228
Fisher *v.* Bridges, 2 E. & B. 118 ; 3 Id. 642 ; 2 C. L. R. 928 ; 24 L. J. Q. B. 165 ; 1 Jur. N. S. 157 ; 1 W. R. 350 . 375, 376, 377
——— *v.* Fallows, 5 Esp. 171 ; 8 R. R. 843. 149
——— *v.* Val de Travers Co., 1 C. P. D. 511 ; 45 L. J. C. P. 135 ; 35 L. T. 366. 150

PAGE
Fishmongers Co. *v.* Robertson, 3 C. B. 970 ; 16 L. J. C. P. 118 . . 342
Fissington *v.* Hutchinson, 15 L. T. 390 279
Fitch *v.* Sutton, 5 East, 230 ; 1 Smith, 415 . . . 326, 327, 328
Fitzer *v.* Fitzer, 2 Atk. 511 18
Fitzgerald *v.* Dressler, 7 C. B. N. S. 374, 392 ; 29 L. J. C. P. 113 ; 5 Jur. N. S. 598 ; 7 W. R. 190 . . . . . 288, 291
Fitzherbert *v.* Mather, 1 T. R. 12 ; 1 R. R. 134 477
Fitzjohn *v.* Mackinder, 9 C. B. N. S. 505 ; 30 L. J. C. P. 257 ; 7 Jur. N. S. 1283 ; 4 L. T. 149 ; 9 W. R. 477 265
Fitzmaurice *v.* Bayley, 6 E. & B. 868 ; 8 Id. 664 ; 9 H. L. C. 78 ; 3 Jur. N. S. 264 ; 4 Id. 506 ; 6 Id. 1215 ; 6 W. R. 125 ; 8 Id. 750 297, 350
Fivaz *v.* Nicholls, 2 C. B. 501 ; 15 L. J. C. P. 125 ; 10 Jur. 50 . . 387
Fleet *v.* Murton, L. R. 7 Q. B. 126 ; 41 L. J. Q. B. 49 ; 26 L. T. 181 ; 20 W. R. 97 . . . . . 291, 545, 556, 560
Fleetwood *v.* Hull, 23 Q. B. D. 35 ; 58 L. J. Q. B. 341 ; 60 L. T. 790 ; 37 W. R. 714 65
Fleming *v.* Hislop, 11 App. Cas. 686 . . . . . 268, 269
——— *v.* M. S. & L. R. Co., 4 Q. B. D. 81 ; 37 L. T. 403 ; 39 Id. 555 ; 26 W. R. 741 ; 27 Id. 481 223
Fletcher *v.* Harcot, Hutt. 55 155
——— *v.* Rylands, L. R. 1 Ex. 265 ; L. R. 3 H. L. 330 ; 3 H. & C. 774 ; 4 Id. 263 ; 35 L. J. Ex. 154 ; 37 Id. 161 ; 11 Jur. N. S. 714 ; 12 Id. 603 ; 14 L. T. 523 ; 19 Id. 220 ; 13 W. R. 992 ; 14 Id. 799 . . . . . 273, 789
——— *v.* Smith, 2 App. Cas. 781 ; L. R. 7 Ex. 305 ; 41 L. J. Ex. 193 ; 47 Id. 4 ; 27 L. T. 164 ; 31 Id. 190 ; 37 Id. 367 ; 20 W. R. 987 ; 26 Id. 83 823
——— *v.* Sondes, 3 Bing. 501 369
Flight *v.* Gray, 3 C. B. N. S. 320 ; 27 L. J. C. P. 13 ; 4 Jur. N. S. 13 339
——— *v.* Reed, 1 H. & C. 703 ; 32 L. J. Ex. 265 ; 9 Jur. N. S. 1016 ; 8 L. T. 638 . . . . . 144, 369, 377
——— *v.* Thomas, 10 A. & E. 590 ; 2 P. & D. 531 ; 7 Dowl. 741 ; 3 Jur. 822 269
Flockton *v.* Hall, 14 Q. B. 380 ; 16 Id. 1039 ; 19 L. J. Q. B. 4 ; 20 Id. 208 ; 14 Jur. 571 ; 15 Id. 600 337
Flood *v.* Jackson, (1895) 2 Q. B. 21 ; 64 L. J. Q. B. 665 ; 73 L. T. 161 ; 43 W. R. 453 ; 14 R. 281
Flory *v.* Denny, 7 Exch. 581 ; 21 L. J. Ex. 223 194
Flounders, *Re*, 4 B. & Ad. 865 ; 1 N. & M. 592 659
Flower *v.* Adam, 2 Taunt. 314 275
——— *v.* Sadler, 10 Q. B. D. 572 ; 9 Id. 83 ; 46 J. P. 503 . . . 365
Flowers *v.* S. E. R. Co., 16 L. T. 329 206
Foakes *v.* Beer, 9 App. Cas. 605 ; 11 Q. B. D. 221 ; 52 L. J. Q. B. 426, 712 ; 54 Id. 130 ; 51 L. T. 833 ; 33 W. R. 233 . 328, 330, 332, 335, 339
Foley *v.* Fletcher, 28 L. J. Ex. 100 ; 3 H. & N. 769 ; 5 Jur. N. S. 342 ; 7 W. R. 141 340
Folkes *v.* Chadd, 3 Dougl. 157 491
Ford *v.* Beech, 11 Q. B. 842, 852 ; 5 D. & L. 610 ; 16 L. J. Q. B. 100 ; 17 Id. 114 ; 11 Jur. 299 ; 12 Id. 310 339
—— *v.* Brooke, Cro. Eliz. 261 598
—— *v.* Hopkins, 1 Salk. 283 . . . . . 449, 451, 453
—— *v.* Hoskins, Cro. Jac. 368 ; Moore, 842 ; 2 Bulstr. 336 ; 1 Roll. Rep. 125 . . . . . 237, 238, 242
—— *v.* Tynte, 31 L. J. Ch. 177 430
—— *v.* Yates, 2 M. & Gr. 549 ; 2 Scott, N. R. 645 ; 10 L. J. C. P. 117 559
Foreman *v.* G. W. R. Co., 38 L. T. 851 217
Forster *v.* Taylor, 5 B. & Ad. 887 ; 3 N. & M. 244 ; 3 L. J. K. B. 137 369
Forth *v.* Stanton, 1 Wm. Saund. (6th ed.) 210 ; 2 Keb. 465 ; 1 Lev. 262 . . . . . 288, 291
Forward *v.* Pittard, 1 T. R. 27 ; 1 R. R. 142 199

PAGE
Foster, *Re*, 6 Ch. D. 87 ; 46 L. J. Ch. 480 ; 36 L. T. 582 ; 25 W. R. 553 27
——— *v.* Bates, 12 M. & W. 226 ; 1 D. & L. 400 ; 13 L. J. Ex. 88 ; 7 Jur. 1093 350
——— *v.* Dawber, 6 Exch. 839 ; 20 L. J. Ex. 385 . . . 337, 564
——— *v.* Frampton, 6 B. & C. 107 ; 9 D. & R. 108 ; 2 C. & P. 469 727, 732
——— *v.* Green, 7 H. & N. 881 ; 31 L. J. Ex. 158 ; 6 L. T. 390. 452, 682
——— *v.* Jackson, Hob. 52. 113
——— *v.* Mentor Life Ass., 3 E. & B. 48 ; 23 L. J. Q. B. 145 ; 18 Jur. 827 ; 2 C. L. R. 1404 556
——— *v.* Rowland, 7 H. & N. 103 ; 30 L. J. Ex. 396 ; 7 Jur. N. S. 998 297
Foulger *v.* Steadman, L. R. 8 Q. B. 65 ; 42 L. J. M. C. 3 ; 26 L. T. 395 665
——— *v.* Taylor, 5 H. & N. 202 ; 29 L. J. Ex. 154 ; 1 L. T. 481 ; 8 W. R. 279 432
Foulkes *v.* Met. Dist. R. Co., 5 C. P. D. 157 ; 4 Id. 267 ; 48 L. J. C. P. 555 ; 49 Id. 361 ; 41 L. T. 95 ; 42 Id. 345 ; 28 W. R. 526 . 202, 224
Fowler *v.* Knoop, 4 Q. B. D. 299 ; 47 L. J. Q. B. 473 ; 48 Id. 333 ; 40 L. T. 180 ; 27 W. R. 299 740
——— *v.* Lock, L. R. 7 C. P. 272 ; 10 Id. 90 ; 41 L. J. C. P. 99 ; 26 L. T. 476 ; 31 Id. 844 ; 20 W. R. 672 ; 23 Id. 415 230
Fowles *v.* G. W. R. Co., 7 Exch. 699 ; 22 L. J. Ex. 76 ; 7 Railw. Cas. 421 208
Fox *v.* Bishop of Chester, 6 Bing. 1 369
—— *v.* Nott, 6 H. & N. 630 ; 30 L. J. Ex. 259 ; 7 Jur. N. S. 663 . 739
—— *v.* Scard, 33 Beav. 327 401
—— *v.* Swann, Styles, 482 47
Frampton *v.* Frampton, 4 Beav. 287 ; 5 Jur. 980 366
France *v.* Clark, 26 Ch. D. 257 ; 22 Id. 830 ; 52 L. J. Ch. 362 ; 53 Id. 585 ; 48 L. T. 185 ; 50 Id. 1 ; 31 W. R. 374 ; 32 Id. 466 . 192, 466, 473
Francis, *Ex p.*, 56 L. T. 577 ; 6 Asp. M. C. 138 ; 4 M. B. R. 146 . 729
——— *v.* Cockerell, L. R. 5 Q. B. 184, 501 ; 39 L. J. Q. B. 113, 291 ; 22 L. T. 203 ; 23 Id. 466 ; 18 W. R. 668, 1205 . 220, 230
——— *v.* Wyatt, 1 W. Bl. 483 ; 3 Burr. 1498 429
Franklin *v.* Neate, 13 M. & W. 481 ; 14 L. J. Ex. 59 194
———*v.* S. E. R. Co., 3 H. & N. 211 ; 4 Jur. N. S. 565 ; 6 W. R. 573 267
Fraser *v.* Witt, 7 Eq. 64 ; 19 L. T. 440 ; 17 W. R. 92 727
Fray *v.* Blackburn, 3 B. & S. 576 631
Frazer *v.* Jordan, 8 E. & B. 303 ; 26 L. J. Q. B. 288 ; 3 Jur. N. S. 1054 ; 5 W. R. 819 339
Freedom, The, L. R. 3 P. C. 594 ; 38 L. J. A. 25 ; 24 L. T. 452 . . 739
Freeman *v.* Appleyard, 32 L. J. Ex. 175 ; 7 L. T. 282 742
——— *v.* Bernard, 1 Salk. 69 ; 1 Ld. Raym. 247 325
——— *v.* Birch, 3 Q. B. 492, n. ; 1 N. & M. 420 222
——— *v.* Edwards, 2 Exch. 732 ; 17 L. J. Ex. 258 519
——— *v.* Freeman, 2 Vern. 233 ; Eq. Ca. Ab. 87, pl. 9 ; Pre. Ch. 28 419
——— *v.* Pope, 9 Eq. 206 ; 5 Ch. 538 ; 39 L. J. Ch. 148, 689 ; 21 L. T. 816 ; 23 Id. 208 ; 18 W. R. 399, 906 . . 21, 22, 23
——— *v.* Rosher, 13 Q. B. 780 ; 18 L. J. Q. B. 340 ; 13 Jur. 881 . 351
Fremantle *v.* L. & N. W. R. Co., 10 C. B. N. S. 89 ; 31 L. J. C. P. 12 ; 5 L. T. 556 ; 9 W. R. 611 825
French *v.* French, 6 De G. M. & G. 95 ; 25 L. J. Ch. 612 ; 2 Jur. N. S. 169 ; 4 W. R. 139 . . . . . 19, 20
——— *v.* Phillips, 1 H. & N. 564 ; 26 L. J. Ex. 82 ; 2 Jur. N. S. 1169 ; 5 W. R. 114 274
——— *v.* Styring, 2 C. B. N. S. 357 ; 26 L. J. C. P. 181 ; 3 Jur. N. S. 670 ; 5 W. R. 561 153
Frend *v.* Dennett, 4 C. B. N. S. 576 ; 27 L. J. C. P. 314 ; 4 Jur. N. S. 897 ; 5 L. T. 73 379
Freston, *Re*, 11 Q. B. D. 545 ; 52 L. J. Q. B. 545 ; 49 L. T. 290 ; 31 W. R. 804 109

PAGE

Freston, *Ex p.*, 30 L. J. Ch. 460; 7 Jur. N. S. 432; 3 L. T. 832; 9 W. R. 321 114
Fricker *v.* Tomlinson, 1 M. & Gr. 772 302
Friere *v.* Woodhouse, Holt, N. P. 572 478
Fritz *v.* Hobson, 14 Ch. D. 542; 49 L. J. Ch. 321; 42 L. T. 225; 28 W. R. 459 274
Fuentes *v.* Montis, L. R. 3 C. P. 268; 4 Id. 93; 37 L. J. C. P. 137; 38 Id. 95; 18 L. T. 21; 19 Id. 364; 16 W. R. 900; 17 Id. 208 . . 743
Fuller *v.* Redman, 26 Beav. 614; 29 L. J. Ch. 324; 5 Jur. N. S. 1046 571
Furley *v.* Wood, 1 Esp. 198 552
Furlong *v.* S. London Trams., 48 J. P. 329; C. & E. 316 352
Furness *v.* Meek, 27 L. J. Ex. 34 299

G.

Gabarron *v.* Kreeft, L. R. 10 Ex. 274; 44 L. J. Ex. 238; 33 L. T. 365; 24 W. R. 146 736
Gabay *v.* Lloyd, 3 B. & C. 763; 5 D. & R. 641 548
Gabriel *v.* Dresser, 15 C. B. 622; 3 C. L. R. 415; 24 L. J. C. P. 81; 3 W. R. 236 336
Gahan *v.* Lafitte, 3 Moo. P. C. 382 631
Gale *v.* Capern, 1 A. & E. 102; 3 N. & M. 863; 3 L. J. K. B. 140 . 568
—— *v.* Gale, 6 Ch. D. 144; 46 L. J. Ch. 809; 36 L. T. 690; 25 W. R. 772 28
—— *v.* Reed, 8 East, 80; 9 R. R. 376 . . . . . 405, 411
—— *v.* Williamson, 8 M. & W. 405; 10 L. J. Ex. 446 29
Gallin *v.* L. & N. W. R. Co., L. R. 10 Q. B. 212; 44 L. J. Q. B. 89; 32 L. T. 550; 23 W. R. 308 210
Gambier's Case, unreported 594
Games, *Ex p.*, 12 Ch. D. 314; 40 L. T. 789; 27 W. R. 492, 744 . 17
Gandy *v.* Adelaide Ins. Co., L. R. 6 Q. B. 746; 40 L. J. Q. B. 239; 25 L. T. 742 478
——— *v.* Gandy, 30 Ch. D. 57; 54 L. J. Ch. 1154; 46 L. T. 607; 30 W. R. 673 140
Gardiner *v.* Williamson, 2 B. & Ad. 336 54
Gardner *v.* Walsh, 5 E. & B. 83; 24 L. J. Q. B. 285; 1 Jur. N. S. 828; 3 W. R. 460 . . . . . 782, 783
Gargrave *v.* Smith, 1 Salk. 221 . . . . . 131, 132
Garnett *v.* Backhouse, L. R. 3 Q. B. 699; 9 B. & S. 306; 37 L. J. Q. B. 228; 19 L. T. 145; 16 W. R. 1203 671
——— *v.* Ferrand, 6 B. & C. 611 283
Garrard *v.* Lewis, 10 Q. B. D. 30; 47 L. T. 408; 31 W. R. 475. 472, 783
——— *v.* Woolner, 8 Bing. 258; 1 M. & Scott, 327; 4 C. & P. 471 . 334
Garside *v.* Trent Nav. Co., 4 T. R. 581; 2 R. R. 468 199
Gas Light Co. *v.* Hardy, 17 Q. B. D. 619; 56 L. J. Q. B. 168; 55 L. T. 585; 35 W. R. 50 437
———— *v.* Turner, 5 B. N. C. 666; 6 Id. 324; 7 Scott, 779; 8 Id. 609; 9 L. J. C. P. 75; 9 Id. Ex. 336 373
Gaskell *v.* King, 11 East, 165; 10 R. R. 462 371
Gates *v.* Bayley, 2 Wils. 313 443
Gatty *v.* Field, 9 Q. B. 431; 15 L. J. Q. B. 408; 10 Jur. 980 . . 386
Gauntlett *v.* King, 3 C. B. N. S. 59 351
Gay *v.* Matthews, 4 B. & S. 425, 440; 32 L. J. M. C. 58; 33 Id. 14; 9 Jur. N. S. 716; 7 L. T. 504; 8 Id. 674; 11 W. R. 89, 922 . 655
Gaylord *v.* Nicholls, 9 Exch. 702; 2 C. L. R. 1066; 23 L. J. Ex. 205 270
Gebhardt *v.* Saunders, (1892) 2 Q. B. 452; 40 W. R. 571; 56 J. P. 741 142
Gee *v.* Metr. R. Co., L. R. 8 Q. B. 161; 42 L. J. Q. B. 105; 25 L. T. 822; 28 Id. 282; 21 W. R. 581 276

PAGE

Geere *v.* Mare, 2 H. & C. 339 ; 33 L. J. Ex. 50 ; 8 L. T. 463 ; 12 W. R. 17 377
Gelen *v.* Hall, 2 H. & N. 379 ; 27 L. J. M. C. 78 . . 631, 642, 648
Gelley *v.* Clerk, Cro. Jac. 188 124
General Auction Co. *v.* Smith, (1891) 3 Ch. 432 ; 60 L. J. Ch. 723 ; 65 L. T. 188 ; 40 W. R. 106 378
——— Credit Co. *v.* Glegg, 22 Ch. D. 549 ; 52 L. J. Ch. 297 ; 48 L. T. 182 ; 31 W. R. 421 192
——— Estates Co., *Re*, 3 Ch. 758 ; 18 L. T. 457, 894 ; 16 W. R. 919 467
——— St. Nav. Co. *v.* Guillou, 11 M. & W. 877 ; 13 L. J. Ex. 168 . 619
Genner *v* Sparkes, 1 Salk. 79 ; 6 Mod. 173 109
George *v.* Kinch, 7 Mod. 478 344
——— *v.* Milbanke, 9 Ves. 190 ; 7 R. R. 157 . . . . 27, 28
Gerrard *v.* Floyd, 1 Sid. 185 599
Gibbes, *Ex p.*, 1 Ch. D. 101 ; 45 L. J. Bkcy. 10 ; 33 L. T. 479 ; 24 W. R. 298 . . . . . 727, 732
Gibbon *v.* Budd, 2 H. & C. 92 ; 32 L. J. Ex. 182 ; 9 Jur. N. S. 525 ; 8 L. T. 321 ; 11 W. R. 626 146
Gibbons *v.* Vouillon, 8 C. B. 483 ; 7 D. & L. 266 ; 19 L. J. C. P. 74 ; 14 W. R. 66 . . . . . 158, 340
Gibbs *v.* Cruickshank, L. R. 8 C. P. 454 ; 42 L. J. C. P. 273 ; 28 L. T. 735 ; 21 W. R. 734 . . . . . 504, 527
——— *v.* Fremont, 9 Exch. 25 ; 22 L. J. Ex. 302 ; 17 Jur. 820 . . 611
——— *v* Pike, 9 M. & W. 351 ; 1 Dowl. N. S. 409 ; 12 L. J. Ex. 257 ; 6 Jur. 465 260
——— *v* Potter, 10 M. & W. 70 ; 11 L. J. Ex. 376 ; 6 Jur. 586 . . 219
——— *v.* Société de Métaux, 25 Q. B. D. 399 ; 59 L. J. Q. B. 510 ; 63 L. T. 503 . . . . . 609, 619
Giblin *v.* M'Mullen, L. R. 2 P. C. 317 ; 38 L. J. P. C. 25 ; 21 L. T. 214 ; 17 W. R. 445 . . . . . 183, 186, 187, 189
Gibson *v.* Carruthers, 8 M. & W. 321 ; 11 L. J. Ex. 138 . . 720, 730
——— *v.* Crick, 1 H. & C. 142 ; 2 F. & F. 766 ; 31 L. J. Ex. 304 ; 6 L. T. 392 ; 10 W. R. 525 . . . . . 543, 558, 559
——— *v.* Doeg, 2 H. & N. 615 ; 27 L. J. Ex. 37 ; 6 W. R. 107 . . 45
——— *v.* Holland, L. R. 1 C. P. 1 ; 35 L. J. C. P. 5 ; 11 Jur. N. S. 1022 ; 13 L. T. 293 ; 14 W. R. 86 ; 1 H. & R. 1 . . 297, 300, 302, 622
——— *v.* Hunter, 2 H. Bl. 187 719
——— *v.* Ireson, 3 Q. B. 39 . . . . . 427, 429
——— *v.* Small, 4 H. L. C. 353 ; 1 C. L. R. 363 ; 16 Q. B. 128 ; 14 Jur. 368 ; 15 Id. 325 ; 17 Id. 1131 484
Gifford, *Ex p.*, 1 Carrow's New Sess. Cas. 490 669
Gilbart *v.* Dale, 5 A. & E. 543 ; 1 N. & P. 22 ; 2 H. & W. 383 ; 6 L. J. K. B. 3 222
Gilbert *v.* Guignon, 8 Ch. 16 ; 27 L. T. 733 ; 21 W. R. 281 . . 736
——— *v.* Stone, Al. 35 ; Styl. 72 442
Gilbertson *v.* Richards, 4 H & N. 277 ; 5 Id. 453 ; 28 L. J. Ex. 158 ; 29 Id. 213 ; 6 Jur. N. S. 672 418
Gilding *v.* Eyre, 10 C. B. N. S. 592 ; 31 L. J. C. P. 174 ; 5 L. T. 136 ; 9 W. R. 946 260
Giles *v.* Spencer, 3 C. B. N. S. 244 ; 26 L. J. C. P. 237 ; 3 Jur. N. S. 820 ; 5 W. R. 883 434
——— *v.* Walker, 24 Q. B. D. 656 ; 59 L. J. Q. B. 416 ; 62 L. T. 933 ; 38 W. R. 782 ; 54 J. P. 599 . . . . . 272, 825
Gill *v.* Cubitt, 3 B. & C. 466 ; 5 D. & R. 324 ; 1 C. & P. 163 . . 469
———*v.* Edouin, 71 L. T. 762 824
Gillard *v.* Brittan, 8 M. & W. 575 ; 1 Dowl. N. S. 424 ; 11 L. J. Ex. 133 724
Gillett *v.* Rippon, 1 M. & M. 406 149
Gillow *v.* Lillie, 1 B. & C. 695 ; 1 Scott, 597 ; 1 Hodges, 160 ; 4 L. J. C. P. 222. 382

PAGE
Gilman *v.* Elton, 3 B. & B. 75 ; 6 Moore, 243 427
Gilroy *v.* Price, (1893) A. C. 56 ; 68 L. T. 302 ; 7 Asp. M. C. 314 ; 1 R. 7 220
Gipps *v.* Hume, 31 L. J. Ch. 37 ; 9 Jur. N. S. 233 365
Giraud *v.* Richmond, 2 C. B. 835 ; 15 L. J. C. P. 180 . . . 304
Gisbourn *v.* Hurst, 1 Salk. 249 427
Gladstone *v.* Musurus Bey, 32 L. J. Ch. 155 ; 1 Hem. & M. 495 ; 9 Jur. N. S. 71 . . . . . 626, 628, 630
——— *v.* Ottoman Bank, 32 L. J. Ch. 228 ; 1 Hem. & M. 505 ; 9 Jur. N. S. 246 ; 8 L. T. 162 626
Glendarroch, The, (1894) P. 226 ; 63 L. J. P. 89 ; 70 L. T. 344 ; 6 R. 686 220
Gloucester Bank *v.* Rudry Co., (1895) 1 Ch. 629; 64 L. J. Ch. 451 ; 72 L. T. 375 ; 43 W. R. 486 380
Glover *v.* Cope, 3 Lev. 326 ; Skin. 296, 305 ; 1 Show. 284 ; 4 Mod. 80 ; Carth. 205 ; Holt, 159 ; 1 Salk. 185 . . . . . 60, 68
Glyn *v.* Baker, 13 East, 509 ; 12 R. R. 414. . . . . 456, 458, 467
Glyn & Co. *v.* E. & W. India Dock Co., 7 App. Cas. 591 ; 5 Q. B. D. 129 ; 6 Id. 475 ; 49 L. J. Q. B. 303 ; 50 Id. 62 ; 52 Id. 146 ; 42 L. T. 90 ; 43 Id. 584 ; 47 Id. 309 ; 28 W. R. 444 ; 29 Id. 316 ; 31 Id. 201 697, 705, 736
Glynn *v.* Margetson, (1893) A. C. 351 ; (1892) 1 Q. B. 337 ; 61 L. J. Q. B. 186 ; 62 Id. 466 ; 66 L. T. 142 ; 69 Id. 1 ; 40 W. R. 264 ; 1 R. 193 554
——— *v.* Thomas, 11 Exch. 870 ; 25 L. J. Ex. 125 ; 2 Jur. N. S. 378 ; 4 W. R. 363 . . . . . 130, 274
Goatley *v.* Paine, 2 Camp. 520 37
Godard *v.* Gray, L. R. 6 Q. B. 139 ; 40 L. J. Q. B. 62 ; 24 L. T. 89 ; 19 W. R. 348 608
Goddard *v.* O'Brien, 9 Q. B. D. 37 ; 46 L. T. 306 ; 30 W. R. 549 . 332, 335, 337
Godfrey *v.* Furzo, 3 P. Wms. 185 706
——— *v.* Poole, 13 App. Cas. 497 ; 57 L. J. P. C. 78 ; 58 L. T. 685 17, 20, 26
Godolphin *v.* Tudor, 2 Salk. 468 ; 1 Bro. P. C. 135 369
Godsall *v.* Boldero, 9 East, 72 388
Godts *v.* Rose, 17 C. B. 229 ; 25 L. J. C. P. 61 ; 1 Jur. N. S. 1173 ; 4 W. R. 129 542
Goff *v.* G. N. R. Co., 3 E. & E. 672 ; 30 L. J. Q. B. 148 ; 7 Jur. N. S. 286 ; 3 L. T. 850 352
Goffin *v.* Donelly, 6 Q. B. D. 307 ; 50 L. J. Q. B. 303 ; 44 L. T. 141 ; 29 W. R. 440 ; 45 J. P. 439 265
Golden *v.* Gillam, 20 Ch. D. 389 ; 51 L. J. Ch. 154, 503 ; 46 L. T. 222 . . . . . 18, 19
Goldham *v.* Edwards, 16 C. B. 437 ; 17 Id. 141 ; 18 Id. 389 ; 24 L. J. C. P. 189 ; 25 Id. 223 ; 1 Jur. N. S. 684 ; 2 Id. 493 ; 3 W. R. 551 ; 4 Id. 550 369
Golding Co., *Ex p.*, 13 Ch. D. 628 ; 42 L. T. 270 ; 28 W. R. 481 . 730, 733, 739
Goldney *v.* Lording, L. R. 8 Q. B. 182 ; 42 L. J. Q. B. 103 ; 21 W. R. 543 335
Goldshede *v.* Swan, 1 Exch. 154 ; 16 L. J. Ex. 284 294
Gooch's Case, 5 Co. Rep. 60 . . . . . 22, 24
Good *v.* Cheeseman, 2 B. & Ad. 328 ; 4 C. & P. 513 . . . 334, 336
—— *v.* Walker, 61 L. J. Q. B. 736 457
Goodman *v.* Boycott, 2 B. & S. 1 ; 31 L. J. Q. B. 69 ; 8 Jur. N. S. 763 ; 6 L. T. 25 73
——— *v.* Chase, 1 B. & Ald. 297 288
——— *v.* Harvey, 4 A. & E. 870 ; 6 N. & M. 372 ; 6 L. J. K. B. 260 469
Goodright *v.* Davids, 2 Cowp. 803 . . . . . 36, 45

PAGE
Goodright *v.* Moses, 2 W. Bl. 1019 . . . . . 24, 25
Goodwin *v.* Cremer, 18 Q. B. 757 ; 22 L. J. Q. B. 30 ; 17 Jur. 2 . 338
——— *v.* Parton, 41 L. T. 91 ; 42 Id. 568 568
——— *v.* Robarts, 1 App. Cas. 476 ; L. R. 10 Ex. 76, 337 ; 44 L. J. Ex. 57, 157 ; 45 Id. 748 ; 32 L. T. 199 ; 33 Id. 272 ; 35 Id. 179 ; 23 W. R. 342, 915 ; 24 Id. 987 . . 457, 462, 465, 466, 540, 553
Goodwyn *v.* Cheveley, 4 H. & N. 631 ; 28 L. J. Ex. 298 ; 7 W. R. 631 827
Gordon *v.* Fluskey, 1 Arms. M. & O. 155 279
——— *v.* G. W. R. Co., 8 Q. B. D. 44 ; 51 L. J. Q. B. 58 ; 45 L. T. 509 ; 30 W. R. 230 ; 46 J. P. 294 218
——— *v.* Harper, 7 T. R. 9 ; 4 R. R. 369 721
——— *v.* Silber, 25 Q. B. D. 491 ; 59 L. J. Q. B. 507 ; 63 L. T. 283 ; 39 W. R. 111 125
Gorgier *v.* Mieville, 3 B. & C. 45 ; 4 D. & R. 641 . 456, 462, 463, 466
Gorris *v.* Scott, L. R. 9 Ex. 125 ; 43 L. J. Ex. 92 ; 30 L. T. 431 ; 22 W. R. 575 286
Gorrisen *v.* Perrin, 2 C. B. N. S. 681 ; 27 L. J. C. P. 29 ; 3 Jur. N. S. 867 ; 5 W. R. 709 547
Gorst *v.* Lowndes, 11 Sim. 434 ; 10 L. J. Ch. 161 ; 5 Jur. 457 . . 420
Gorton *v.* Falkner, 4 T. R. 565 ; 2 R. R. 463 434
——— *v.* Gregory, 3 B. & S. 90 ; 31 L. J. Q. B. 302 ; 6 L. T. 656 ; 10 W. R. 713 89
Gosbell *v.* Archer, 2 A. & E. 500 ; 4 N. & M. 485 ; 1 H. & W. 31 ; 4 L. J. K. B. 78 321
Goss *v.* Jackson, 3 Esp. 198 654
Gosset *v.* Howard, 10 Q. B. 359, 411 ; 14 L. J. Q. B. 367 ; 16 Id. 345 ; 9 Jur. 842 ; 11 Id. 750 286
Gould, *Ex p.*, 13 Q. B. D. 454 ; 51 L. T. 368 ; 1 M. B. R. 168 . . 47
——— *v.* Coombs, 1 C. B. 543 ; 14 L. J. C. P. 175 ; 9 Jur. 494 . . 787
Gouldsworth *v.* Knights, 11 M. & W. 337 ; 12 L. J. Ex. 282 . . 91
Gower *v.* Postmaster-General, 57 L. T. 527 66
Grace *v.* Wilmer, 6 E. & B. 982 ; 26 L. J. Q. B. 1 ; 3 Jur. N. S. 64 ; 5 W. R. 47 600
Græme *v.* Wroughton, 11 Ex. 146 ; 24 L. J. Ex. 265 ; 3 W. R. 509 . 369
Graetano & Maria, The, 7 P. D. 137, 1 ; 51 L. J. P. 7, 67 ; 45 L. T. 510 ; 46 Id. 835 ; 4 Asp. M. C. 470, 535 ; 30 W. R. 108, 766 608, 609, 622
Graham *v.* Gibson, 4 Exch. 768 ; 19 L. J. Ex. 204 339
——— *v.* Massey, 23 Ch. D. 743 ; 52 L. J. Ch. 750 ; 48 L. T. 701 ; 32 W. R. 147 603
Granger *v.* Collins, 6 M. & W. 458 ; 9 L. J. Ex. 172 147
Grant *v.* Maddox, 15 M. & W. 737 ; 16 L. J. Ex. 227 550
——— *v.* Sec. of State for India, 2 C. P. D. 445 ; 46 L. J. C. P. 681 ; 37 L. T. 188 ; 25 W. R. 848 . . . . . 262, 630
——— *v.* Vaughan, 3 Burr. 1516 ; 1 W. Bl. 485 . . . . . 455, 457
Grantham *v.* Gordon, 1 P. Wms. 612 400
——— *v.* Hawley, Hob. 132 532
Gravely *v.* Barnard, 18 Eq. 518 ; 43 L. J. Ch. 659 ; 30 L. T. 863 ; 22 W. R. 891 . . . . . 406, 407
Graves *v.* Key, 3 B. & Ad. 313 328
——— *v.* Legg, 2 H. & N. 210 ; 26 L. J. Ex. 316 ; 3 Jur. N. S. 519 ; 5 W. R. 597 550
Gray *v.* Cookson, 16 East, 13 641
—— *v.* Smith, 43 Ch. D. 208 ; 59 L. J. Ch. 145 ; 62 L. T. 335 ; 38 W. R. 310 302
Great Berlin Steamboat Co., *Re*, 26 Ch. D. 616 ; 54 L. J. Ch. 68 ; 51 L. T. 445 388
G. N. R. Co. *v.* Inett, 2 Q. B. D. 284 ; 46 L. J. M. C. 237 ; 25 W. R. 584 . . . . . 671, 672
——————— *v.* Morville, 21 L. J. Q. B. 319 ; 7 Railw. Cas. 830 ; 16 Jur. 528 208

PAGE

G. N. R. Co. *v.* Shepherd, 8 Exch. 30 ; 21 L. J. Ex. 114, 286 ; 7 Railw. Cas. 310 201
——— *v.* Swaffield, L. R. 9 Ex. 132 ; 43 L. J. Ex. 89 ; 30 L. T. 562 225
——— *v.* Taylor, L. R. 1 C. P. 385 ; Harr. & R. 471 ; 35 L. J. C. P. 210 ; 12 Jur. N. S. 372 ; 14 L. T. 363 ; 14 W. R. 639 . . 223
G. W. R. Co. *v.* Bagge, 15 Q. B. D. 625 ; 54 L. J. Q. B. 599 ; 53 L. T. 225 ; 34 W. R. 45 222
——— *v.* Bunch, 13 App. Cas. 31 ; 17 Q. B. D. 215 ; 55 L. J. Q. B. 427 ; 57 Id. 361 ; 55 L. T. 427 ; 58 Id. 128 ; 34 W. R. 74, 574 ; 36 Id. 785 201
——— *v.* Crouch, 3 H. & N. 183 ; 2 Id. 491 ; 26 L. J. Ex. 418 ; 27 Id. 345 ; 3 Jur. N. S. 796 ; 4 Id. 457 ; 5 W. R. 831 ; 6 Id. 391 225
——— *v.* Goodman, 12 C. B. 313 ; 21 L. J. C. P. 197 ; 16 Jur. 862 205
——— *v.* McCarthy, 12 App. Cas. 218 ; 56 L. J. P. C. 33 ; 56 L. T. 582 ; 35 W. R. 429 ; 51 J. P. 582 . 215, 217, 218
——— *v.* Rimell, 18 C. B. 575 ; 27 L. J. C. P. 201 . . 209, 210
Green's Case, Cro. Eliz. 3 . . . . . 37, 39
Green *v.* Attenborough, 3 H. & C. 468 ; 34 L. J. Ex. 88 ; 11 Jur. N. S. 140 ; 11 L. T. 513 ; 13 W. R. 185 786
——— *v.* Bennett, 54 L. J. Ch. 85 ; 50 L. T. 706 ; 32 W. R. 848 . 601
——— *v.* Chelsea Waterworks Co., 70 L. T. 547 . . . . 828, 829
——— *v.* Cresswell, 10 A. & E. 453 ; 2 P. & D. 430 ; 9 L. J. Q. B. 63 ; 4 Jur. 169 290
——— *v.* Humphreys, 26 Ch. D. 474 ; 23 Id. 207 ; 53 L. J. Ch. 625 ; 51 L. T. 42 570
——— *v.* James, 6 M. & W. 656 ; 10 L. J. Ex. 73 70
——— *v.* Marsh, (1892) 2 Q. B. 330 ; 61 L. J. Q. B. 442 ; 66 L. T. 480 ; 40 W. R. 449 ; 56 J. P. 839 524
——— *v.* Price, 13 M. & W. 695 ; 16 Id. 346 ; 14 L. J. Ex. 105, 225 ; 16 Id. 108 ; 9 Jur. 880 . . . . 372, 408, 413, 414
——— *v.* Saddington, 7 E. & B. 503 ; 3 Jur. N. S. 717 ; 5 W. R. 593 . 308
——— *v.* Sichel, 7 C. B. N. S. 747 ; 29 L. J. C. P. 213 ; 6 Jur. N. S. 827 ; 8 W. R. 663 729
Greenaway *v.* Adams, 12 Ves. 395 46
——— *v.* Hart, 14 C. B. 340 ; 2 C. L. R. 370 ; 23 L. J. C. P. 115 ; 18 Jur. 449 ; 2 W. R. 702 . . . . . 61, 63
Greenland *v.* Chaplin, 5 Exch. 243 ; 19 L. J. Ex. 293 277
Greenslade *v.* Tapscott, 1 C. M. & R. 59 ; 4 Tyr. 566 ; 3 L. J. Ex. 328 46
Gregory *v.* Piper, 9 B. & C. 591 ; 4 M. & Ry. 500 799
——— *v.* W. Mid. R. Co., 2 H. & C. 944 ; 33 L. J. Ex. 155 ; 10 Jur. N. S. 243 ; 10 L. T. 38 ; 12 W. R. 528 216
——— *v.* Wilson, 9 Hare, 683 ; 22 L. J. Ch. 159 ; 16 Jur. 304 . 37
Grell *v.* Levy, 16 C. B. N. S. 73 ; 10 Jur. N. S. 210 ; 9 L. T. 721 ; 12 W. R. 378 605
Greville *v.* Attkins, 9 B. & C. 462 ; 4 M. & Ry. 372 364
——— *v.* Chapman, 5 Q. B. 731 ; D. & M. 553 ; 13 L. J. Q. B. 172 . 492
Grice *v.* Richardson, 3 App. Cas. 319 ; 47 L. J. P. C. 48 ; 37 L. T. 677 ; 26 W. R. 358 723
Griffin *v.* Tomkins, 42 L. T. 359 ; 44 J. P. 457 45
——— *v.* Weatherby, L. R. 3 Q. B. 753 ; 9 B. & S. 726 ; 37 L. J. Q. B. 280 ; 18 L. T. 881 ; 17 W. R. 8. 140
Griffinhoofe *v.* Daubuz, 5 E. & B. 746 ; 4 Id. 230 ; 24 L. J. Q. B. 20 ; 25 Id. 237 ; 2 Jur. N. S. 392 ; 4 W. R. 131 . . . . 142, 159
Griffith *v.* Harries, 2 M. & W. 335 ; M. & H. 8 ; 6 L. J. M. C. 29 ; 1 Jur. 57 . . . . . 640, 646
——— *v.* Matthews, 5 T. R. 296 ; 2 R. R. 598 347
Griffiths *v.* Lee, 1 C. & P. 110 222
——— *v.* Puleston, 13 M. & W. 359 ; 14 L. J. Ex. 33 . . . 528

PAGE

Grill *v.* Gen. Iron Screw Co., L. R. 1 C. P. 600; 3 Id. 476; 35 L. J. C. P. 321; 37 Id. 205; 14 L. T. 711; 18 Id. 485; 14 W. R. 893; 16 Id. 796 . . . . . 186, 220
Grimwood *v.* Moss, L. R. 7 C. P. 360; 41 L. J. C. P. 239; 27 L. T. 268; 20 W. R. 972 . . . . . 40, 44
Grinnell *v.* Wells, 7 M. & Gr. 1033; 8 Scott, N. R. 741; 2 D. & L. 610; 14 L. J. C. P. 19; 8 Jur. 1101 266
Grissell *v.* Bristowe, L. R. 4 C. P. 36; 3 Id. 112; 37 L. J. C. P. 89; 38 Id. 10; 17 L. T. 564; 19 Id. 390; 16 W. R. 428; 17 Id. 123 . . . . . 166, 545, 549, 550
——— *v.* Robinson, 3 B. N. C. 10; 3 Scott, 329; 5 L. J. C. P. 313 142, 551
Grocers Co. *v.* Donne, 3 B. N. C. 34; 3 Scott, 356; 2 Hodges, 120 . 270
Groenvelt *v.* Burwell, 1 Salk. 396; 12 Mod. 386; 20 How. St. Tr. 203; 1 Raym. 454 577
Groome *v.* Forrester, 5 M. & S. 314 640
Guepratte *v.* Young, 4 De G. & S. 217 608
Guild *v.* Conrad, (1894) 2 Q. B. 885; 63 L. J. Q. B. 721; 71 L. T. 140; 42 W. R. 642; 9 R. 746 290
Gunmakers Co., *v.* Fell, Willes, 384 402
Gunn *v.* Bolckow, 10 Ch. 491; 44 L. J. Ch. 732; 32 L. T. 781; 23 W. R. 739 . . . . . 724, 742
Gunnis *v.* Erhart, 1 H. Bl. 289; 2 R. R. 769 313
Gurney, *Re*, 67 L. T. 598 728
——— *v.* Behrend, 3 E. & B. 622; 23 L. J. Q. B. 265; 18 Jur. 856; 2 W. R. 425 . . . . . 736, 740
Guy *v.* Churchill, 40 Ch. D. 481; 58 L. J. Ch. 345; 60 L. T. 473; 37 W. R. 504 371
Gwynne *v.* Burnell, 2 B. N. C. 7; 2 Scott, 16; 4 L. J. Ex. 340. . 382

H.

Haddan *v.* Lott, 15 C. B. 411; 3 C. L. R. 144; 24 L. J. C. P. 49 . 281
Haigh *v.* Brooks, 10 A. & E. 309; 2 P. & D. 477; 3 Id. 452; 9 L. J. Q. B. 99 . . . . . 141, 294
Hailes *v.* Marks, 7 H. & N. 56; 30 L. J. Ex. 389; 7 Jur. N. S. 851; 4 L. T. 805; 9 W. R. 808 261
Hale, *Ex p.*, 1 Ch. D. 285; 45 L. J. Bkcy. 21; 33 L. T. 706; 24 W. R. 300 . . . . . 433, 434
—— *v.* Saloon Omnibus Co., 4 Drew, 492; 28 L. J. Ch. 777; 7 W. R. 316 . . . . . 13, 18
Halestrap *v.* Gregory, (1895) 1 Q. B. 561; 64 L. J. Q. B. 415; 72 L. T. 292; 43 W. R. 507 . . . . . 198, 278
Halifax Bank *v.* Gledhill, (1891) 1 Ch. 31; 60 L. J. Ch. 181; 63 L. T. 623; 39 W. R. 104 . . . . . 16, 28, 30
——— Union *v.* Wheelright, L. R. 10 Ex. 183; 44 L. J. Ex. 121; 32 L. T. 802; 23 W. R. 704 458
Hall *v.* City of London Brewery, 2 B. & S. 737; 31 L. J. Q. B. 257; 9 Jur. N. S. 18 161
—— *v.* Comfort, 18 Q. B. D. 11; 56 L. J. Q. B. 185; 55 L. T. 550; 35 W. R. 48 524
—— *v.* Ewin, 37 Ch. D. 74; 57 L. J. Ch. 95; 57 L. T. 831; 36 W. R. 84 86
—— *v.* Featherstone, 3 H. & N. 284; 27 L. J. Ex. 308; 4 Jur. N. S. 813 472
—— *v.* Hall, 8 Ch. 430; 14 Eq. 365; 41 L. J. Ch. 667; 27 L. T. 115; 28 Id. 383; 20 W. R. 797 16
—— *v.* Janson, 4 E. & B. 500; 3 C. L. R. 737; 24 L. J. Q. B. 77; 1 Jur. N. S. 571 . . . . . 542, 555
—— *v.* N. E. R. Co., L. R. 10 Q. B. 437; 44 L. J. Q. B. 164; 33 L. T. 306; 23 W. R. 860. 224

PAGE

Hall *v.* Palmer, 3 Hare, 532 ; 13 L. J. Ch. 353 ; 8 Jur. 459 . . 368
—— *v.* Potter, 3 Lev. 411 367
Hallett, *Re*, 13 Ch. D. 696 ; 49 L. J. Ch. 415 ; 41 L. T. 186 ; 42 Id. 421 ; 28 W. R. 732 452
Halley, The, L. R. 2 P. C. 193 ; L. R. 2 A. & E. 3 ; 37 L. J. A. 33 ; 18 L. T. 879 ; 16 W. R. 998 605
Halliday *v.* Holgate, L. R. 3 Ex. 299 ; 37 L. J. Ex. 174 ; 18 L. T. 656 193, 195, 196
Hamelin *v.* Bruck, 9 Q. B. 306 ; 15 L. J. Q. B. 343 ; 10 Jur. 1094 . 781
Hamer *v.* Knowles, 6 H. & N. 454 ; 30 L. J. Ex. 102 ; 3 L. T. 746 ; 9 W. R. 615 . . . . . 270, 271
Hamilton *v.* Young, 7 L. R. Ir. 289 558
Hamlyn *v.* Talisker Distillery, (1894) A. C. 202 ; 71 L. T. 1 ; 58 J. P. 540 ; 6 R. 188 609
Hammack *v.* White, 11 C. B. N. S. 588 ; 31 L. J. C. P. 129 ; 8 Jur. N. S. 796 ; 5 L. T. 676 ; 10 W. R. 230 . . . . . 798, 810
Hammersley *v.* De Biel, 12 Cl. & F. 45 ; 3 Beav. 469 . . . 296, 309
Hammersmith R. Co. *v.* Brand, L. R. 4 H. L. 171 ; L. R. 1 Q. B. 130 ; 2 Id. 223 ; 1 B. & S. 1 ; 35 L. J. Q. B. 53 ; 36 Id. 139 ; 38 Id. 265 ; 12 Jur. N. S. 336 ; 13 L. T. 501 ; 16 Id. 101 ; 21 Id. 238 ; 14 W. R. 129 ; 15 Id. 437 ; 18 Id. 12 . . . . . 825, 828
Hammond *v.* Anderson, 1 B. & P. N. R. 69 ; 2 Camp. 243 ; 8 R. R. 763 730
———— *v.* Bussey, 20 Q. B. D. 79 ; 57 L. J. Q. B. 58 . . . 150
———— *v.* St. Pancras Vestry, L. R. 9 C. P. 316 ; 43 L. J. C. P. 157 ; 30 L. T. 296 ; 22 W. R. 826 828
Hamond *v.* Howell, 2 Mod. 218 ; 1 Id. 184 . . . . . 236, 577
Hampshire *v.* Wickens, 7 Ch. D. 555 ; 47 L. J. Ch. 243 ; 38 L. T. 408 ; 26 W. R. 491 49
Hampson *v.* Fellows, 6 Eq. 575 ; 37 L. J. Ch. 694 521
Hanbury *v.* Cundy, 58 L. T. 155 401
—— *v.* Lovett, 16 W. R. 795 ; 18 L. T. 366 781
Hannam *v.* Mockett, 2 B. & C. 934 432
Hanson *v.* Meyer, 6 East, 614 ; 2 Smith, 670 ; 8 R. R. 572 . . 730
Hardcastle *v.* Howard, 2 T. R. 28, n. 326, 327
Harden *v.* Clifton, 1 Q. B. 522 ; 1 G. & D. 22 ; 10 L. J. Q. B. 159 ; 5 Jur. 562 788
Harding *v.* Nott, 7 E. & B. 650 ; 26 L. J. Q. B. 244 ; 3 Jur. N. S. 1020 ; 5 W. R. 574 418
Hardman *v.* Booth, 1 H. & C. 803 ; 32 L. J. Ex. 105 ; 9 Jur. N. S. 81 ; 7 L. T. 638 ; 11 W. R. 239 744
Hare *v.* Elms, (1893) 1 Q. B. 604 ; 62 L. J. Q. B. 187 ; 68 L. T. 223 ; 41 W. R. 297 ; 57 J. P. 309 ; 5 R. 189 51
—— *v.* L. & N. W. R. Co., 2 J. & H. 80 ; 30 L. J. Ch. 817 ; Johns. 722 ; 7 Jur. N. S. 1145 ; 3 L. T. 289 ; 9 W. R. 33 366
Hargreaves *v.* Diddams, L. R. 10 Q. B. 582 ; 44 L. J. M. C. 178 ; 32 L. T. 600 ; 23 W. R. 828 665
———— *v.* Parsons, 13 M. & W. 561 ; 14 L. J. Ex. 250 . . . 289
———— *v.* Taylor, 32 L. J. M. C. 111 ; 3 B. & S. 613 ; 9 Jur. N. S. 1053 ; 8 L. T. 149 ; 11 W. R. 562 670
Harker *v.* Birkbeck, 3 Burr. 1556 ; 1 W. Bl. 482 440
Harland *v.* Binks, 15 Q. B. 713 ; 20 L. J. Q. B. 126 ; 14 Jur. 979 . 17
Harley *v.* King, 5 Tyr. 692 ; 1 Gale, 100 ; 2 C. M. & R. 18 ; 4 L. J. Ex. 144 70
Harmer *v.* Cornelius, 5 C. B. N. S. 236 ; 4 Jur. N. S. 1110 . . 185
Harms *v.* Parsons, 32 Beav. 328 ; 32 L. J. Ch. 247 ; 9 Jur. N. S. 145 ; 7 L. T. 815 ; 11 W. R. 250 411
Harper *v.* Charlesworth, 4 B. & C. 574 ; 6 D. & R. 572 . . . 344
——— *v.* Marcks, (1894) 2 Q. B. 319 ; 63 L. J. M. C. 167 ; 70 L. T. 804 ; 42 W. R. 605 ; 58 J. P. 527 ; 10 R. 335 432
Harrington *v.* Victoria Graving Docks, 3 Q. B. D. 549 ; 47 L. J. Q. B. 594 ; 39 L. T. 120 ; 26 W. R. 740 . . . . . 372, 375

PAGE

Harris, *Ex p.*, 16 Q. B. D. 130 ; 55 L. J. M. C. 24 ; 53 L. T. 655 ; 34 W. R. 132 ; 50 J. P. 164 436
——— *v.* Birch, 9 M. & W. 591 ; 1 Dowl. N. S. 899 ; 11 L. J. Ex. 219 194
——— *v.* Brisco, 17 Q. B. D. 504 ; 55 L. J. Q. B. 423 ; 55 L. T. 14 ; 34 W. R. 729 ; 51 J. P. 37 371
——— *v.* "Franconia," 2 C. P. D. 173 ; 46 L. J. C. P. 363 . . 607
——— *v.* G. W. R. Co., 1 Q. B. D. 515 ; 45 L. J. Q. B. 729 ; 34 L. T. 647 ; 25 W. R. 63 208
——— *v.* Quine, L. R. 4 Q. B. 653 ; 10 B. & S. 644 ; 38 L. J. Ch. 331 ; 20 L. T. 947 ; 17 W. R. 967 616
——— *v.* Ryding, 5 M. & W. 60 269
——— *v.* Thompson, 13 C. B. 333 263
——— *v.* Tubb, 42 Ch. D. 79 ; 58 L. J. Ch. 434 ; 60 L. T. 699 . . 26
——— *v.* Venables, L. R. 7 Ex. 235 ; 41 L. J. Ex. 180 ; 26 L. T. 437 ; 20 W. R. 974 331
Harrison, *Ex p.*, 13 Q. B. D. 753 ; 53 L. J. Ch. 977 ; 51 L. T. 878 . 434
———, *Ex p.*, 18 Ch. D. 127 ; 50 L. J. Ch. 832 ; 45 L. T. 290 ; 30 W. R. 38 . . . . . 516, 521, 522
——— *v.* Barrow, 63 L. T. 834 ; 39 W. R. 250 48
——— *v.* Blackburn, 34 L. J. C. P. 109 ; 10 Jur. N. S. 1131 ; 17 C. B. N. S. 678 ; 11 L. T. 453 ; 13 W. R. 135 . . 513
——— *v.* Bush, 5 E. & B. 344 ; 25 L. J. Q. B. 25 ; 1 Jur. N. S. 846 263
——— *v.* Cotgreave, 4 C. B. 562 ; 5 D. & L. 169 ; 16 L. J. C. P. 198 781
——— *v.* Elvin, 3 Q. B. 117 ; 2 G. & D. 769 ; 11 L. J. Q. B. 197 ; 6 Jur. 849 323
——— *v.* Godman, 1 Burr. 12 393
——— *v.* Heathorn, 6 Scott, N. R. 735 ; 6 M. & Gr. 81 ; 12 L. J. C. P. 283 342
——— *v.* L. B. & S. C. R. Co., 2 B. & S. 122, 152 ; 29 L. J. Q. B. 209 ; 31 Id. 113 ; 8 Jur. N. S. 740 . . 200, 212, 216
——— *v.* Sharp, Bunb. 174 533
Harrold *v.* Whitaker, 11 Q. B. 147, 163 ; 15 L. J. Q. B. 345 ; 10 Jur. 1004 512
Harrower *v.* Hutchinson, L. R. 5 Q. B. 584 ; 10 B. & S. 469 ; 39 L. J. Q. B. 229 ; 22 L. T. 684 478
Hart *v.* Alexander, 2 M. & W. 484 ; M. & H. 63 ; 7 C. & P. 746 ; 6 L. J. Ex. 129 334
—— *v.* Baxendale, 6 Exch. 769 ; 20 L. J. Ex. 338 ; 21 Id. 123 ; 16 Jur. 126 . . . . . 206, 207, 212
—— *v.* Gumpach, L. R. 4 P. C. 439 ; 42 L. J. P. C. 25 ; 9 Moore, P. C. C. N. S. 241 . . . . . 607, 629
—— *v.* Herwig, 8 Ch. 860 ; 28 L. T. 329 ; 29 Id. 47 ; 21 W. R. 538, 663 . . . . . 604, 607
—— *v.* Middlehurst, 3 Atk. 371 28
—— *v.* Miles, 4 C. B. N. S. 371 ; 27 L. J. C. P. 218 141
—— *v.* Nash, 2 C. M. & R. 337 ; 1 Gale, 171 ; 5 Tyr. 955 . . . 566
—— *v.* Stephens, 6 Q. B. 935 ; 14 L. J. Q. B. 148 ; 9 Jur. 225 . . 567
Hartas *v.* Ribbons, 22 Q. B. D. 254 ; 58 L. J. Q. B. 187 ; 37 W. R. 278 . . . . . 147, 550
Hart-Dyke, *Ex p.*, 22 Ch. D. 410 ; 52 L. J. Ch. 570 ; 48 L. T. 303 ; 31 W. R. 278 44
Hartley, *Re*, 31 L. J. M. C. 232 . . . . . 640, 644
——— *v.* Cummings, 5 C. B. 247 ; 17 L. J. C. P. 84 ; 12 Jur. 57 . 414
Hartop *v.* Hoare, 2 Str. 1187 ; 1 Wils. 8 693
Hartshorne *v.* Watson, 4 B. N. C. 178 ; 5 Id. 477 ; 5 Scott, 506 ; 7 Id. 494 ; 6 Dowl. 404 ; 1 Arn. 15 ; 2 Id. 270 ; 8 L. J. C. P. 299 ; 2 Jur. 155 40
Harvey *v.* Bridges, 14 M. & W. 437 ; 1 Exch. 261 ; 14 L. J. Ex. 272 ; 9 Jur. 759 ; 3 D. & L. 55 134

PAGE

Harvey *v.* Harvey, 26 Ch. D. 644 ; 51 L. T. 508 ; 33 W. R. 76 ; 48 J. P. 468 109
——— *v.* Pocock, 11 M. & W. 740 ; 12 L. J. Ex. 434 132
Haseler *v.* Lemoyne, 5 C. B. N. S. 530 ; 28 L. J. C. P. 103 ; 4 Jur. N. S. 1279 ; 7 W. R. 14 350
Hastelow *v.* Jackson, 8 B. & C. 221 ; 2 M. & Ry. 209 386
Hastings *v.* Pearson, (1893) 1 Q. B. 62 ; 62 L. J. Q. B. 75 ; 67 L. T. 553 ; 41 W. R. 127 ; 57 J. P. 70 ; 5 R. 26 743
——— *v.* Whitley, 2 Exch. 611 . . . . . 411, 412, 414
Hatfield *v.* Phillips, 9 M. & W. 647 ; 14 Id. 665 ; 12 Cl. & F. 343 ; 11 L. J. Ex. 425 ; 10 Jur. 189 744
Hathesing *v.* Laing, 17 Eq. 92 ; 43 L. J. Ch. 233 ; 29 L. T. 734 . 548, 555, 725, 736
Hatton, *Re*, 7 Ch. 723 ; 42 L. J. Bkcy. 12 ; 27 L. T. 396 ; 20 W. R. 978 335
Haward *v.* Bankes, 2 Burr. 1114 440
Hawes *v.* Leader, Cro. Jac. 270 ; Yelv. 196 ; 1 Brownl. 111 . . 389
Hawkes *v.* Smith, Car. & M. 72 222
——— *v.* E. Counties R. Co., 5 H. L. C. 331 ; 20 L. J. Ch. 243 ; 15 Jur. 979 377
Hawkins, *Ex p.*, 2 B. & C. 31 651
——— *v.* Cooper, 8 C. & P. 473 275
——— *v.* Twizell, 5 E. & B. 883 ; 25 L. J. Q. B. 160 ; 2 Jur. N. S. 302 480
Hawley *v.* Beverley, 6 M. & Gr. 221 ; 6 Scott, N. R. 837 . . 149, 161
Hawthorn *v.* Hammond, 1 C. & K. 404 125
Hayes *v.* Smith, Sm. & Bat. 378 279
—— *v.* Warren, 2 Str. 933 141
Haylock *v.* Sparke, 1 E. & B. 471 ; 22 L. J. M. C. 67 ; 17 Jur. 731 . 642
Hayman *v.* Flewker, 13 C. B. N. S. 519 ; 32 L. J. C. P. 132 ; 9 Jur. N. S. 895 743
Hayton *v.* Irwin, 5 C. P. D. 130 ; 41 L. T. 666 ; 28 W. R. 665 . . 555
Hayward, *Ex p.*, 32 L. J. M. C. 89 ; 3 B. & S. 546 ; 9 Jur. N. S. 820 ; 7 L. T. 622 ; 11 W. R. 259 648
Haywood *v.* Brunswick Society, 8 Q. B. D. 403 ; 51 L. J. Q. B. 73 ; 45 L. T. 699 ; 30 W. R. 299 . . . . . 87, 90
——— *v.* Rodgers, 4 East, 590 ; 1 Smith, 289 ; 11 R. R. 638 . 492
Hazard *v.* Mare, 6 H. & N. 434 ; 30 L. J. Ex. 97 ; 9 W. R. 252 . 334
Head, *Re*, (1893) 3 Ch. 426 ; 63 L. J. Ch. 35 ; 69 L. T. 753 ; 42 W. R. 55 ; 3 R. 712 334
Heald *v.* Carey, 11 C. B. 977 ; 21 L. J. C. P. 97 ; 16 Jur. 197 . . 228
Heape *v.* Tonge, 9 Hare, 90 ; 20 L. J. Ch. 661 . . . . . 29, 30
Hearn *v.* L. & S. W. R. Co., 10 Exch. 793 ; 3 C. L. R. 597 ; 24 L. J. Ex. 180 ; 1 Jur. N. S. 286 207
Hearne *v.* Garton, 28 L. J. M. C. 216 ; 2 E. & E. 66 ; 5 Jur. N. S. 648 204
Heath *v.* Milward, 2 B. N. C. 98 ; 2 Scott, 160 ; 4 L. J. C. P. 292 . 345
Heathcote *v.* Crookshanks, 2 T. R. 24 . . . . . 327, 328
——— *v.* Wing, 25 L. J. Ex. 23 ; 11 Exch. 355 ; 3 C. L. R. 1110 . 342
Heather *v.* Webb, 2 C. P. D. 1 ; 46 L. J. C. P. 89 ; 25 W. R. 253 . 144
Heawood *v.* Bone, 13 Q. B. D. 179 ; 51 L. T. 125 ; 32 W. R. 752 ; 48 J. P. 710 436
Hebditch *v.* MacIlwaine, (1894) 2 Q. B. 54 ; 63 L. J. Q. B. 587 ; 70 L. T. 826 ; 42 W. R. 422 ; 58 J. P. 620 ; 9 R. 452 263
Hedges *v.* Tagg, L. R. 7 Ex. 283 ; 41 L. J. Ex. 169 ; 20 W. R. 976 . 266
Hedley *v.* Pinkney's Co., (1894) A. C. 222 ; (1892) 1 Q. B. 58 ; 61 L. J. Q. B. 179 ; 63 Id. 419 ; 66 L. T. 71 ; 70 Id. 630 ; 40 W. R. 113 ; 42 Id. 497 ; 6 R. 106 220
Heffield *v.* Meadows, L. R. 4 C. P. 595 ; 20 L. T. 746 295
Hemekey *v.* Earle, 8 E. & B. 410, 427 ; 28 L. J. Q. B. 79 ; 4 Jur. N. S. 13 ; 6 W. R. 687 727
Heisch *v.* Carrington, 5 C. & P. 471 542
Helby *v.* Matthews, (1895) A. C. 471 ; (1894) 2 Q. B. 262 ; 63 L. J. Q. B. 577 ; 70 L. T. 837 ; 42 W. R. 514 ; 58 J. P. 785 ; 9 R. 767 746

PAGE

Hellawell *v.* Eastwood, 6 Exch. 295 ; 20 L. J. Ex. 154 . . 426, 427
Hellier *v.* Casbard, 1 Sid. 266 ; 1 Lev. 127 ; 1 Keb. 679 . . . 69
Hellings *v.* Russell, 33 L. T. 380 743
Helliwell *v.* Hobson, 3 C. B. N. S. 761 601
Helps *v.* Clayton, 17 C. B. N. S. 553 ; 34 L. J. C. P. 1 ; 10 Jur. N. S. 1184 ; 11 L. T. 476 ; 13 W. R. 161 551
Helshaw *v.* Langley, 11 L. J. Ch. 17 823
Hemings *v.* Robinson, Barnes, 436 . . . . . 561, 562
Hemingway *v.* Fernandes, 13 Sim. 228 ; 12 L. J. Ch. 130 ; 7 Jur. 888 66
Henderson *v.* Broomhead, 4 H. & N. 569 ; 28 L. J. Ex. 360 ; 5 Jur. N. S. 1175 265
——— *v.* Comptoir D'Escompte, L. R. 5 P. C. 253 ; 42 L. J. P. C. 60 ; 29 L. T. 192 ; 21 W. R. 873 460
——— *v.* L. & N. W. R. Co., L. R. 5 Ex. 90 ; 39 L. J. Ex. 55 ; 21 L. T. 756 ; 18 W. R. 352 206
——— *v.* Stevenson, L. R. 2 H. L. Sc. 470 ; 32 L. T. 709 . . 208
——— *v.* Stobart, 5 Exch. 99 ; 19 L. J. Ex. 135 338
——— *v.* Underwriting Ass., 65 L. T. 616, 732 ; 64 Id. 774 ; (1891) 1 Q. B. 557 ; 60 L. J. Q. B. 406 ; 39 W. R. 528 . . . 332
Henfree *v.* Bromley, 6 East, 309 ; 2 Smith, 400 ; 8 R. R. 491 . . 786
Hentig *v.* Stanniforth, 5 M. & S. 122 385
Herbert *v.* Markwell, 45 L. T. 649 ; 46 J. P. 358 123
——— *v.* Sayer, 5 Q. B. 965 ; 2 D. & L. 49 ; 12 L. J. Q. B. 286 ; 13 Id. 209 ; 8 Jur. 812 344
Heriz *v.* Riera, 11 Sim. 318 ; 10 L. J. Ch. 47 618
Herman *v.* Jeuchner, 15 Q. B. D. 561 ; 54 L. J. Q. B. 340 ; 53 L. T. 94 ; 33 W. R. 606 ; 49 J. P. 502 . . . . . 365, 387, 388
Herring *v.* Finch, 2 Lev. 250 . . . . . 237, 241, 246, 256
Hesketh *v.* Braddock, 3 Burr. 1847 393
Heugh *v.* L. & N. W. R. Co., L. R. 5 Ex. 51 ; 39 L. J. Ex. 48 ; 21 L. T. 676 225
Hewison *v.* Negus, 16 Beav. 594 ; 22 L. J. Ch. 655 ; 17 Jur. 445, 567 ; 1 W. R. 262 27
Hey *v.* Moorhouse, 6 B. N. C. 52 ; 8 Scott, 156 ; 9 L. J. C. P. 113 . 134
Heylin *v.* Hastings, 1 Salk. 29 ; 1 Ld. Raym. 389, 421 ; 1 Com. 54 ; 5 Mod. 426 ; 12 Id. 223 . . . . . 561, 564
Hibbert *v.* Carter, 1 T. R. 745 ; 1 R. R. 388 . . 680, 700, 705, 734
Hibblewhite *v.* McMorine, 6 M. & W. 200 ; 9 L. J. Ex. 217 ; 4 Jur. 769 775
Hickman *v.* Cox, 18 C. B. 817 ; 3 C. B. N. S. 523 ; 9 Id. 47 ; 8 H. L. C. 268 ; 25 L. J. C. P. 277 ; 27 Id. 129 ; 30 Id. 125 ; 2 Jur. N. S. 884 ; 4 Id. 88 ; 4 W. R. 636 ; 6 Id. 166 ; 8 Id. 758 17
——— *v.* Haynes, L. R. 10 C. P. 598 ; 44 L. J. C. P. 358 ; 32 L. T. 873 ; 23 W. R. 872 300
——— *v.* Machin, 4 H. & N. 716 ; 28 L. J. Ex. 310 ; 5 Jur. N. S. 576 . . . . . 508, 526
Hicks *v.* Faulkner, 8 Q. B. D. 167 ; 51 L. J. Q. B. 268 ; 46 L. T. 127 ; 30 W. R. 545 ; 46 J. P. 420 262
—— *v.* Powell, 4 Ch. 741 ; 17 W. R. 449 621
Hide *v.* Thornborough, 2 C. & K. 250 269
Higginson *v.* Simpson, 2 C. P. D. 76 ; 46 L. J. C. P. 192 ; 36 L. T. 17 ; 25 W. R. 303 369
Higham *v.* Ridgway, 10 East, 109 ; 10 R. R. 235 569
Hill *v.* Barclay, 16 Ves. 402 ; 18 Id. 56 ; 11 R. R. 147 51
—— *v.* Bateman, 2 Str. 711 634
—— *v.* Bigge, 3 Moo. P. C. 465 . . . . . 585, 623
—— *v.* Exeter, 2 Taunt. 69 ; 11 R. R. 527 25
—— *v.* Royds, 8 Eq. 290 ; 38 L. J. Ch. 538 ; 20 L. T. 842 . . . 140
—— *v.* Scott, (1895) 2 Q. B. 371, 713 119
—— *v.* Tupper, 2 H. & C. 121 ; 32 L. J. Ex. 217 ; 9 Jur. N. S. 725 ; 8 L. T. 792 . . . . . 345, 346

PAGE
Hilliard, *Re*, 2 D. & L. 919 ; 14 L. J. Q. B. 225 ; 9 Jur. 664 . . 301
Hilton *v.* Eckersley, 6 E. & B. 47, 66 ; 24 L. J. Q. B. 353 ; 25 Id. 199 ; 2 Jur. N. S. 587 ; 4 W. R. 326 . . . . . 364, 377, 415
Hinde *v.* Gray, 1 M. & Gr. 195 ; 1 Scott, N. R. 123 ; 9 L. J. C. P. 253 ; 4 Jur. 392 . . . . . 65, 403
Hindley *v.* Westmeath, 6 B. & C. 200 ; 9 D. & R. 351 366
Hindmarsh *v.* Charlton, 8 H. L. C. 160 ; 7 Jur. N. S. 611 ; 4 L. T. 125 ; 9 W. R. 521 324
Hinton *v.* Dibbin, 2 Q. B. 646 ; 2 G. & D. 36 ; 11 L. J. Q. B. 113 ; 6 Jur. 601 . . . . . 186, 205, 210
Hirschfield *v.* Smith, L. R. 1 C. P. 340 ; 35 L. J. C. P. 177 ; 12 Jur. N. S. 525 ; 14 L. T. 886 ; 14 W. R. 455 . . . . . 612, 782
Hirschman *v.* Budd, L. R. 8 Ex. 171 ; 42 L. J. Ex. 113 ; 28 L. T. 602 ; 21 W. R. 582 781
Hitchcock *v.* Coker, 6 A. & E. 439 ; 1 N. & P. 796 ; 2 H. & W. 464 ; 6 L. J. Ex. 266 . . . . . 405, 406, 411
Hoad *v.* Grace, 7 H. & N. 494 ; 31 L. J. Ex. 98 ; 8 Jur. N. S. 43 ; 5 L. T. 359 ; 10 W. R. 85 295
Hoare *v.* G. W. R. Co., 25 W. R. 631 ; 37 L. T. 186 218
Hobbs *v.* Dance, L. R. 9 C. P. 30 ; 43 L. J. M. C. 21 ; 29 L. T. 689 ; 22 W. R. 90 670
Hobson *v.* Thelluson, L. R. 2 Q. B. 642 ; 36 L. J. Q. B. 302 ; 16 L. T. 837 ; 15 W. R. 1037 274
Hockin *v.* Cooke, 4 T. R. 314 . . . . . 552, 553
Hodder *v.* Williams, (1895) 2 Q. B. 662 . . . . . *Add.* 106
Hodgkinson *v.* Crowe, 10 Ch. 622 ; 19 Eq. 591 ; 44 L. J. Ch. 238, 680 ; 32 L. T. 144 ; 23 W. R. 406, 885 49
——— *v.* Ennor, 4 B. & S. 229 ; 32 L. J. Q. B. 231 ; 9 Jur. N. S. 1152 ; 8 L. T. 451 ; 11 W. R. 775 . 273, 794, 797, 815
——— *v.* Fernie, 2 C. B. N. S. 415 ; 27 L. J. C. P. 66 . . 630
Hodgman *v.* W. Mid. R. Co., 5 B. & S. 173 ; 6 Id. 560 ; 33 L. J. Q. B. 233 ; 35 Id. 85 ; 10 Jur. N. S. 673 ; 10 L. T. 609 ; 12 W. R. 1054 ; 13 Id. 758 212
Hodgson *v.* Johnson, E. B. & E. 685 ; 28 L. J. Q. B. 88 ; 5 Jur. N. S. 290 308
——— *v.* Loy, 7 T. R. 440 ; 4 R. R. 483. . . . 720, 721, 727
——— *v.* Towning, 5 Dowl. 410 112
Hodkinson *v.* L. & N. W. R. Co., 14 Q. B. D. 228 ; 32 W. R. 662 201, 225
Hodson *v.* Terrill, 1 C. & M. 797 ; 3 Tyr. 929 ; 2 Dowl. 264 ; 2 L. J. Ex. 282 386
Hogarth *v.* Latham, 3 Q. B. D. 643 ; 47 L. J. Q. B. 339 ; 39 L. T. 75 ; 26 W. R. 388 472
Hogg *v.* Berrington, 2 F. & F. 246 553
Hoggins *v.* Gordon, 3 Q. B. 466 ; 2 G. & D. 656 ; 11 L. J. Q. B. 286 ; 6 Jur. 895 146
Holbird *v.* Anderson, 5 T. R. 235 17
Holborn Union *v.* St. Leonards, 2 Q. B. D. 145 ; 46 L. J. Q. B. 36 ; 35 L. T. 400 ; 25 W. R. 40 286
Holcraft's Case, Dyer, 294 b 20
Holder *v.* Soulby, 8 C. B. N. S. 254 ; 29 L. J. C. P. 246 ; 2 L. T. 219 ; 6 Jur. N. S. 1031 ; 8 W. R. 438 125
Holding *v.* Pigott, 7 Bing. 465 ; 5 M. & P. 427 538
Hole *v.* Barlow, 4 C. B. N. S. 334 ; 27 L. J. C. P. 207 ; 4 Jur. N. S. 1019 ; 6 W. R. 619 268
——— *v.* Harrison, 1 Ch. Ca. 246 151
Holland *v.* Cole, 1 H. & C. 67 ; 31 L. J. Ex. 481 ; 6 L. T. 503 ; 10 W. R. 563 ; 8 Jur. N. S. 1066 46
——— *v.* Hodgson, L. R. 7 C. P. 328 ; 41 L. J. C. P. 146 ; 26 L. T. 709 ; 20 W. R. 990 427
——— *v.* King, 6 C. B. 727 350
Hollingshead, *Re*, 37 Ch. D. 651 ; 57 L. J. Ch. 400 ; 58 L. T. 758 ; 36 W. R. 660 568

PAGE
Hollis *v.* Edwards, 1 Vern. 159 305
Holme *v.* Green, 1 Stark. 488 566
Holmes, *Re*, 2 J. & H. 527 ; 31 L. J. Ch. 58 ; 8 Jur. N. S. 76 ; 5 L. T. 548 ; 10 W. R. 39 603
——— *v.* Buckley, 1 Abr. Eq. 27 . . . . . 78, 79
——— *v.* Clarke, 6 H. & N. 349 ; 30 L. J. Ex. 135 ; 7 Jur. N. S. 397 ; 3 L. T. 675 ; 9 Id. 178 ; 9 W. R. 419 275
——— *v.* Mather, L. R. 10 Ex. 261 ; 44 L. J. Ex. 176 ; 33 L. T. 361 ; 23 W. R. 869. . . . . 442, 827
——— *v.* Mitchell, 7 C. B. N. S. 361 ; 28 L. J. C. P. 301 ; 6 Jur. N. S. 73 . . . . . 292, 297, 299
——— *v.* Newlands, 5 Q. B. 367 ; 11 A. & E. 44 ; 3 P. & D. 128 ; 9 L. J. Q. B. 19 113
——— *v.* Penney, 3 K. & J. 90 ; 26 L. J. Ch. 179 ; 3 Jur. N. S. 80 ; 5 W. R. 132 20
——— *v.* The Queen, 31 L. J. Ch. 58 ; 2 J. & H. 527 ; 8 Jur. N. S. 76 ; 5 L. T. 548 ; 10 W. R. 39 591
——— *v.* Williamson, 6 M. & S. 158 152
Holst *v.* Pownal, 1 Esp. 240 ; 2 B. & P. 461, n. 732
Holthausen, *Ex p.*, 9 Ch. 722 ; 44 L. J. Bk. 26 ; 31 L. T. 13 . . 609
Home, *Re*, 54 L. T. 301 27
Homer *v.* Ashford, 3 Bing. 322 ; 11 Moore, 91 403
Hood *v.* Barrington, 6 Eq. 218 298
Hooper *v.* Clark, L. R. 2 Q. B. 200 ; 36 L. J. Q. B. 79 ; 15 W. R. 347 65
——— *v.* Lane, 6 H. L. C. 443 ; 10 Q. B. 546 ; 17 L. J. Q. B. 189 ; 27 Id. 75 ; 3 Jur. N. S. 1026 ; 6 W. R. 146 . . 112, 114
——— *v.* Stephens, 4 A. & E. 71 ; 1 H. & W. 480 ; 5 N. & M. 635 ; 7 C. & P. 260 ; 5 L. J. K. B. 4 566
——— *v.* Treffry, 1 Exch. 17 ; 16 L. J. Ex. 233 149
Hope *v.* Hope, 26 L. J. Ch. 417 ; 8 De G. M. & G. 731 ; 3 Jur. N. S. 454 ; 5 W. R. 387 605
Hopkins, *Re*, E. B. & E. 100 ; 4 Jur. N. S. 529 . . . . . 659, 663
——— *v.* De Robeck, 3 T. R. 79 ; 1 R. R. 650 437
——— *v.* G. N. R. Co., 2 Q. B. D. 224 ; 46 L. J. Q. B. 265 ; 36 L. T. 898 267
——— *v.* Logan, 5 M. & W. 241 ; 7 Dowl. 360 ; 8 L. J. Ex. 218 147, 148
——— *v.* Prescott, 4 C. B. 578 ; 16 L. J. C. P. 259 ; 11 Jur. 562 . 369
Hopper *v.* Warburton, 32 L. J. Q. B. 104 ; 7 L. T. 722 ; 11 W. R. 384 649
Hornby *v.* Cardwell, 8 Q. B. D. 329 ; 51 L. J. Q. B. 89 ; 45 L. T. 781 ; 30 W. R. 263 151
Horne *v.* Rouquette, 3 Q. B. D. 514 ; 39 L. T. 219 ; 26 W. R. 894...612, 613
Horner *v.* Graves, 7 Bing. 735 ; 5 M. & P. 768 . . . . 406, 407, 411
Horsford *v.* Webster, 5 Tyr. 409 ; 1 C. M. & R. 696 ; 4 L. J. Ex. 100 434
Horsley *v.* Style, 69 L. T. 222 ; 58 J. P. 38 ; 4 R. 574 260
Horton *v.* Riley, 11 M. & W. 492 ; 13 L. J. Ex. 81 149
——— *v.* Sayer, 4 H. & N. 643 ; 29 L. J. Ex. 28 ; 5 Jur. N. S. 989 ; 7 W. R. 735 341
Houghton *v.* Matthews, 3 B. & P. 485 ; 7 R. R. 815 704
Houlden *v.* Smith, 14 Q. B. 841 ; 19 L. J. Q. B. 170 ; 14 Jur. 598 631, 657
House & Land Trust, *Re*, 1 Manson, 148 ; 42 W. R. 572 ; 8 R. 232 . 433
Howard *v.* Fanshaw, (1895) 2 Ch. 581 . . . . . *Add.* 51
——— *v.* Gosset, 10 Q. B. 359 286
——— *v.* ———, 1 Car. & K. 380 286
——— *v.* Harris, C. & E. 253 190
——— *v.* Refuge Soc., 54 L. T. 644 . . . . . 384, 388
——— *v.* Shepherd, 9 C. B. 297 ; 19 L. J. C. P. 249 739
——— *v.* Woodward, 34 L. J. Ch. 47 ; 10 Jur. N. S. 1123 ; 11 L. T. 414 ; 13 W. R. 132 401
Howden *v.* Haigh, 11 A. & E. 1033 ; 3 P. & D. 661 ; 9 L. J. Q. B. 198 ; 4 Jur. 821 372

PAGE

Howden *v.* Simpson, 10 A. & E. 793 ; 9 Cl. & F. 61 ; 2 P. & D. 714, 731 ; 8 L. J. Q. B. 169 ; Id. Ex. 281 ; 1 Rail. Cas. 347 ; 3 Id. 294 365
Howe *v.* Synge, 15 East, 440 372
Howell *v.* White, 1 M. & Rob. 400 344
———, *Re*, (1895) 1 Q. B. 844 ; 64 L. J. Q. B. 454 ; 72 L. T. 472 ; 43 W. R. 447 433
Howes *v.* Martin, 1 Esp. 162 287
Howkins *v.* Bennet, 7 C. B. N. S. 507 ; 30 L. J. C. P. 193 ; 6 Jur. N. S. 1152 ; 1 L. T. 297 369
Howson *v.* Hancock, 8 T. R. 575 . . . . . 384, 386
Hoyle, *Re*, (1893) 1 Ch. 84 ; 62 L. J. Ch. 182 ; 67 L. T. 674 ; 41 W. R. 81 ; 2 R. 145 . . . . . 290, 299, 300
Huber *v.* Steiner, 2 B. N. C. 202 ; 2 Scott, 304 ; 1 Hodges, 206 ; 2 Dowl. 781 616
Hubert *v.* Moreau, 2 C. & P. 528 ; 12 Moo. 216 323
——— *v.* Treherne, 3 M. & Gr. 743 ; 4 Scott, N. R. 486 ; Car. & M. 351 ; 11 L. J. C. P. 78 ; 6 Jur. 194 . . . . . 299, 321
Hudson *v.* Baxendale, 2 H. & N. 575 ; 27 L. J. Ex. 93 ; 6 W. R. 83 . 225
——— *v.* Clementson, 18 C. B. 213 ; 25 L. J. C. P. 234 . . . 547
——— *v.* Grainger, 5 B. & Ald. 27 704
——— *v.* MacRae, 4 B. & S. 585 ; 33 L. J. M. C. 65 ; 9 L. T. 678 ; 12 W. R. 80 665
——— *v.* Tabor, 2 Q. B. D. 290 ; 1 Id. 225 ; 45 L. J. Q. B. 190 ; 46 Id. 463 ; 34 L. T. 249 ; 36 Id. 492 ; 24 W. R. 579 ; 25 Id. 740 . 266
Hudston *v.* Mid. R. Co., L. R. 4 Q. B. 366 ; 38 L. J. Q. B. 213 ; 20 L. T. 526 ; 17 W. R. 705 202
Huffer *v.* Allen, L. R. 2 Ex. 15 ; 4 H. & C. 634 ; 36 L. J. Ex. 17 ; 12 Jur. N. S. 930 ; 15 L. T. 225 ; 15 W. R. 281 261
Hughes *v.* G. W. R. Co., 14 C. B. 637 ; 2 C. L. R. 1360 ; 23 L. J. C. P. 153 ; 18 Jur. 1001 200
——— *v.* Palmer, 19 C. B. N. S. 393 ; 34 L. J. C. P. 279 ; 11 Jur. N. S. 876 ; 12 L. T. 635 ; 13 W. R. 974 . . . 42
——— *v.* Percival, 8 App. Cas. 443 ; 52 L. J. Q. B. 719 ; 49 L. T. 189 ; 31 W. R. 725 ; 47 J. P. 772 830
——— *v.* Smallwood, 25 Q. B. D. 306 ; 59 L. J. Q. B. 503 ; 63 L. T. 198 432
——— *v.* Wavertree L. B., 58 J. P. 654 673
Hull *v.* Pickersgill, 1 B. & B. 282 ; 3 Moore, 612 350
Hulme *v.* Tenant, 1 Bro. C. C. 16 ; 2 Dick. 560 417
Hulse *v.* Hulse, 17 C. B. 711 ; 25 L. J. C. P. 177 ; 4 W. R. 239 . . 144
Humbertson, *Re*, 1 De G. 262 ; 2 M. D. & D. 654 ; 11 L. J. Bkcy. 15 ; 8 Jur. 675 724
Humfrey *v.* Dale, 7 E. & B. 266 ; E. B. & E. 1004 ; 26 L. J. Q. B. 137 ; 27 Id. 390 ; 3 Jur. N. S. 213 ; 5 Id. 191 ; 5 W. R. 466 ; 6 Id. 854. . . . . 539, 543, 555, 556, 557, 560
Humphreys *v.* Welling, 1 H. & C. 7 ; 32 L. J. Ex. 33 ; 6 L. T. 250 . 370
Humphries *v.* Cousins, 2 C. P. D. 239 ; 46 L. J. C. P. 438 ; 36 L. T. 180 ; 25 W. R. 371 826
Humphrys *v.* Pratt, 2 Dow. & Cl. 288 ; 5 Bligh, N. S. 154 . . . 155
Hungerford *v.* Earle, 2 Vern. 261 20
Hunt *v.* Bate, Dyer, 272 a. 137
——— *v.* Bishop, 8 Exch. 675 ; 22 L. J. Ex. 337 37
——— *v.* Dowman, Cro. Jac. 478 254
——— *v.* G. N. R. Co., (1891) 2 Q. B. 189 ; 60 L. J. Q. B. 498 ; 55 J. P. 648 262
——— *v.* Hooper, 12 M. & W. 664 ; 1 D. & L. 626 ; 13 L. J. Ex. 183 ; 8 Jur. 203 19
——— *v.* Hunt, 31 L. J. Ch. 161 ; 8 Jur. N. S. 45, 85 ; 5 L. T. 412, 778 ; 10 W. R. 161, 215 366
——— *v.* Remnant, 9 Exch. 635 ; 23 L. J. Ex. 135 ; 18 Jur. 335 ; 2 W. R. 276 37

PAGE

Hunt *v.* Wimbledon L. B., 3 C. P. D. 208 ; 4 Id. 48 ; 48 L. J. C. P. 207 ; 39 L. T. 35 ; 26 W. R. 830 ; 27 Id. 123 379
Hunter *v.* Hunt, 1 C. B. 300 ; 14 L. J. C. P. 113 ; 9 Jur. 375 . . 156
——— *v.* M'Gowan, 1 Bligh, 573 219
——— *v.* Parker, 7 M. & W. 322 ; 10 L. J. Ex. 281 350
Huntington *v.* Attrill, (1893) A. C. 150 ; 62 L. J. P. C. 44 ; 68 L. T. 326 ; 41 W. R. 575 ; 57 J. P. 404 . . . . . 575, 608
Huntley *v.* Bedford Hotel, 56 J. P. 53 . . . . . 123, 124
——— *v.* Ward, 6 C. B. N. S. 514 ; 6 Jur. N. S. 18. 263
Hurdman *v.* N. E. R. Co., 3 C. P. D. 168 ; 47 L. J. C. P. 368 ; 38 L. T. 339 ; 26 W. R. 489 823
Hurry *v.* Mangles, 1 Camp. 452 ; 10 R. R. 727 727
Husband *v.* Davis, 10 C. B. 645 ; 2 L. M. & P. 50 ; 20 L. J. C. P. 118 341
Hussey *v.* Horne-Payne, 4 App. Cas. 311 ; 8 Ch. D. 670 ; 47 L. J. Ch. 519, 751 ; 48 Id. 846 ; 38 L. T. 341, 543 ; 41 Id. 1 ; 26 W. R. 532, 703 ; 27 Id. 585 302
Hutcheson *v.* Eaton, 13 Q. B. D. 861 ; 51 L. T. 846 558
Hutchins *v.* Chambers, 1 Burr. 579 434
——— *v.* Scott, 2 M. & W. 809 ; M. & H. 194 ; 6 L. J. Ex. 186 ; 1 Jur. 265 . . . . . 786, 787
Hutchinson *v.* Birch, 4 Taunt. 619 ; 13 R. R. 703 . 105, 106, 107, 109
——— *v.* Bowker, 5 M. & W. 535 . . . . . 545, 560
——— *v.* Guion, 5 C. B. N. S. 149 ; 28 L. J. C. P. 63 ; 4 Jur. N. S. 1149 ; 6 W. R. 757 204
——— *v.* Sydney, 10 Exch. 438 ; 3 C. L. R. 175 ; 24 L. J. Ex. 25 ; 3 W. R. 65 161
——— *v.* Tatham, L. R. 8 C. P. 482 ; 42 L. J. C. P. 260 ; 29 L. T. 103 ; 22 W. R. 18 . . . . . 545, 556, 560
Hutley *v.* Hutley, L. R. 8 Q. B. 112 ; 42 L. J. Q. B. 52 ; 28 L. T. 63 ; 21 W. R. 479 371
Hutton *v.* Eyre, 6 Taunt. 289 152
——— *v.* Parker, 7 Dowl. 739 . . . . . 406, 407
——— *v.* Warren, 1 M. & W. 466 ; 2 Gale, 71 ; 1 T. & G. 646 ; 5 L. J. Ex. 234 . . . . . 535, 536, 537, 538
Hyde *v.* Trent Nav. Co., 5 T. R. 389 ; 2 R. R. 620 . 124, 199, 224, 226
——— *v.* Warden, 3 Ex. D. 72 ; 47 L. J. Ex. 121 ; 37 L. T. 567 ; 26 W. R. 201. . . . . 48, 49
——— *v.* Watts, 12 M. & W. 254 ; 1 D. & L. 479 ; 13 L. J. Ex. 41 . 42
Hyman *v.* Helm, 24 Ch. D. 531 ; 49 L. T. 376 ; 32 W. R. 258 . . 623
——— *v.* Nye, 6 Q. B. D. 685 ; 44 L. T. 919 ; 45 J. P. 554 . . 230

I.

Illingworth *v.* Bulmer East H. B., 53 L. J. M. C. 60 ; 52 Id. 680 ; 48 J. P. 37 ; 32 W. R. 451 660
Imperial Bank *v.* L. & St. K. Dock Co., 5 Ch. D. 195 ; 46 L. J. Ch. 335 ; 36 L. T. 233 . . . . 154, 545, 724, 725, 730
——— Land Co., *Re*, 11 Eq. 478 ; 40 L. J. Ch. 93, 343 ; 23 L. T. 515 ; 24 Id. 255 ; 19 W. R. 223 467
Imray *v.* Magnay, 11 M. & W. 267 ; 2 Dowl. N. S. 531 ; 12 L. J. Ex. 188 ; 7 Jur. 240 . . . . . 19, 23, 24
India (Sec. of State for) *v.* Kamachee Boye Sahaba, 13 Moo. P. C. 22 350, 629, 630
Indus, The, 12 P. D. 46 ; 56 L. J. P. 88 ; 56 L. T. 376 ; 6 Asp. M. C. 105 ; 35 W. R. 490 219
Industrie, The, (1894) P. 58 ; 63 L. J. P. 84 ; 70 L. T. 791 ; 42 W. R. 280 ; 6 R. 681 609
Ingate *v.* Christie, 3 Car. & K. 61 199
Ingham *v.* Primrose, 7 C. B. N. S. 82 ; 28 L. J. C. P. 294 ; 5 Jur. N. S. 710. 472

PAGE
Inglis *v.* De Barnard, 3 Moo. P. C. 425 351
—— *v.* Usherwood, 1 East, 515 721
Iona, The, L. R. 1 P. C. 426 ; 4 Moo. P. C. N. S. 336 ; 16 L. T. 158 . 219
Ionides *v.* Pender, L. R. 9 Q. B. 531 ; 43 L. J. Q. B. 227 ; 30 L. T. 547 ; 22 W. R. 884 493
Ireland *v.* Higgins, Cro. Eliz. 125 431
Irons *v.* Smallpiece, 2 B. & Ald. 551 148
Irvine *v.* Union Bank of Australia, 2 App. Cas. 366 ; 46 L. J. P. C. 87 ; 37 L. T. 176 ; 25 W. R. 682 350
Irving *v.* Veitch, 3 M. & W. 90 ; Mur. & H. 313 ; 7 L. J. Ex. 25 . 567
Isaack *v.* Clark, 2 Bulst. 306 ; 1 Rolle, 59, 126 . . . . . 190, 194
Isaacson, *Re*, (1895) 1 Q. B. 333 ; 64 L. J. Q. B. 191 ; 71 L. T. 583, 812 ; 43 W. R. 128, 278 372
Isherwood, *Ex p.*, 22 Ch. D. 384 ; 52 L. J. Ch. 370 ; 46 L. T. 539 . 527
———— *v.* Oldknow, 3 M. & S. 382 . . . . . 60, 63
Islington (Inhabitants of) Case, Co. Litt. 3 a, n. 3 248
Israel *v.* Douglas, 1 H. Bl. 239 773

J.

Jackson, *Ex p.*, 14 Ch. D. 725 ; 43 L. T. 272 ; 29 W. R. 253 . . 521
———— *v.* Cobbin, 8 M. & W. 790 ; 1 Dowl. N. S. 96 ; 10 L. J. Ex. 389 . . . . . 147, 375
———— *v.* Kidd, 29 L. J. C. P. 221 ; 8 C. B. N. S. 354 ; 6 Jur. N. S. 1094, 1117 601
———— *v.* Lowe, 1 Bing. 9 ; 7 Moore, 219 296
———— *v.* Rogers, 2 Show. 327 202
———— *v.* Spittall, L. R. 5 C. P. 542 ; 39 L. J. C. P. 321 ; 22 L. T. 755 ; 18 W. R. 1162 603
———— *v.* Warwick, 7 T. R. 121 375
Jacob *v.* Hart, 6 M. & S. 142 ; 2 Stark. 45 783
—— *v.* Kirk, 2 M. & Rob. 221 322
Jacobs *v.* Crédit Lyonnais, 12 Q. B. D. 589 ; 53 L. J. Q. B. 156 ; 49 L. T. 39 ; 50 Id. 194 ; 32 W. R. 761 609
Jacobson *v.* Blake, 6 M. & Gr. 919 ; 13 L. J. C. P. 89 . . . 133
Jacques *v.* Golightly, 2 W. Bl. 1073 385
———— *v.* Withy, 1 H. Bl. 65 385
Jagger *v.* Jagger, 25 Ch. D. 729 ; 53 L. J. Ch. 201 ; 49 L. T. 667 ; 32 W. R. 284 420
Jago *v.* Graham, 32 L. J. P. & M. 10 ; 3 Sw. & Tr. 103 ; 8 Jur. N. S. 1081 ; 7 L. T. 645 ; 11 W. R. 86, 192, 551 618
Jakeman *v.* Cook, 4 Ex. D. 26 ; 48 L. J. Ex. 165 ; 27 W. R. 171 . 144
James *v.* Griffin, 1 M. & W. 20 ; 2 Id. 623 ; 6 L. J. Ex. 241 . . 727
—— *v.* Isaacs, 12 C. B. 791 ; 22 L. J. C. P. 73 ; 17 Jur. 69 ; 1 W. R. 21 338
—— *v.* Williams, 5 B. & Ad. 1109 ; 3 N. & M. 196 ; 3 L. J. K. B. 97 294
Janes *v.* Whitbread, 11 C. B. 406 ; 20 L. J. C. P. 217 ; 15 Jur. 612 . 18
Jaques *v.* Millar, 6 Ch. D. 153 ; 47 L. J. Ch. 544 ; 37 L. T. 151 ; 25 W. R. 846 298
Jardine *v* Leathley, 3 B. & S. 700 ; 32 L. J. Q. B. 132 ; 9 Jur. N. S. 1035 ; 7 L. T. 783 ; 11 W. R. 432 350
Jarrett *v.* Hunter, 34 Ch. D. 182 ; 56 L. J. Ch. 141 ; 55 L. T. 727 ; 35 W. R. 132 ; 51 J. P. 165 298
Jarvis *v.* Wilkins, 7 M. & W. 410 ; 10 L. J. Ex. 104 ; 5 Jur. 9 . . 294
Jee *v.* Thurlow, 2 B. & C. 547 ; 4 D. & R. 11 366
Jefferys *v.* Gurr, 2 B. & Ad. 833 ; 1 L. J. K. B. 23 142
Jeffries *v.* Alexander, 31 L. J. Ch. 9 ; 8 H. L. C. 594 ; 7 Jur. N. S. 221 ; 2 L. T. 748 370
———— *v.* G. W. R. Co., 5 E. & B. 802 ; 25 L. J. Q. B. 107 ; 2 Jur. N. S. 230 ; 4 W. R. 201 344

PAGE
Jeffries *v.* Williams, 5 Exch. 792 ; 20 L. J. Ex. 14 . . . 270, 347
Jeffs *v.* Day, L. R. 1 Q. B. 372 ; 35 L. J. Q. B. 99 340
Jemmot *v.* Cooly, 1 Lev. 170 ; 1 Saund. 112 c ; 1 Sid. 223, 262, 344 ; T. Raym. 135, 158 ; 1 Keb. 784, 915 ; 2 Id. 20, 184, 270, 295 . 515
Jenings *v.* Florence, 2 C. B. N. S. 467 ; 26 L. J. C. P. 277 ; 3 Jur. N. S. 774 260
Jenkins *v.* Kemishe, Hard. 395 ; 1 Lev. 150 . . . . . 25, 28
——— *v.* Milford, 1 J. & W. 629 514
Jenkyn *v.* Vaughan, 3 Drew. 419 20
Jenkyns, *Re*, 32 L. J. P. 71 ; 3 Sw. & Tr. 93 ; 9 Jur. N. S. 311 ; 8 L. T. 517 ; 11 W. R. 501 323
——— *v.* Usborne, 8 Scott, N. R. 505 ; 7 M. & Gr. 678 ; 13 L. J. C. P. 196 ; 8 Jur. 1139 . . . . . 722, 725, 733, 745
Jennings *v.* Brown, 9 M. & W. 496 ; 12 L. J. Ex. 86 145
——— *v.* Hammond, 9 Q. B. D. 225 ; 51 L. J. Q. B. 493 ; 31 W. R. 40 370
Jenoure *v.* Delmege, (1891) A. C. 73 ; 60 L. J. P. C. 11 ; 63 L. T. 814 ; 39 W. R. 388 ; 55 J. P. 500 263
Jenys *v.* Fawler, 2 Stra. 946 450
Jervis *v.* Berridge, L. R. 8 Ch. 351 ; 42 L. J. Ch. 518 ; 27 L. T. 436 ; 28 Id. 481 ; 21 W. R. 96, 395 302
——— *v.* Bruton, 2 Vern. 251 ; Eq. Ca. Ab. 87, pl. 8 419
Jessel *v.* Bath, L. R. 2 Ex. 267 ; 36 L. J. Ex. 149 ; 15 W. R. 1041 . 741
Jewan *v.* Whitworth, 2 Eq. 692 ; 36 L. J. Ch. 127 ; 14 W. R. 1020 . 745
Jewel's Case, 5 Co. Rep. 3 54
Jezeph *v.* Ingram, 8 Taunt. 838 ; 1 Moore, 189 13
Jodrell *v.* Jodrell, 9 Beav. 45 ; 15 L. J. Ch. 17 ; 9 Jur. 1022 . . 366
Joel *v.* Morison, 6 C. & P. 501 353
John *v.* Bacon, L. R. 5 C. P. 437 ; 39 L. J. C. P. 365 ; 22 L. T. 477 ; 18 W. R. 894 224
Johns *v.* James, 8 Ch. D. 744 ; 47 L. J. Ch. 853 ; 37 L. T. 778 ; 39 Id. 54 ; 26 W. R. 276, 821 17
Johnson, *Re*, 70 L. T. 381 ; 1 Manson, 54 48
——— *v.* Crédit Lyonnais, 2 C. P. D. 224 ; 3 Id. 32 ; 47 L. J. C. P. 241 ; 36 L. T. 253 ; 37 Id. 657 ; 26 W. R. 195 . . 455, 743, 745
——— *v.* Dodgson, 2 M. & W. 653 ; 6 L. J. Ex. 185 ; 1 Jur. 739 296, 319, 320
——— *v.* Emerson, L. R. 6 Ex. 329 ; 40 L. J. Ex. 201 ; 25 L. T. 337 262, 265
——— *v.* Faulkner, 2 Q. B. 925 ; 2 G. & D. 184 ; 11 L. J. Q. B. 193 ; 6 Jur. 833 430
——— *v.* Hill, 3 Stark. 172 125
——— *v.* Hudson, 11 East, 180 ; 10 R. R. 465 374
——— *v.* Jones, 9 A. & E. 809 ; 1 P. & D. 651 ; 8 L. J. Q. B. 124 157, 162, 507
——— *v.* Leigh, 6 Taunt. 246 ; 1 Marsh. 565 . . . . 105, 106
——— *v.* Marlborough, 2 Stark. 313 784
——— *v.* Mid. R. Co., 4 Exch. 367 ; 6 Railw. Cas. 61 ; 18 L. J. Ex. 366 . . . . . 200, 202
——— *v.* Raylton, 7 Q. B. D. 438 ; 50 L. J. Q. B. 753 ; 45 L. T. 374 ; 30 W. R. 350 542
——— *v.* Royal Mail Co., L. R. 3 C. P. 38 ; 37 L. J. C. P. 33 ; 17 L. T. 445 142
——— *v.* Stear, 15 C. B. N. S. 330 ; 33 L. J. C. P. 130 ; 10 Jur. N. S. 99 ; 9 L. T. 538 ; 12 W. R. 347 . . 195, 228, 72
——— *v.* Upham, 2 E. & E. 250 ; 28 L. J. Q. B. 252 ; 5 Jur. N. S. 681 131
Johnston *v.* Meldon, 30 L. R. Ir. 15 666
——— *v.* Salvage Ass., 19 Q. B. D. 458 ; 57 L. T. 218 ; 6 Asp. M. C. 167 ; 36 W. R. 56 152

PAGE
Johnston *v.* Usborne, 11 A. & E. 549 ; 3 P. & D. 236 . . . 542, 560
Johnstone *v.* Nicholls, 1 C. B. 251 ; 14 L. J. C. P. 151 ; 9 Jur. 429 . 295
Jolly *v.* Arbuthnot, 4 De G. & J. 224 ; 28 L. J. Ch. 274, 547 ; 5 Jur. N. S. 80, 689 ; 7 W. R. 127, 532 . . . . 93, 94, 516, 522, 527
Jonassohn *v.* Ransome, 3 C. B. N. S. 779 339
Jones *v.* Ashurst, Skinn. 357 18
—— *v.* Broadhurst, 9 C. B. 173 338
—— *v.* Carter, 15 M. & W. 718 ; 15 L. J. Q. B. 96 44
—— *v.* Chapman, 2 Exch. 803 ; 18 L. J. Ex. 456 344
—— *v.* Croucher, 1 Sim. & S. 315 30
—— *v.* Festiniog R. Co., L. R. 3 Q. B. 733 ; 9 B. & S. 835 ; 37 L. J. Q. B. 214 ; 18 L. T. 902 ; 17 W. R. 28 825
—— *v.* Foley, (1891) 1 Q. B. 730 ; 60 L. J. Q. B. 464 ; 64 L. T. 538 ; 39 W. R. 510 ; 55 J. P. 521 134
—— *v.* Gordon, 2 App. Cas. 616 ; 1 Ch. D. 137 ; 45 L. J. Bkcy. 1 ; 47 Id. 1 ; 33 L. T. 483 ; 37 Id. 477 ; 24 W. R. 257 ; 26 Id. 172 . . . . . 470, 472
—— *v.* Hughes, 5 Exch. 104 ; 19 L. J. Ex. 200 568
—— *v.* Jones, 8 M. & W. 431 ; 10 L. J. Ex. 481 731
—— *v.* ——, 1 H. & C. 1 ; 31 L. J. Ex. 506 ; 8 Jur. N. S. 1132 . 134
—— *v.* Lees, 1 H. & N. 189 ; 26 L. J. Ex. 9 ; 2 Jur. N. S. 645 . 411
—— *v.* Marsh, Forrest. *temp.* Talbot, 64 27
—— *v.* Marshall, 24 Q. B. D. 269 ; 59 L. J. Q. B. 123 ; 61 L. T. 721 ; 38 W. R. 269 192
—— *v.* Merionethshire Soc., (1892) 1 Ch. 173 ; (1891) 2 Id. 587 ; 60 L. J. Ch. 564 ; 61 Id. 138 ; 65 L. T. 685 ; 40 W. R. 273 ; 17 Cox C. C. 389 . . . . . 365, 386
—— *v.* North, 19 Eq. 426 ; 44 L. J. Ch. 388 ; 32 L. T. 149 ; 23 W. R. 468 415
—— *v.* Owen, 2 D. & R. 600 649
—— *v.* Ryder, 4 M. & W. 32 ; 1 H. & H. 256 ; 7 L. J. Ex. 216 . 571
—— *v.* Taylor, 1 E. & E. 20 . . . . . 665, 671
—— *v.* Tyler, 1 A. & E. 522 ; 3 N. & M. 576 ; 3 L. J. K. B. 166 . 122
—— *v.* Victoria Dock, 2 Q. B. D. 314 ; 46 L. J. Q. B. 219 ; 36 L. T. 347 ; 25 W. R. 501 . . . . . 299, 300, 322
—— *v.* Waite, 5 B. N. C. 341 ; 1 Id. 656 ; 1 Scott, 730 ; 7 Id. 317 ; Hodges, 166 ; 4 M. & Gr. 1104 ; 5 Scott, N. R. 951 ; 9 Cl. & F. 101 ; 8 L. J. Ex. 305 ; 4 L. J. C. P. 184 ; 6 Jur. 653 . . . . . 366, 372, 373
—— *v.* Williams, 7 M. & W. 493 ; 9 Dowl. 252 ; 10 L. J. Ex. 120 . 150
Joseph *v.* Webb, C. & E. 262 743
Joule *v.* Jackson, 7 M. & W. 450 ; 10 L. J. Ex. 142 428

K.

Kaltenbach *v.* Lewis, 10 App. Cas. 617 ; 24 Ch. D. 54 ; 51 L. J. Ch. 881 ; 55 Id. 58 ; 45 L. T. 666 ; 48 Id. 844 ; 30 W. R. 356 ; 31 Id. 731 745
Kane *v.* Mulvany, 2 Ir. Rep. C. L. 402 264
Kaye *v.* Dutton, 8 Scott, N. R. 495 ; 2 D. & L. 291 ; 7 M. & Gr. 807 ; 13 L. J. C. P. 183 ; 8 Jur. 910 . . . . . 147, 148
Keane *v.* Smallbone, 17 C. B. 179 ; 25 L. J. C. P. 72 ; 4 W. R. 11 . 775
Kearley *v.* Thomson, 24 Q. B. D. 742 ; 59 L. J. Q. B. 288 ; 63 L. T. 150 ; 38 W. R. 614 . . . . . 365, 370, 385, 387, 388
Kearney *v.* King, 2 B. & Ald. 301 553
———— *v.* Whitehaven Co., (1893) 1 Q. B. 700 ; 62 L. J. M. C. 129 ; 68 L. T. 690 ; 41 W. R. 594 ; 57 J. P. 645 ; 4 R. 388 . . . 372
Kearns *v.* Durell, 6 C. B. 596 ; 18 L. J. C. P. 28 ; 13 Jur. 153 . . 141
Kearslake *v.* Morgan, 5 T. R. 513 326

PAGE

Kearsley *v.* Philips, 11 Q. B. D. 621 ; 52 L. J. Q. B. 581 ; 49 L. T. 435 ; 31 W. R. 909 516
Keate *v.* Temple, 1 B. & P. 158 287
Keates *v.* Lyon, 4 Ch. 218 ; 38 L. J. Ch. 357 ; 20 L. T. 255 ; 17 W. R. 338 87
Keech *v.* Hall, 1 Dougl. 21 . . . . . 495, 526
Keen *v.* Henry, (1894) 1 Q. B. 292 ; 63 L. J. Q. B. 211 ; 69 L. J. 671 ; 42 W. R. 214 ; 58 J. P. 262 ; 9 R. 102 . . . . 205, 353
—— *v.* Priest, 4 H. & N. 236 ; 28 L. J. Ex. 157 ; 7 W. R. 376 . . 434
Keir *v.* Leeman, 6 Q. B. 308 ; 9 Id. 371 ; 13 L. J. Q. B. 259 ; 15 Id. 360 ; 8 Jur. 824 ; 10 Id. 742 364
Keith *v.* National Telephone Co., (1894) 2 Ch. 147 ; 63 L. J. Ch. 373 ; 70 L. T. 276 ; 42 W. R. 380 ; 58 J. P. 573 ; 8 R. 776 . . . 44
Kellock *v.* Enthoven, L. R. 9 Q. B. 241 ; 8 Id. 458 ; 42 L. J. Q. B. 174 ; 43 Id. 90 ; 28 L. T. 893 ; 30 Id. 68 ; 21 W. R. 944 ; 22 Id. 322 166
Kelly *v.* Metrop. R. Co., (1895) 1 Q. B. 944 ; 64 L. J. Q. B. 568 ; 72 L. T. 551 ; 43 W. R. 497 . . . . . 223, 233
—— *v.* Partington, 5 B. & Ad. 645 ; 2 N. & M. 460 ; 3 Id. 116 ; 3 L. J. K. B. 104 280
Kelner *v.* Baxter, L. R. 2 C. P. 174 ; 36 L. J. C. P. 94 ; 15 L. T. 213 ; 15 W. R. 278 349
Kelsall *v.* Marshall, 1 C. B. N. S. 241 ; 26 L. J. C. P. 19 ; 2 Jur. N. S. 1142 ; 5 W. R. 114 620
Kemp *v.* Falk. See Falk, *Ex p.*
—— *v.* Finden, 12 M. & W. 421 ; 13 L. J. Ex. 137 ; 8 Jur. 65 . 151
—— *v.* Neville, 10 C. B. N. S. 523 ; 31 L. J. C. P. 158 ; 7 Jur. N. S. 913 ; 4 L. T. 640 ; 10 W. R. 6 . . . . 283, 631, 641
—— *v.* Watt, 15 M. & W. 672 ; 4 D. & L. 21 338
—— *v.* Westbrook, 1 Ves. Sen. 278 . . . . . 193, 194
Kempe *v.* Crews, 1 Ld. Raym. 167 ; 2 Lutw. 1573 435
Kendal *v.* Marshall, 11 Q. B. D. 356 ; 52 L. J. Q. B. 313 ; 46 L. T. 693 ; 48 Id. 951 ; 31 W. R. 597 ; 46 J. P. 631 . . . . 727, 728
Kendall *v.* L. & S. W. R. Co., L. R. 7 Ex. 373 ; 41 L. J. Ex. 184 ; 26 L. T. 735 ; 20 W. R. 886 . . . . . 200, 205
——— *v.* Webster, 1 H. & C. 440 ; 31 L. J. Ex. 492 367
——— *v.* Wilkinson, 4 E. & B. 680 ; 24 L. J. M. C. 89 ; 3 C. L. R. 668 ; 1 Jur. N. S. 538 ; 3 W. R. 234 642
Kendillon *v.* Maltby, Car. & M. 402 ; 2 M. & Rob. 438 . . 265, 281
Kennaway *v.* Treleaven, 5 M. & W. 498 ; 9 L. J. Ex. 20 ; 3 Jur. 1034 295
Kennedy *v.* Broun, 13 C. B. N. S. 677 ; 32 L. J. C. P. 137 ; 9 Jur. N. S. 119 ; 7 L. T. 626 ; 11 W. R. 284 146
Kennerly *v.* Nash, 1 Stark. 452 784
Kent *v.* Shuckard, 2 B. & Ad. 803 122
—— *v.* Ward, 70 L. T. 612 ; 9 R. 593 375
Keppell *v.* Bailey, 2 M. & K. 517 ; Coop. *temp.* Brough. 298 82, 86, 418
Kerbey *v.* Denby, 1 M. & W. 336 ; 2 Gale, 31 ; 1 T. & G. 688 ; 5 L. J. Ex. 162 . . . . . 105, 113
Kern *v.* Deslandes, 10 C. B. N. S. 205 ; 30 L. J. C. P. 297 ; 8 Jur. N. S. 194 ; 5 L. T. 349 733
Kerr *v.* Willan, 6 M. & S. 150 ; 2 Stark. 53 205
Kerrison *v.* Cole, 8 East, 231 372
——— *v.* Dorien, 9 Bing. 76 ; 2 M. & Scott, 114 25
Kershaw *v.* Cox, 3 Esp. 246 781
Kettle *v.* Bromsall, Willes, 118 189
Kevan *v.* Crawford, 6 Ch. D. 29 ; 46 L. J. Ch. 729 ; 37 L. T. 322 ; 26 W. R. 49 18
Key *v.* Cotesworth, 7 Ex. 595 ; 22 L. J. Ex. 4 . . . . 729, 740
Keyes *v.* Elkins, 5 B. & S. 240 ; 34 L. J. Q. B. 25 ; 11 Jur. N. S. 111 ; 11 L. T. 474 ; 13 W. R. 180 339
Keys *v.* Belfast R. Co., 9 H. L. C. 556 ; 8 Ir. C. L. R. 167 ; 9 W. R. 793 210
Kidd *v.* Rawlinson, 2 B. & P. 59 ; 3 Esp. 52 ; 5 R. R. 540 . . . 13

PAGE

Kidderminster *v.* Hardwick, L. R. 9 Ex. 13 ; 43 L. J. Ex. 9 ; 29 L. T. 611 ; 22 W. R. 160 309
Kidson *v.* Turner, 3 H. & N. 581 ; 27 L. J. Ex. 492 ; 6 W. R. 678 . 370
Kidwelly *v.* Brand, Plowd. 69 60
Kielley *v.* Carson, 4 Moore, P. C. 63 286
Kilpin *v.* Ratley, (1892) 1 Q. B. 582 ; 66 L. T. 797 ; 40 W. R. 479 ; 56 J. P. 565 148
Kimber *v.* Press Association, (1893) 1 Q. B. 65 ; 62 L. J. Q. B. 152 ; 67 L. T. 515 ; 41 W. R. 17 ; 57 J. P. 247 ; 4 R. 95 263
King's Trade Mark, *Re*, (1892) 2 Ch. 462 ; 66 L. T. 489, 491 ; 67 Id. 33 ; 40 W. R. 580 607
King *v.* Dickeson, 40 Ch. D. 596 ; 58 L. J. Ch. 464 ; 60 L. T. 785 ; 37 W. R. 553 86
—— *v.* Hansell, 5 H. & N. 106 ; 1 L. T. 376 412
—— *v.* Hinde, 12 L. R. Ir. 113 547
—— *v.* Jones, 5 Taunt. 418 ; 1 Marsh. 107 ; 4 M. & S. 188 ; 15 R. R. 533 73
—— *v.* London Cab Co., 23 Q. B. D. 281 ; 58 L. J. Q. B. 456 ; 61 L. T. 34 ; 37 W. R. 737 ; 53 J. P. 788 353
—— *v.* Meredith, 2 Camp. 639 221
—— *v.* Sears, 2 C. M. & R. 53 ; 5 Tyr. 587 ; 1 Gale, 241 ; 4 L. J. Ex. 181 139
—— *v.* Spurr, 8 Q. B. D. 104 ; 51 L. J. Q. B. 105 ; 45 L. T. 709 ; 30 W. R. 152 ; 46 J. P. 198 353
Kingdon *v.* Nottle, 4 M. & S. 53 . . . . . 72, 73
Kingsford *v.* Merry, 1 H. & N. 503 ; 11 Exch. 577 ; 26 L. J. Ex. 83 ; 3 Jur. N. S. 68 ; 5 W. R. 151 744
Kingston's (Duchess of) Case, 2 Smith's L. C. 713... 389, 465, 608, 669, 713
Kinlock *v.* Craig, 3 T. R. 783 ; 1 R. R. 664 713
Kirchner *v.* Venus, 12 Moore, P. C. 361 ; 5 Jur. N. S. 395 ; 7 W. R. 455 . . . . . 547, 548
Kirk *v.* Bromley, 2 Phil. 640 ; 2 Coop. 177 ; 16 L. J. Ch. 114 ; 17 Id. 127 ; 12 Jur. 85 308
—— *v.* Clark, Prec. Cha. 275 . . . . . 27, 28
Kirkpatrick *v.* Tattersall, 13 M. & W. 766 ; 14 L. J. Ex. 209 ; 9 Jur. 214 144
Kirwan *v.* Goodman, 9 Dowl. 330 ; 5 Jur. 293 365
——— *v.* Kirwan, 4 Tyr. 491 ; 2 C. & M. 617 ; 3 L. J. Ex. 187 . 333
Kitchen *v.* Irvine, 28 L. J. Q. B. 46 ; 5 Jur. N. S. 118 ; 8 E. & B. 789 194
Kite's Case, 1 B. & C. 101 650
Kitto *v.* Bilbie, 72 L. T. 266 746
Kleinwort *v.* Comptoir National, (1894) 2 Q. B. 157 ; 63 L. J. Q. B. 674 ; 10 R. 259 . . . . . 458, 473
Knight *v.* Clements, 8 A. & E. 215 ; 3 N. & P. 375 ; 1 W., W. & H. 280 ; 7 L. J. Q. B. 144 ; 2 Jur. 395 784
——— *v.* Cotesworth, C. & E. 48 . . . . . 541, 559, 560
——— *v.* Crockford, 1 Esp. 190 ; 5 R. R. 729 320
——— *v.* Gibbs, 1 A. & E. 43 ; 3 N. & M. 467 ; 3 L. J. K. B. 135 . 280
——— *v.* Halliwell, L. R. 9 Q. B. 412 ; 43 L. J. M. C. 113 ; 30 L. T. 359 ; 22 W. R. 689 671
——— *v.* Hughes, 1 M. & M. 247 ; 3 C. & P. 467 149
Knill *v.* Towse, 24 Q. B. D. 186, 697 ; 59 L. J. Q. B. 136, 455 ; 62 L. T. 259 ; 63 Id. 47 ; 38 W. R. 383, 521 ; 54 J. P. 454, 789 285
—— *v.* Williams, 10 East, 431 781
Knowles *v.* Mitchell, 13 East, 249 308
Knowlman *v.* Bluett, L. R. 9 Ex. 307 ; 43 L. J. Ex. 29, 151 ; 29 L. T. 462 ; 22 W. R. 77, 758 . . . . . 145, 304, 308
Koptoff *v.* Wilson, 1 Q. B. D. 377 ; 45 L. J. Q. B. 436 ; 34 L. T. 677 ; 24 W. R. 706 220
Kronheim *v.* Johnson, 7 Ch. D. 60 ; 47 L. J. Ch. 132 ; 37 L. T. 751 ; 26 W. R. 142 . . . . . 297, 299
Kruger *v.* Wilcox, Ambl. 252 ; 1 Dick. 269 704

L.

PAGE

Labalmondiere *v.* Addison, 1 E. & E. 41 ; 28 L. J. M. C. 25 ; 5 Jur. N. S. 431 648
——— *v.* Frost, 1 E. & E. 527 ; 28 L. J. M. C. 155 ; 5 Jur. N. S. 789 ; 7 W. R. 205 . . . . . 652, 653
Lackington *v.* Atherton, 7 M. & Gr. 360 ; 8 Scott, N. R. 38 ; 13 L. J. C. P. 140 ; 8 Jur. 407 730
Ladd *v.* Thomas, 4 P. & D. 9 ; 12 A. & E. 117 ; 4 Jur. 797 ; 9 L. J. Q. B. 345 130
Lalor *v.* Bland, 8 Ir. C. L. R. 115 . . . . . 642, 643, 668
Lamb *v.* Attenborough, 31 L. J. Q. B. 41 ; 1 B. & S. 831 ; 8 Jur. N. S. 280 ; 10 W. R. 211 743
——— *v.* Walker, 3 Q. B. D. 389 ; 47 L. J. Q. B. 451 ; 38 L. T. 643 ; 26 W. R. 775 272
Lambert *v.* Bessey, T. Raym. 421 . . . . . 794, 799, 816, 820
——— *v.* Norris, 2 M. & W. 333 ; M. & H. 29 ; 6 L. J. Ex. 109 ; 1 Jur. 24 507
La Mert, *Ex p.*, 33 L. J. Q. B. 69 ; 4 B. & S. 582 ; 12 W. R. 201 . 641
Lampleigh *v.* Braithwait, Hob. 105 ; Moore, 866 ; Brownl. & Gold. 7. 492
Lancashire Co., *Re*, 35 Ch. D. 656 ; 56 L. J. Ch. 761 ; 57 L. T. 511 ; 36 W. R. 305 433
——— Waggon Co. *v.* Fitzhugh, 6 H. & N. 502 ; 30 L. J. Ex. 231 ; 3 L. T. 703 89
L. & Y. R. Co. *v.* Greenwood, 21 Q. B. D. 215 ; 58 L. J. Q. B. 16 ; 59 L. T. 930. 203
Lancaster *v.* Greaves, 9 B. & C. 628 640
Lander, *Re*, (1892) 3 Ch. 41 ; 61 L. J. Ch. 707 ; 67 L. T. 521 . . 49
Lane, *Re*, 23 Q. B. D. 74 ; 58 L. J. Q. B. 373 ; 61 L. T. 54 ; 37 W. R. 671 ; 6 M. B. R. 143 566
—— *v.* Capsey, (1891) 3 Ch. 411 ; 61 L. J. Ch. 55 ; 65 L. T. 375 ; 40 W. R. 87 134
—— *v.* Cotton, 1 Ld. Raym. 646 ; 11 Mod. 12 ; 12 Id. 473 ; 1 Salk. 17 ; Holt, 582 202
—— *v.* Horlock, 5 H. L. C. 580 ; 1 Drew. 587 ; 25 L. J. Ch. 253 ; 2 Jur. N. S. 289 ; 4 W. R. 408 369
Lang *v.* Smyth, 7 Bing. 284 ; 5 M. & P. 78 462
Langfort *v.* Tiler, 1 Salk. 113 712
Langridge *v.* Levy, 2 M. & W. 519 ; 4 Id. 337 ; 7 Dowl. 27 ; 6 L. J. Ex. 137 ; 7 Id. 387 ; 1 Jur. 659 259
Langton *v.* Lazarus, 5 M. & W. 629 ; 9 L. J. Ex. 89 788
Lanman *v.* Audley, 2 M. & W. 535 ; 6 L. J. Ex. 136 ; 1 Jur. 479 . 342
Larivière *v.* Morgan, 7 Ch. 550 ; L. R. 7 H. L. 423 ; 44 L. J. Ch. 457 ; 26 L. T. 339, 859 ; 32 Id. 41 ; 20 W. R. 731 ; 23 Id. 537 . . 628
Lassence *v.* Tierney, 1 Mac. & G. 551 ; 2 Hall & Tw. 115 . . . 309
Latimer *v.* Batson, 4 B. & C. 652 ; 7 D. & R. 106 13
Latouche *v.* Latouche, 3 H. & C. 576 ; 34 L. J. Ex. 85 ; 11 Jur. N. S. 271 ; 11 L. T. 773 ; 13 W. R. 563 143
Lattimore *v.* Garrard, 1 Exch. 809 ; 17 L. J. Ex. 100. 148
Laughton *v.* Sodor & Man, L. R. 4 P. C. 495 ; 9 Moore, P. C. N. S. 318 ; 42 L. J. P. C. 11 ; 28 L. T. 377 ; 21 W. R. 204 . . . 262
Launock *v.* Brown, 2 B. & Ald. 592 109
Laurie *v.* Scholefield, L. R. 4 C. P. 622 ; 38 L. J. C. P. 290 ; 17 W. R. 931 295
Lavender *v.* Blackstone, 2 Lev. 146 25
Law *v.* Law, 3 P. Wms. 391 369
—— *v.* Parnell, 7 C. B. N. S. 282 ; 29 L. J. C. P. 17 ; 6 Jur. N. S. 172 ; 1 L. T. 32 ; 8 W. R. 6 473
—— *v.* Wilkin, 6 A. & E. 718 ; 1 N. & P. 697 ; W. W. & D. 235 . 145
Lawless *v.* Anglo-Egyptian Co., L. R. 4 Q. B. 262 ; 10 B. & S. 226 ; 38 L. J. Q. B. 129 ; 17 W. R. 498 263
Lawrenson *v.* Hill, 10 Ir. C. L. R. 177 642

PAGE

Lawrie *v.* Lees, 14 Ch. D. 249 ; 49 L. J. Ch. 636 ; 42 L. T. 485 ; 28 W. R. 779 45
Lawson *v.* Burness, 1 H. & C. 396 ; 2 F. & F. 793 ; 10 W. R. 733 . 547
——— *v.* Weston, 4 Esp. 56 468
Laycock *v.* Pickles, 4 B. & S. 497 ; 33 L. J. Q. B. 43 ; 10 Jur. N. S. 336 ; 9 L. T. 378 ; 12 W. R. 76 . . . . . 308, 332
Layer *v.* Nelson, 1 Vern. 456 151
Laying *v.* Paine, Willes, 571 369
Laythoarp *v.* Bryant, 2 B. N. C. 735 ; 3 Scott, 238 ; 5 L. J. C. P. 217 297, 298
Lazarus *v.* Cowie, 3 Q. B. 459 ; 2 G. & D. 487 ; 11 L. J. Q. B. 310 . 788
Leake *v.* Loveday, 4 M. & Gr. 972 ; 2 Dowl. N. S. 624 ; 5 Scott, N. R. 908 ; 12 L. J. C. P. 65 ; 7 Jur. 17 344
Learoyd *v.* Robinson, 12 M. & W. 745 ; 13 L. J. Ex. 213 . . . 744
Leary *v.* Patrick, 15 Q. B. 266 ; 4 New Sess. Cas. 258 ; 19 L. J. M. C. 211 ; 14 Jur. 932 642
Leask *v.* Scott, 2 Q. B. D. 376 ; 46 L. J. Q. B. 329, 576 ; 35 L. T. 903 ; 36 Id. 784 ; 25 W. R. 654 . . . . . 735, 736, 739
Leather Cloth Co. *v.* Hieronimus, L. R. 10 Q. B. 140 ; 44 L. J. Q. B. 54 ; 32 L. T. 307 ; 23 W. R. 593 300
———— Co. *v.* Lorsont, 9 Eq. 345 ; 39 L. J. Ch. 86 ; 21 L. T. 661 ; 18 W. R. 572 . . . . . 404, 410, 411
Lebel *v.* Tucker, L. R. 3 Q. B. 77 ; 8 B. & S. 830 ; 37 L. J. Q. B. 46 ; 17 L. T. 244 ; 16 W. R. 338 . . . . . 610, 613, 614
Leck *v.* Maestaer, 1 Camp. 138 ; 10 R. R. 660 198
Le Conteur *v.* L. & S. W. R. Co., L. R. 1 Q. B. 54 ; 35 L. J. Q. B. 40 ; 12 Jur. N. S. 266 ; 13 L. T. 325 ; 14 W. R. 80 . . 201, 206, 210
Lee *v.* Abdy, 17 Q. B. D. 309 ; 55 L. T. 297 ; 34 W. R. 653 . 613, 614
—— *v.* Bayes, 18 C. B. 599 ; 25 L. J. C. P. 249 ; 2 Jur. N. S. 1093 . 279
—— *v.* Butler, (1893) 2 Q. B. 318 ; 62 L. J. Q. B. 591 ; 69 L. T. 370 ; 42 W. R. 88 ; 4 R. 563 . . . . . 192, 742, 746
—— *v.* Coleshill, 2 And. 55, 107 ; Cro. Eliz. 529 . . . . 7, 371
—— *v.* Gansel, 1 Cowp. 1 ; Lofft, 374 106
—— *v.* Matthews, 6 L. R. Ir. 530. 26
—— *v.* Muggeridge, 5 Taunt. 36 ; 1 Ves. & B. 118 143
—— *v.* Page, 30 L. J. Ch. 857 ; 7 Jur. N. S. 768 ; 9 W. R. 754 . . 341
—— *v.* Riley, 34 L. J. C. P. 212 ; 18 C. B. N. S. 722 ; 11 Jur. N. S. 527 ; 12 L. T. 388 ; 13 W. R. 751. 827
—— *v.* Rowley, 8 E. & B. 857 ; 27 L. J. Q. B. 193 ; 4 Jur. N. S. 583 . 649
Leeds *v.* Wright, 3 B. & P. 320 ; 7 R. R. 779 727
Leeds Bank *v.* Walker, 11 Q. B. D. 84 ; 52 L. J. Q. B. 590 ; 47 J. P. 502 780, 781
Legatees, The, 1 Swa. Ad. 168 ; 5 W. R. 154 150
Legg *v.* Cheesebrough, 28 L. J. C. P. 209 ; 5 C. B. N. S. 741 ; 5 Jur. N. S. 795. 340
Legge *v.* Pardoe, 30 L. J. M. C. 108 ; 9 C. B. N. S. 289 ; 7 Jur. N. S. 499 ; 3 L. T. 371 ; 9 W. R. 234 665
Leggott *v.* G. N. R. Co., 1 Q. B. D. 599 ; 45 L. J. Q. B. 557 ; 35 L. T. 334 ; 24 W. R. 784 267
Lehain *v.* Philpott, L. R. 10 Ex. 242 ; 44 L. J. Ex. 225 ; 33 L. T. 98 ; 23 W. R. 876 340
Lehmann *v.* McArthur, 3 Eq. 746 ; 3 Ch. 496 ; 37 L. J. Ch. 625 ; 18 L. T. 806 ; 16 Id. 196 ; 15 W. R. 551 ; 16 Id. 877 48
Leicester U. S. Auth. *v.* Holland, 57 L. J. M. C. 75 ; 52 J. P. 788 . 665
Leideman *v.* Schultz, 14 C. B. 38 ; 2 C. L. R. 87 ; 23 L. J. C. P. 17 ; 18 Jur. 42 ; 2 W. R. 35 547
Leigh *v.* Dickeson, 15 Q. B. D. 60 ; 12 Id. 194 ; 53 L. J. Q. B. 120 ; 54 Id. 18 ; 50 L. T. 124 ; 52 Id. 790 ; 32 W. R. 339 ; 32 Id. 538 143
——— *v.* Hind, 9 B. & C. 774 ; 4 M. & Ry. 579 404
Leighton *v.* Wales, 3 M. & W. 545 ; 7 L. J. Ex. 145 . . . 403, 405

PAGE
Le Keux *v.* Nash, 2 Str. 1221 70
Lemaitre *v.* Davis, 19 Ch. D. 281 ; 51 L. J. Ch. 173 ; 46 L. T. 107 ; 30 W. R. 360 ; 46 J. P. 324 272
Lampriere *v.* Pasley, 2 T. R. 485 . . . . . 710, 712
Lenzberg, *Re*, 7 Ch. D. 650 ; 47 L. J. Ch. 178 ; 26 W. R. 258 . . 370
Leon, The, 6 P. D. 148 ; 50 L. J. P. 59 ; 44 L. T. 613 ; 4 Asp. M. C. 404 ; 29 W. R. 916 609
Leonard *v.* Baker, 1 M. & S. 251 13
Lepla *v.* Rogers, (1893) 1 Q. B. 31 ; 68 L. T. 584 ; 57 J. P. 55 ; 5 R. 57 49
Leroux *v.* Brown, 12 C. B. 801 ; 22 L. J. C. P. 1 ; 16 Jur. 1021 ; 1 W. R. 22 . . . . . 297, 622
Leslie *v.* Baillie, 2 Y. & C. C. C. 91 ; 12 L. J. Ch. 153 ; 7 Jur. 77 . 618
—— *v.* French, 23 Ch. D. 552 ; 52 L. J. Ch. 762 ; 48 L. T. 564 ; 31 W. R. 561 142
Lester *v.* Foxcroft, Colles, 108 ; 1 Wh. & Tud. L. C. 309
Lethulier's Case, 2 Salk. 443 541
Leuckhart *v.* Cooper, 3 B. N. C. 99 ; 3 Scott, 521 ; 2 Hodges, 150 ; 6 L. J. C. P. 131 559
Leuw *v.* Dudgeon, L. R. 3 C. P. 17, n. ; 37 L. J. C. P. 5, n. ; 17 L. T. 145 ; 16 W. R. 80 220
Leverick *v.* Mercer, 14 Q. B. 759 ; 22 L. J. M. C. 81 655
Levy *v.* Barnard, 8 Taunt. 149 709
—— *v.* Rice, L. R. 5 C. P. 119 ; 21 L. T. 717 ; 18 W. R. 458 . . 601
—— *v.* Yates, 8 A. & E. 129 ; 3 N. & P. 249 ; 1 W. W. & H. 219 ; 7 L. J. Q. B. 138 369
Lewis, *Ex p.*, 21 Q. B. D. 191 ; 57 L. J. M. C. 108 ; 59 L. T. 338 . 644
—— *v.* Campbell, 8 Taunt. 715 72
—— *v.* G. W. R. Co., 5 H. & N. 867 ; 29 L. J. Ex. 425 216
—— *v.* ————, 3 Q. B. D. 195 ; 47 L. J. Q. B. 131 ; 37 L. T. 774 ; 26 W. R. 255 . . . . . 217, 218
—— *v.* Levy, E. B. & E. 537 ; 27 L. J. Q. B. 282 ; 4 Jur. N. S. 970 ; 6 W. R. 629 263
—— *v.* Marshall, 7 M. & Gr. 729 ; 8 Scott, N. R. 477 ; 13 L. J. C. P. 193 ; 8 Jur. 848 560
—— *v.* Rees, 3 K. & J. 132 ; 26 L. J. Ch. 101 ; 3 Jur. N. S. 12 ; 5 W. R. 96 26
Leyfield's Case, 10 Co. Rep. 88, a ; 1 Bulst. 154 . . . . 775, 778
Leyland *v.* Tancred, 16 Q. B. 664 ; 19 L. J. Q. B. 313 ; 14 Jur. 695 . 274
Liberia (Republic of) *v.* Roye, 1 App. Cas. 139 ; 16 Eq. 179 ; 9 Ch. 569 ; 42 L. J. Ch. 574 ; 43 Id. 640 ; 45 Id. 297 ; 31 L. T. 262 ; 34 Id. 145 ; 22 W. R. 814 ; 24 Id. 965 628
Lickbarrow *v.* Mason, 2 T. R. 63 ; 5 Id. 683 ; 1 H. Bl. 357 ; 4 Bro. P. C. 57 ; 6 East, 20, n. ; 1 R. R. 425 . . . . . 455, 674, 702
Lightbown *v.* M'Myn, 33 Ch. D. 575 ; 55 L. J. Ch. 841 ; 55 L. T. 834 ; 35 W. R. 179 153
Lilley *v.* Roney, 61 L. J. Q. B. 727 265
Lilly *v.* Hays, 5 A. & E. 548 ; 1 N. & P. 26 ; 2 H. & W. 338 ; 6 L. J. K. B. 5 140
Limpus *v.* L. G. O. Co., 1 H. & C. 526 ; 32 L. J. Ex. 34 ; 9 Jur. N. S. 333 ; 7 L. T. 641 ; 11 W. R. 149 352
Lindenau *v.* Desborough, 8 B. & C. 586 487
Lindon *v.* Sharp, 6 M. & Gr. 893 ; 7 Scott, N. S. 730 ; 13 L. J. C. P. 67 13
Linsell *v.* Bonsor, 2 B. N. C. 241 ; 2 Scott, 399 ; 1 Hodges, 305 ; 5 L. J. C. P. 40 . . . . . 564, 568
Lister *v.* Perryman, L. R. 4 H. L. 521 ; L. R. 3 Ex. 197 ; 37 L. J. Ex. 166 ; 39 Id. 177 ; 18 L. T. 574 ; 23 Id. 269 ; 19 W. R. 9 . 261
—— *v.* Turner, 5 Hare, 281 ; 15 L. J. Ch. 336 ; 10 Jur. 751 . . . 25
Litchfield *v.* Ready, 5 Exch. 939 ; 20 L. J. Ex. 51 . 496, 508, 514, 526
Littledale *v.* Dixon, 1 B. & P. N. R. 151 492
Littlefield *v.* Shee, 2 B. & Ad. 811 ; 1 L. J. K. B. 12 143

PAGE

Liver Alkali Co. *v.* Johnson, L. R. 7 Ex. 267 ; 9 Id. 338 ; 41 L. J. Ex. 110 ; 43 Id. 216 ; 31 L. T. 95 199
Liverpool Bank *v.* Eccles, 4 H. & N. 139 ; 28 L. J. Ex. 122 . . 298
——— Marine Credit Co. *v.* Hunter, 3 Ch. 479 ; 4 Eq. 62 ; 36 L. J. Ch. 567 ; 37 Id. 386 ; 16 L. T. 447 ; 18 Id. 749 ; 15 W. R. 758 ; 16 Id. 1090 608
Liversidge *v.* Broadbent, 4 H. & N. 603 ; 28 L. J. Ex. 332 ; 7 W. R. 615 . . . . . 140, 338
Livingston *v.* Ralli, 5 E. & B. 132 ; 24 L. J. Q. B. 269 ; 1 Jur. N. S. 594 341
Llewellyn *v.* Llewellyn, 3 D. & L. 318 ; 15 L. J. Q. B. 4 ; 9 Jur. 991 331
Lloyd *v.* Crispe, 5 Taunt. 249 ; 14 R. R. 744 . . . . 34, 36, 44
——— *v.* Gen. Iron Screw Collier Co., 33 L. J. Ex. 269 ; 3 H. & C. 284 ; 10 Jur. N. S. 661 ; 10 L. T. 586 ; 12 W. R. 882 . 220
——— *v.* Guibert, L. R. 1 Q. B. 115 ; 6 B. & S. 100 ; 33 L. J. Q. B. 241 ; 35 Id. 74 ; 10 Jur. N. S. 949 ; 10 L. T. 570 ; 12 W. R. 953. . . . . 550, 608, 609
——— *v.* Nowell, (1895) 2 Ch. 744 . . . . . *Add.* 302
——— *v.* Sandilands, 8 Taunt. 250 106
Lobb *v.* Stanley, 5 Q. B. 574 ; D. & M. 635 ; 13 L. J. Q. B. 117 ; 8 Jur. 462 . . . . . 320, 354
Lock *v.* Pearce, (1893) 2 Ch. 271 ; 62 L. J. Ch. 582 ; 68 L. T. 569 ; 41 W. R. 369 ; 2 R. 403 50
Lockhart *v.* St. Albans, 21 Q. B. D. 188 ; 57 L. J. M. C. 118 ; 36 W. R. 800 ; 52 J. P. 420. 673
Lockwood *v.* Coysgarne, 3 Burr. 1676. 437
——— *v.* Ewer, 9 Mod. 275 ; 2 Atk. 303 192
Lodge *v.* Dicas, 3 B. & Ald. 611 333
Logan *v.* Hall, 4 C. B. 598 ; 16 L. J. C. P. 252 ; 11 Jur. 804 . . 151
Lohre *v.* Aitchison, 3 Q. B. D. 558 ; 2 Id. 501 ; 46 L. J. Q. B. 715 ; 47 Id. 534 ; 36 L. T. 794 ; 38 Id. 802 ; 26 W. R. 42, 780 . . 541
London B. & S. C. R. Co. *v.* Truman, 11 App. Cas. 45 ; 25 Ch. D. 423 ; 29 Id. 89 ; 53 L. J. Ch. 209 ; 54 Id. 849 ; 55 Id. 354 ; 54 L. T. 250 ; 50 L. T. 89 ; 52 Id. 522 ; 32 W. R. 364 ; 33 Id. 762 ; 34 Id. 657 ; 50 J. P. 388 828
——— & County Bank *v.* London & R. Plate Bank, 20 Q. B. D. 232 ; 21 Id. 535 ; 57 L. J. Q. B. 601 ; 37 W. R. 89 . 335, 338, 459
——— Founders' Ass. *v.* Clarke, 20 Q. B. D. 576 ; 57 L. J. Q. B. 291 ; 59 L. T. 93 ; 36 W. R. 489 550
——— J. S. Bank *v.* Simmons, (1892) A. C. 201 ; (1891) 1 Ch. 270 ; 60 L. J. Ch. 313 ; 61 Id. 723 ; 62 Id. 427 ; 63 L. T. 789 ; 66 Id. 625 ; 39 W. R. 449 ; 41 Id. 108 ; 56 J. P. 644 462, 468, 469, 471, 472
——— & N. W. R. Co. *v.* Bartlett, 7 H. & N. 400 ; 31 L. J. Ex. 92 ; 8 Jur. N. S. 58 ; 5 L. T. 399 ; 10 W. R. 109. . . . . 221, 732
——— ——— *v.* Evershed. See *Evershed* v. *L. & N. W. R. Co.*
——— ——— *v.* Glyn, 28 L. J. Q. B. 188 ; 1 E. & E. 652 ; 5 Jur. N. S. 1004 ; 7 W. R. 238 . . . 207
——— & Provincial Bank *v.* Roberts, 22 W. R. 402. . . . 783
——— & S. W. Bank *v.* Wentworth, 5 Ex. D. 96 ; 49 L. J. Ex. 657 ; 42 L. T. 188 ; 28 W. R. 516 472
——— & S. W. R. Co. *v.* Gomm, 20 Ch. D. 562 ; 51 L. J. Ch. 193, 530 ; 46 L. T. 449 ; 30 W. R. 321, 620 . . 83, 87, 419
——— & Yorkshire Bank *v.* Belton, 15 Q. B. D. 457 ; 54 L. J. Q. B. 568 ; 34 W. R. 31 435
Long *v.* Clarke, (1894) 1 Q. B. 119 ; 63 L. J. Q. B. 108 ; 69 L. T. 654 ; 42 W. R. 130 . . . . . 106, 108
——— *v.* Greenville, 3 B. & C. 10 ; 4 D. & R. 632 564
——— *v.* Hemming, 1 Anders. 256 ; Cro. Eliz. 209 499

PAGE

Long *v.* Millar. 4 C. P. D. 450 ; 43 L. J. C. P. 596 ; 41 L. T. 366 ; 27 W. R. 720 297
Longfellow *v.* Williams, 2 Peake, 225 297
Longman *v.* Galini, Abbott on Shipp. (13 ed.), 465, n. 191
Longridge *v.* Dorville, 5 B. & Ald. 117 . . . . . 330, 331
Lopez *v.* Burslem, 4 Moo. P. C. 300 617
Lord *v.* Mid. R. Co., L. R. 2 C. P. 339 ; 36 L. J. C. P. 170 ; 15 L. T. 576 ; 15 W. R. 405 216
Loring *v.* Warburton, E. B. & E. 507 ; 28 L. J. Q. B. 31 ; 4 Jur. N. S. 634 30
Lougher *v.* Williams, 2 Lev. 92 64
Lound *v.* Grimwade, 39 Ch. D. 605 ; 57 L. J. Ch. 725 ; 59 L. T. 168. 365
Lovat *v.* Ranelagh, 3 V. & B. 24 51
Lovesy *v.* Stallard, 30 L. T. 792 666
Lovick *v.* Crowder, 8 B. & C. 132 ; 2 M. & R. 84 19
Lowe *v.* Fox, 12 App. Cas. 206 ; 15 Q. B. D. 667 ; 56 L. J. Q. B. 480 ; 53 L. T. 886 ; 56 Id. 406 ; 34 W. R. 144 ; 36 Id. 25 . 782, 786
——— *v.* G. N. R. Co., 62 L. J. Q. B. 524 ; 5 R. 535 352
——— *v.* Peers, 4 Burr. 2225 ; Wilmot, 364 367
Lows *v.* Telford, 1 App. Cas. 414 ; 45 L. J. Ex. 613 ; 35 L. T. 69 134, 504, 526
Lowther *v.* Radnor, 8 East, 113 . . . . . 631, 641
Lubbock *v.* Tribe, 3 M. & W. 607 ; 1 H. & H. 160 ; 7 L. J. Ex. 158 . 160
Luby *v.* Wodehouse, 17 Ir. C. L. R. 618 624
Lucas *v.* Dixon, 22 Q. B. D. 357 ; 58 L. J. Q. B. 161 ; 37 W. R. 370 300, 302
——— *v.* Dorrien, 7 Taunt. 278 ; 1 Moore, 29 455
——— *v.* Mason, L. R. 10 Ex. 251 ; 44 L. J. Ex. 145 ; 33 L. T. 13 ; 23 W. R. 924 353
——— *v.* Tarleton, 3 H. & N. 116 ; 27 L. J. Ex. 246 132
——— *v.* Wilkinson, 1 H. & N. 420 ; 26 L. J. Ex. 13 ; 5 W. R. 197 . 338
Ludford *v.* Barber, 1 T. R. 90 ; 1 R. R. 156 95
Luker *v.* Dennis, 7 Ch. D. 227 ; 47 L. J. Ch. 174 ; 37 L. T. 827 ; 26 W. R. 167 86
Lumley *v.* Gye, 2 E. & B. 216 ; 22 L. J. Ex. 9 ; Id. Q. B. 463 ; 16 Jur. 1048 ; 17 Id. 827 ; 1 W. R. 39, 432 . . . 281
——— *v.* Palmer, 2 Str. 1000 450
——— *v.* Wagner, 1 De G. M. & G. 604 ; 21 L. J. Ch. 898 ; 16 Jur. 871 339
Lundy Co., *Re,* 6 Ch. 462 ; 40 L. J. Ch. 588 ; 24 L. T. 922 ; 19 W. R. 609 433
Lush *v.* Wilkinson, 5 Ves. 384 20
Luton L. B. *v.* Davis, 29 L. J. M. C. 173 ; 29 L. J. Q. B. 192 ; 6 Jur. N. S. 580 ; 2 L. T. 172 ; 8 W. R. 411 670
Lutterell *v.* Reynell, 1 Mod. 282 279
Lyell *v.* Kennedy, 18 Q. B. D. 796 ; 14 App. Cas. 437 ; 56 L. J. Q. B. 303 ; 59 Id. 268 ; 56 L. T. 647 ; 62 Id. 77 ; 35 W. R. 725 ; 38 Id. 353 350
Lygo *v.* Newbold, 9 Exch. 302 ; 2 C. L. R. 449 ; 23 L. J. Ex. 108 ; 2 W. R. 158 275
Lyn *v.* Wyn, O. Bridg. 122 91
Lynch *v.* Nurdin, 1 Q. B. 29 ; 4 P. & D. 672 ; 10 L. J. Q. B. 73 . 275
Lynn *v.* Bruce, 2 H. Bl. 317 ; 3 R. R. 381 . . . 328, 336, 337, 339
Lyon *v.* Fishmongers Co., 1 App. Cas. 662 ; 10 Ch. 679 ; 44 L. J. Ch. 408, 747 ; 46 Id. 68 ; 32 L. T. 479 ; 33 Id. 146 ; 35 Id. 569 ; 23 W. R. 689 ; 24 Id. 1 ; 25 Id. 165 274
Lyons *v.* Elliott, 1 Q. B. D. 210 ; 45 L. J. Q. B. 159 ; 33 L. T. 806 ; 24 W. R. 296 428
——— *v.* Hoffnung, 15 App. Cas. 391 ; 59 L. J. P. C. 79 ; 63 L. T. 293 ; 39 W. R. 390 728
Lyth *v.* Ault, 7 Exch. 669 ; 21 L. J. Ex. 217 . . . 334, 337

M.

PAGE

MABER *v.* Maber, L. R. 2 Ex. 153 ; 36 L. J. Ex. 70 . . 567
Macartney *v.* Garbutt, 24 Q. B. D. 368 ; 62 L. T. 656 ; 38 W. R. 559 . 630
McCall *v.* Taylor, 19 C. B. N. S. 301 ; 34 L. J. C. P. 365 ; 11 Jur. N. S. 529 ; 12 L. T. 461 ; 13 W. R. 840 206
M'Callan *v.* Mortimer, 9 M. & W. 636 ; 11 L. J. Ex. 429 ; 6 Jur. 196 375
McCance *v.* L. & N. W. R. Co., 7 H. & N. 477 ; 3 H. & C. 343 ; 31 L. J. Ex. 65 ; 34 Id. 39 ; 7 Jur. N. S. 1304 ; 10 Id. 1058 ; 11 L. T. 426 ; 10 W. R. 154 ; 12 Id. 1086 . . . . . 213, 216
McCarthy *v.* Young, 6 H. & N. 329 ; 30 L. J. Ex. 227 ; 3 L. T. 785 ; 9 W. R. 439 229
McCawley *v.* Furness R. Co., L. R. 8 Q. B. 57 ; 42 L. J. Q. B. 4 ; 27 L. T. 485 ; 21 W. R. 140 210
McClatchie *v.* Haslam, 63 L. T. 376 . 65 L. J. 691 Rev. . 386
M'Coubray *v.* Thomson, 2 Ir. R. C. L. 226 139
McDevitt *v.* Connolly, 13 L. R. Ir. 207 558
Macdona *v.* Swiney, 8 Ir. C. L. R. 73 13
Macdonald *v.* Longbottom, 1 E. & E. 977 ; 29 L. J. Q. B. 256 ; 28 Id. 293 ; 6 Jur. N. S. 724 ; 7 W. R. 507 294
Macdougall *v.* Knight (No. 1), 17 Q. B. D. 636 ; 14 App. Cas. 194 ; 55 L. J. Q. B. 464 ; 55 L. T. 274 ; 60 Id. 762 ; 34 W. R. 727 ; 38 Id. 44 ; 51 J. P. 38 264
——— *v.* Knight (No. 2), 25 Q. B. D. 1 ; 59 L. J. Q. B. 517 ; 63 L. T. 43 ; 38 W. R. 553 ; 54 J. P. 788 264
Mace *v.* Cammel, Lofft, 782 13
MacFarlane *v.* Norris, 31 L. J. Q. B. 245 ; 2 B. & S. 783 ; 9 Jur. N. S. 74 ; 6 L. T. 492 . . . . . 611, 616
McGregor *v.* Lowe, Ry. & M. 57 ; 1 C. & P. 200 386
——— *v.* McGregor, 20 Q. B. D. 529 ; 21 Id. 424 ; 57 L. J. Q. B. 268, 591 ; 58 L. T. 227 ; 36 W. R. 470 ; 37 Id. 45 . . 304, 305, 308
McHenry *v.* Lewis, 22 Ch. D. 397 ; 21 Id. 202 ; 52 L. J. Ch. 16, 325 ; 46 L. T. 567 ; 47 Id. 549 ; 31 W. R. 305 623
Macher *v.* Foundling Hospital, 1 V. & B. 188 34
Machu *v.* L. & S. W. R. Co., 2 Exch. 415 ; 17 L. J. Ex. 271 ; 12 Jur. 501 ; 5 Railw. Cas. 302 209
Macintosh *v.* Haydon, Ry. & M. 362 782
——— *v.* Marshall, 11 M. & W. 116 ; 12 L. J. Ex. 337 . . . 478
Mackay *v.* Douglas, 14 Eq. 106 ; 41 L. J. Ch. 539 ; 26 L. T. 721 ; 20 W. R. 652 20
——— *v.* Ford, 5 H. & N. 792 ; 29 L. J. Ex. 404 ; 6 Jur. N. S. 587 ; 2 L. T. 514 ; 8 W. R. 586 264
McKean *v.* McIvor, L. R. 6 Ex. 36 ; 40 L. J. Ex. 30 ; 24 L. T. 559 . 223
McKellar *v.* Wallace, 8 Moore, P. C. 378 332
Mackenzie *v.* Childers, 43 Ch. D. 265 ; 59 L. J. Ch. 188 ; 62 L. T. 98 ; 38 W. R. 243 . . . . . 83, 88
——— *v.* Cox, 9 C. & P. 632 199
——— *v.* Dunlop, 3 Macq. 22 ; 2 Jur. N. S. 957 ; 4 W. R. 815 . 559
McKewan *v.* Sanderson, 20 Eq. 65 ; 44 L. J. Ch. 447 ; 32 L. T. 385 ; 23 W. R. 607 370
Mackie *v.* Herbertson, 9 App. Cas. 303 28
McKinnell *v.* Robinson, 3 M. & W. 434 384
Maclae *v.* Sutherland, 3 E. & B. 1 ; 2 C. L. R. 1320 ; 23 L. J. Q. B. 229 ; 18 Jur. 942 ; 2 W. R. 161 455
M'Lanahan *v.* Universal Ins. Co., 1 Peters, 170 (U.S.A.) . . 492, 493
M'Lean *v.* Fleming, L. R. 2 H. L. Sc. 128 ; 25 L. T. 317 . . . 741
McLynch *v.* Ekins, 13 East, 515, n. ; Say. 73 ; 12 R. R. 419, n. . 465
McManus *v.* Bark, L. R. 5 Ex. 65 ; 39 L. J. Ex. 65 ; 21 L. T. 676 147, 338
——— *v.* Cooke, 35 Ch. D. 681 ; 56 L. J. Ch. 662 ; 56 L. T. 900 ; 35 W. R. 754 . . . . . 305, 309

PAGE

McManus *v.* L. & Y. R. Co., 4 H. & N. 327 ; 2 Id. 693 ; 27 L. J. Ex. 201 ; 28 Id. 353 ; 4 Jur. N. S. 144 ; 5 Id. 651 . 200, 213, 214, 215
McNaughton's Case, 10 Cl. & F. 200 ; 8 Scott, N. R. 595 ; 1 C. & K. 130 492
Macnee *v.* Gorst, 4 Eq. 315 ; 15 W. R. 1197 745
McQueen *v.* G. W. R. Co., L. R. 10 Q. B. 569 ; 44 L. J. Q. B. 130 ; 32 L. T. 759 ; 23 W. R. 698 210
Maddever, *Re*, 27 Ch. D. 523 ; 53 L. J. Ch. 998 ; 52 L. T. 35 ; 33 W. R. 286 24
Maddison *v.* Alderson, 8 App. Cas. 467 ; 5 Ex. D. 293 ; 7 Q. B. D. 174 ; 49 L. J. Ex. 801 ; 50 Id. 466 ; 52 Id. 737 ; 43 L. T. 349 ; 45 Id. 334 ; 49 Id. 303 ; 29 W. R. 105, 556 ; 31 Id. 820 ; 46 J. P. 68 ; 47 Id. 821 . . . . . 144, 300, 301, 308
Maddock, *Re*, L. R. 3 P. & D. 169 ; 43 L. J. P. & M. 29 ; 30 L. T. 696 ; 22 W. R. 741 523
Madras R. Co. *v.* Zemindar of Carvatenagarum, L. R. 1 Ind. App. 364 ; 30 L. T. 770 ; 22 W. R. 865 829
Magdalena St. Nav. Co. *v.* Martin, 2 E. & E. 94 ; 28 L. J. Q. B. 310 ; 5 Jur. N. S. 1260 ; 7 W. R. 598 630
Magee *v.* Atkinson, 2 M. & W. 440 ; 6 L. J. Ex. 115 554
Magnee *v.* O'Neil, 7 M. & W. 531 ; 10 L. J. Ex. 326 569
Magnay *v.* Edwards, 13 C. B. 479 ; 22 L. J. C. P. 170 ; 17 Jur. 839 ; 1 W. R. 331 71
Mali Ivo, The, L. R. 2 A. & E. 356 ; 38 L. J. A. 34 ; 20 L. T. 681 . 607
Malins *v.* Freeman, 4 B. N. C. 395 ; 6 Scott, 187 ; 6 Dowl. 614 ; 1 Arn. 177 ; 2 Jur. 618 ; 7 L. J. C. P. 212 42
Mallan *v.* May, 11 M. & W. 653 ; 13 Id. 511 ; 12 L. J. Ex. 376 ; 14 Id. 48 ; 7 Jur. 536 ; 9 Id. 19 . . 372, 406, 408, 409, 412, 413, 547
Mallett *v.* Bateman, 16 C. B. N. S. 530 ; L. R. 1 C. P. 163 ; 1 H. & R. 109 ; 33 L. J. C. P. 243 ; 35 Id. 40 ; 10 Jur. N. S. 865 ; 12 Id. 122 ; 10 L. T. 869 ; 13 Id. 410 ; 14 W. R. 225 291
Man *v.* Shiffner, 2 East, 523 704
M. S. & L. R. Co. *v.* Brown, 8 App. Cas. 703 ; 9 Q. B. D. 230 ; 10 Id. 250 ; 51 L. J. Q. B. 599 ; 52 Id. 132 ; 53 Id. 124 ; 46 L. T. 389 ; 48 Id. 473 ; 50 Id. 281 ; 31 W. R. 15, 491 ; 32 Id. 207 ; 48 J. P. 388 213, 215, 217
——— *v.* Denaby Co., 14 Q. B. D. 209 ; 13 Id. 674 ; 11 App. Cas. 97 ; 53 L. J. Q. B. 579 ; 54 Id. 103 ; 55 Id. 181 ; 51 L. T. 698 ; 52 Id. 598 ; 54 Id. 1 ; 33 W. R. 491 203
Mander *v.* Falcke, (1891) 2 Ch. 554 ; 65 L. T. 203 86
Mangan *v.* Atherton, 35 L. J. Ex. 161 ; L. R. 1 Ex. 239 ; 4 H. & C. 388 ; 14 L. T. 411 ; 14 W. R. 771 275
Manisty *v.* Churchill, 39 Ch. D. 174 ; 58 L. J. Ch. 136 ; 59 L. T. 597 ; 35 W. R. 805 154
Manley *v.* Field, 7 C. B. N. S. 96 ; 29 L. J. C. P. 79 ; 6 Jur. N. S. 300 266
Mann *v.* Edinburgh Trams, (1893) A. C. 69 ; 62 L. J. P. C. 74 ; 68 L. T. 96 ; 57 J. P. 245 378
Mannering, *Ex p.*, 31 L. J. M. C. 153 ; 2 B. & S. 431 667
Manning *v.* Gill, 13 Eq. 485 ; 41 L. J. Ch. 736 ; 26 L. T. 14 ; 20 W. R. 357 . . . . . 16, 18
Mansell *v.* Norton, 22 Ch. D. 769 ; 52 L. J. Ch 357 ; 48 L. T. 654 ; 31 W. R. 325 60
Marathon, The, 40 L. T. 163 ; 48 L. J. P. D. A. 17 ; 4 Asp. M. C. 75. 740
Marc *v.* Rouy, 23 W. R. 89 ; 31 L. T. 372 788
Mare *v.* Stanford, 1 Giff. 288 ; 5 Jur. N. S. 1339 ; 1 L. T. 183 . . 369
Marfell *v.* S. Wales R. Co., 8 C. B. N. S. 525 ; 29 L. J. C. P. 315 ; 7 Jur. N. S. 240 ; 2 L. T. 629 ; 8 W. R. 765 198
Marie Joseph, The, L. R. 1 P. C. 219 ; 3 Moore, P. C. C. N. S. 556 ; 35 L. J. P. C. 66 ; 12 Jur. N. S. 677 ; 15 L. T. 6 ; 15 W. R. 201 ; Brown. & Lush. Ad. 449 736

PAGE
Marriott *v.* Stanley, 1 M. & Gr. 568 ; 1 Scott, N. R. 392 ; 4 Jur. 320. 275
Marseilles Co., *Re*, 30 Ch. D. 598 ; 55 L. J. Ch. 16 641
Marshall *v.* Berridge, 19 Ch. D. 233 ; 51 L. J. Ch. 329 ; 45 L. T. 599 ; 30 W. R. 93 298
——— *v.* Holloway, 2 Swanst. 432 419
——— *v.* Marshall, 5 P. D. 19 ; 48 L. J. P. 49 ; 39 L. T. 640 ; 27 W. R. 399 367
——— *v.* Nat. Provincial Bank, 61 L. J. Ch. 465 ; 66 L. T. 525 ; 40 W. R. 328 471
——— *v.* York, N. & B. R. Co., 11 C. B. 655 ; 21 L. J. C. P. 34 ; 16 Jur. 124 202
Martin *v.* G. I. P. R. Co., L. R. 3 Ex. 9 ; 37 L. J. Ex. 27 ; 17 L. T. 349 . . . . . 202, 210
——— *v.* G. N. R. Co., 16 C. B. 179 ; 3 C. L. R. 817 ; 1 Jur. N. S. 613 . 278
——— *v.* Podger, 2 W. Bl. 701 ; 5 Burr. 2631 12
——— *v.* Pridgeon, 28 L. J. M. C. 179 ; 1 E. & E. 778 ; 5 Jur. N. S. 894 ; 7 W. R. 412 647
——— *v.* Reid, 11 C. B. N. S. 730 ; 31 L. J. C. P. 126 ; 5 L. T. 727 192, 196
——— *v.* Seamore, 1 Cha. C. 170 26
Martindale *v.* Booth, 3 B. & Ad. 498 ; 1 L. J. K. B. 166 . . 13, 14
——— *v.* Smith, 1 Q. B. 389 ; 1 G. & D. 1 ; 10 L. J. Q. B. 155 ; 3 Jur. 932 . . . . . 695, 721
Martini *v.* Coles, 1 M. & S. 140 741
Martyn *v.* Clue, 18 Q. B. 661 ; 22 L. J. Q. B. 147 65
——— *v.* Williams, 1 H. & N. 817 ; 26 L. J. Ex. 117 ; 5 W. R. 351 . 90
Marzetti *v.* Smith, C. & E. 6 641
Mason *v.* Bradley, 11 M. & W. 590 ; 1 D. & L. 380 ; 12 L. J. Ex. 425 ; 7 Jur. 496 78
——— *v.* Corder, 7 Taunt. 9 ; 2 Marsh. 332 33
——— *v.* Jennings, T. Raym. 401 256
——— *v.* Morley, 34 L. J. Ch. 442 ; 12 L. T. 414 ; 13 W. R. 669 . 354
——— *v.* Paynter, 1 Q. B. 974 ; 1 G. & D. 381 ; 10 L. J. Q. B. 299 ; 6 Jur. 214 231
Master *v.* Miller, 4 T. R. 320 ; 5 Id. 367 ; 2 H. Bl. 140 ; 1 Anstr. 225 ; 2 R. R. 399 . . . . . 747, 777
Masters *v.* Green, 20 Q. B. D. 807 ; 59 L. T. 476 ; 52 J. P. 597 ; 36 W. R. 591 436
Mather *v.* Fraser, 2 K. & J. 536 ; 25 L. J. Ch. 361 ; 2 Jur. N. S. 900 ; 4 W. R. 387 427
Matheson *v.* Kilburn, unreported 349
Mathew *v.* Blackmore, 1 H. & N. 762 ; 26 L. J. Ex. 150 ; 5 W. R. 363 147
Mathews *v.* Feaver, 1 Cox, Ch. C. 278 ; 1 R. R. 39 23
——— *v.* Williams & Co., 63 L. J. Q. B. 494 ; 10 R. 210 . . 458
Mathias *v.* Mesnard, 2 C. & P. 353 427
Matson *v.* Cook, 4 B. N. C. 392 ; 6 Scott, 179 ; 1 Arn. 172 . . . 344
——— *v.* Wharam, 2 T. R. 80 ; 1 R. R. 429 288
Matthaei *v.* Galitzin, 18 Eq. 340 ; 43 L. J. Ch. 536 ; 30 L. T. 455 ; 22 W. R. 700 604
Matthews *v.* Carpenter, 16 L. R. Ir. 420 666
Matthieson *v.* London and County Bank, 5 C. P. D. 7 ; 48 L. J. C. P. 529 ; 41 L. T. 35 ; 27 W. R. 838 458
Maugham *v.* Sharpe, 17 C. B. N. S. 443 ; 34 L. J. C. P. 19 ; 10 Jur. N. S. 989 ; 10 L. T. 870 ; 12 W. R. 1057 193
Maunsell *v.* Mid. R. Co., 1 H. & M. 130 ; 32 L. J. Ch. 513 ; 9 Jur. N. S. 660 ; 8 L. T. 347, 826 ; 11 W. R. 768 366
Maving *v.* Todd, 1 Stark. 72 ; 4 Camp. 225 199
May, *Ex p.*, 2 B. & S. 426 ; 31 L. J. M. C. 161 670
——— *v.* Burdett, 9 Q. B. 101 ; 16 L. J. Q. B. 64 ; 10 Jur. 692 . . 805
——— *v.* Chapman, 16 M. & W. 355 470
——— *v.* Tomson, 20 Ch. D. 705 ; 51 L. J. Ch. 917 ; 47 L. T. 295 . 298

PAGE
Mayer *v.* Harding, L. R. 2 Q. B. 410 ; 9 B. & S. 27, n. ; 16 L. T. 429 . 670
Mayhew *v.* Eames, 3 B. & C. 601 ; 1 C. & P. 550 205
——— *v.* Herrick, 7 C. B. 229 ; 18 L. J. C. P. 179 ; 13 Jur. 1078 . 344
——— *v.* Nelson, 6 C. & P. 58 206
Mayou, *Ex p.*, 4 De G. J. & S. 664 ; 34 L. J. Bkcy. 25 ; 12 L. T. 254 ; 13 W. R. 629 19
Maxted *v.* Paine (No. 1), L. R. 4 Ex. 81, 203 ; 38 L. J. Ex. 41 ; 20 L. T. 34 ; 17 W. R. 886 546
——— *v.* ——— (No. 2), L. R. 6 Ex. 132 ; 38 L. J. Ex. 129 ; 40 Id. 57 ; 24 L. T. 149 ; 19 W. R. 527 . . . . . 166, 546
Mazzinghi *v.* Stephenson, 1 Camp. 291 369
Mears *v.* S. W. R. Co., 11 C. B. N. S. 850 ; 31 L. J. C. P. 220 ; 6 L. T. 190 89
Medawar *v.* Grand Hotel, (1891) 2 Q. B. 11 ; 60 L. J. Q. B. 209 ; 64 L. T. 851 ; 55 J. P. 614 . . . . . 123, 124, 125
Medcalfe *v.* Hodgson, Hutt. 120 236
Meggison *v.* Foster, 2 Y. & C. C. C. 336 ; 12 L. J. Ch. 415 ; 7 Jur. 546 28
Melbourn, *Ex p.*, 6 Ch. 64 ; 40 L. J. Bk. 25 ; 23 L. T. 578 ; 19 W. R. 83 621
Melhado *v.* Porto R. Co., L. R. 9 C. P. 503 ; 43 L. J. C. P. 253 ; 31 L. T. 57 ; 23 W. R. 57 349
Melliss *v.* Shirley L. B., 16 Q. B. D. 446 ; 55 L. J. Q. B. 143 ; 53 L. T. 810 ; 34 W. R. 187 ; 50 J. P. 214 373
Mellor *v.* Spateman, 1 Wms. Saund. 343 ; 2 Keb. 527 ; 1 Raym. 406...250, 274
Membery *v.* G. W. R. Co., 14 App. Cas. 179 ; 58 L. J. Q. B. 563 ; 61 L. T. 566 ; 38 W. R. 145 277
Mennie *v.* Blake, 6 E. & B 842 ; 25 L. J. Q. B. 399 ; 2 Jur. N. S. 953 ; 4 W. R. 739 228
Menzies *v.* Lightfoot, 11 Eq. 459 ; 40 L. J. Ch 561 ; 24 L. T. 695 ; 19 W. R. 578 555
Mercer, *Ex p.*, 17 Q. B. D. 290 ; 55 L. J. Q. B. 558 ; 54 L. T. 720 . 22
Merchant Banking Co. *v.* Phœnix Co., 5 Ch. D. 205 ; 46 L. J. Ch. 418 ; 36 L. T. 395 ; 25 W. R. 547 . . . 455, 466, 542, 727, 742
Merry *v.* Nickalls, 7 Ch. 733 ; L. R. 7 H. L. 530 ; 41 L. J. Ch. 767 ; 45 Id. 575 ; 26 L T. 496 ; 27 Id. 12 ; 32 Id. 623 ; 20 W. R. 531, 929 ; 23 Id. 663 . . . . . 166, 546, 559
Merryweather *v.* Nixan, 8 T. R. 186 ; 16 R. R. 810 . 152, 154, 155, 365, 383, 390
Messina *v.* Petrococchino, L. R. 4 P. C. 144 ; 41 L. J. P. C. 27 ; 26 L. T. 561 ; 20 W R. 451 608
Metcalfe *v.* L. & B R. Co., 4 C. B. N. S. 307 ; 27 L. J. C. P. 205 ; 4 Jur. 487 ; 6 W. R. 498, 580, 593 209
Metrop. Asylum *v.* Hill, 6 App. Cas. 193 ; 4 Q. B. D. 433 ; 48 L. J. Q. B. 562 ; 50 Id. 353 ; 40 L. T. 491 ; 44 Id. 653 ; 29 W. R. 317 . . . . . 826, 828
——— Bank *v.* Pooley, 10 App. Cas. 210 ; 54 L. J. Q. B. 449 ; 53 L. T. 163 ; 33 W. R. 709 261
——— R. Co. *v.* Jackson, 3 App. Cas. 193 ; L. R. 10 C. P. 49 ; 44 L. J C. P. 83 ; 47 Id. 303 ; 31 L. T. 475 ; 37 Id. 679 ; 23 W. R. 78 ; 26 Id. 175 276
——— Society *v.* Brown, 4 H. & N. 428 ; 1 E. & E. 832 ; 28 L. J. Ex. 340 ; 5 Jur. N. S. 378 517
Meux *v.* City of London Electric Co., (1895) 1 Ch. 287 ; 64 L. J. Ch. 216 ; 70 L T. 762 ; 72 Id. 34 ; 42 W. R. 644 ; 43 Id. 238 ; 8 R. 823 828
Mews *v.* Carr, 1 H. & N. 484 ; 26 L. J. Ex. 39 321
Meyer *v.* Decroix, (1891) A. C. 520 ; 25 Q. B. D. 343 ; 59 L. J. Q. B. 538 ; 61 Id. 205 ; 65 L. T. 653 ; 40 W. R. 513. . . . 458
——— *v.* Dresser, 16 C. B. N. S. 646 ; 33 L. J. C. P. 289 ; 10 L. T. 612 ; 12 W. R. 983 553
Meyerhoff *v.* Froelich, 4 C. P. D. 63 ; 3 Id. 333 ; 48 L J. C. P. 43 ; 39 L. T. 620 ; 27 W. R. 258 570

PAGE

Meyerstein *v.* Barber, L. R. 2 C. P. 38, 661 ; L. R. 4 H. L. 317 ; 36 L. J. C. P. 48 ; 39 Id. 187 ; 16 L. T. 569 ; 22 Id. 808 ; 15 W. R. 998 ; 18 Id. 1041 105
Michael *v.* Scockwith, Cro. Eliz. 120 . . . . . 751, 778
Middlecome *v.* Marlow, 2 Atk. 519 20
Middleditch *v.* Ellis, 2 Exch. 623 ; 17 L. J. Ex. 365 147
Middlemore *v.* Goodale, Cro. Car. 503, 505 ; 1 Rolles Abr. 521 K. pl. 6; W. Jones, 406 . . . . . 65, 72
Middlesex (Sheriff of), *Re*, 11 A. & E. 273 ; 3 P. & D. 330 ; 9 L. J. Q. B. 218 ; 4 Jur. 68, 70 286
Midland Ins. Co. *v.* Smith, 6 Q. B. D. 561 ; 50 L. J. Q. B. 329 ; 45 L. T. 411 ; 29 W. R. 850 ; 45 J. P. 699 279
——— R. Co. *v.* Bromley, 17 C. B. 372 ; 25 L. J. C. P. 94 ; 2 Jur. N. S. 140 ; 4 W. R. 258 . . . . . 201, 222
Mighell *v.* Sultan of Johore, (1894) 1 Q. B. 149 ; 63 L. J. Q. B. 593 ; 70 L. T. 64 ; 58 J. P. 244 . . . . . 625, 626, 627, 629
Mildred *v.* Maspons, 8 App. Cas. 874 ; 9 Q. B. D. 530 ; 51 L. J. Q. B. 604 ; 53 Id. 33 ; 47 L. T. 318 ; 49 Id. 685 ; 30 W. R. 862 ; 32 Id. 125 745
Miles, *Ex p.*, 15 Q. B. D. 39 ; 54 L. J. Q. B. 566 728
——— *v.* Bough, 3 D. & L. 105 ; 15 L. J. Q. B. 30 ; 10 Jur. 390 ; 3 Railw. Cas. 668 342
——— *v.* Cattle, 6 Bing. 743 ; 4 M. & P. 630 206
——— *v.* Furber, L. R. 8 Q. B. 77 ; 42 L. J. Q. B. 41 ; 27 L. T. 756 ; 21 W. R. 262 . . . . . 428, 429
——— *v.* New Zealand Co., 32 Ch. D. 266 ; 54 L. J. Ch. 1035 ; 55 Id. 801 ; 54 L. T. 582 ; 34 W. R. 669 . . . 295, 307, 331
——— *v.* Tobin, 17 L. T. 432 ; 16 W. R. 465 45
——— *v.* Williams, 9 Q. B. 47 ; 16 L. J. Q. B. 56 ; 11 Jur. 36 . . 342
Millen *v.* Brasch, 10 Q. B. D. 142 ; 8 Id. 35 ; 51 L. J. Q. B. 166 ; 52 Id. 127 ; 45 L. T. 653 ; 47 Id. 685 ; 31 W. R. 190 ; 46 J. P. 183 ; 47 Id. 180 . . . . . 206, 207
Miller *v.* Green, 2 Tyr. 1 ; 2 C. & J. 143 ; 8 Bing. 92 ; 1 M. & Scott, 199 ; 1 L. J. Ex. 51 . . . . . 426, 430
——— *v.* Hope, 2 Shaw, App. Cas. 125 265
——— *v.* Race, 1 Burr. 452 . . . . . 447, 752
——— *v.* Tetherington, 6 H. & N. 278 ; 7 Id. 954 ; 31 L. J. Ex. 363 ; 7 Jur. N. S. 214 ; 3 L. T. 893 ; 9 W. R. 437 ; 10 Id. 356 . 541, 555
Mills *v.* Auriol, 4 T. R. 94 ; 1 H. Bl. 433 ; 2 R. R. 341 . . . 70
——— *v.* Ball, 2 B. & P. 457 ; 5 R. R. 653 . . . . . 727, 732
——— *v.* Dunham, (1891) 1 Ch. 576 ; 60 L. J. Ch. 362 ; 64 L. T. 712 ; 39 W. R. 289 412
——— *v.* Fowkes, 5 B. N. C. 455 ; 7 Scott, 444 ; 2 Arn. 62 ; 8 L. J. C. P. 276 ; 3 Jur. 406 565
Milner *v.* G. N. R. Co., 50 L. T. 367 353
Milnes *v.* Bale, L. R. 10 C. P. 591 ; 44 L. J. C. P. 336 ; 33 L. T. 174 ; 23 W. R. 660 640
——— *v.* Branch, 5 M. & S. 411 . . . . . 72, 79, 89, 90
Mineral Water Soc. *v.* Booth, 36 Ch. D. 465 ; 57 L. T. 573 ; 36 W. R. 274 415
Minet *v.* Gibson, 3 T. R. 481 ; 1 H. Bl. 569 ; 1 R. R. 754 . . 751, 752, 755, 761, 763, 773
Minshall *v.* Lloyd, 2 M. & W. 450 ; 1 Jur. 336 14
Minshull *v.* Oakes, 2 H. & N. 793 ; 27 L. J. Ex. 194 ; 4 Jur. N. S. 169 . . . . . 66—69
Mirabita *v.* Imperial Ottoman Bank, 3 Ex. D. 164 ; 47 L. J. Ex. 418 ; 38 L. T. 597 736
Mirams, *Re*, (1891) 1 Q. B. 594 ; 60 L. J. Q. B. 397 ; 64 L. T. 117 ; 39 W. R. 461 ; 8 M. B. R. 59 377
Missouri S. S. Co., *Re*, 42 Ch. D. 321 ; 58 L. T. 377 ; 6 Asp. M. C. 261 ; 37 W. R. 696 609

PAGE

Mitchell *v.* Cragg, 10 M. & W. 367 ; 2 Dowl. N. S. 252 ; 11 L. J. Ex. 343 328
——— *v.* Crassweller, 13 C. B. 237 ; 22 L. J. C. P. 100 ; 17 Jur. 716 ; 1 W. R. 153 353
——— *v.* Darley Main Co., 14 Q. B. D. 125 ; 11 App. Cas. 127 ; 53 L. J. Q. B. 471 ; 32 W. R. 947 . . . 271, 272, 446
——— *v.* Foster, 9 Dowl. 527 ; 12 A. & E. 472 ; 9 L. J. M. C. 95 ; 4 P. & D. 150 652
——— *v.* L. & Y. R. Co., L. R. 10 Q. B. 256 ; 44 L. J. Q. B. 107 ; 33 L. T. 161 ; 23 W. R. 853 218
——— *v.* Reynolds, 1 P. Wms. 181 ; 10 Mod. 27, 85, 130 ; Fort. 296. 391
Mitchison *v.* Thomson, C. & E. 72 51
Moakes *v.* Nicholson, 19 C. B. N. S. 290 ; 34 L. J. C. P. 273 ; 12 L. T. 573 729
Moenich *v.* Fenestre, 61 L. J. Ch. 737 ; 67 L. T. 602 412
Moffatt *v.* Bateman, L. R. 3 P. C. 115 ; 6 Moore, P. C. C. N. S. 369 ; 22 L. T. 140 227
Moffett *v.* Whittaker, L. & T. 141 26
Mogul S. S. Co. *v.* McGregor, (1892) A. C. 25 ; 23 Q. B. D. 598 ; 21 Id. 544 ; 57 L. J. Q. B. 541 ; 58 Id. 465 ; 61 Id. 295 ; 66 L. T. 1 ; 59 Id. 1 ; 61 Id. 820 ; 40 W. R. 337 ; 37 Id. 286, 756 ; 56 J. P. 101 ; 53 Id. 391, 709 ; 7 Asp. M. C. 120 ; 6 Id. 320, 455 ... 267, 377, 415
Mollett *v.* Wackerbarth, 5 C. B. 181 785
Monk *v.* Whittenbury, 2 B. & Ad. 484 ; 1 M. & Rob. 81 743
Montrose Peerage Case, 1 Macq. H. L. 401 255
Moodie *v.* Bannister, 4 Drew. 432 ; 28 L. J. Ch. 881 ; 5 Jur. N. S. 402 ; 7 W. R. 278 571
Moon *v.* Witney Union, 3 B. N. C. 814 ; 5 Scott, 1 ; 3 Hodges, 206 ; 6 L. J. C. P. 305 541
Moor *v.* Roberts, 3 C. B. N. S. 830 ; 27 L. J. C. P. 161 ; 4 Jur. N. S. 241 ; 6 W. R. 297 342
Moorcock, The, 14 P. D. 64 ; 13 Id. 157 ; 58 L. J. P. 15, 73 ; 60 L. T. 654 ; 59 Id. 872 ; 37 W. R. 31, 439 ; 6 Asp. M. C. 357, 373 . 179, 198
Moore *v.* Bushell, 27 L. J. Ex. 3 140
——— *v.* Campbell, 10 Exch. 323 ; 23 L. J. Ex. 310 ; 2 C. L. R. 1084 547, 560
——— *v.* Greg, 2 Phil. 717 ; 2 De G. & S. 304 ; 12 Jur. 952 . . 88
——— *v.* Harris, 1 App. Cas. 318 ; 47 L. J. P. C. 54 ; 34 L. T. 519 ; 24 W. R. 887 609
——— *v.* Hart, 1 Vern. 110, 201 300
——— *v.* Meagher, 1 Taunt. 39 ; 3 Smith, 135 ; 9 R. R. 702 . . 280
——— *v.* Mid. R. Co., Ir. R. 9 C. L. 20 221
——— *v.* Mourgue, 2 Cowp. 479 185
——— *v.* Pyrke, 11 East, 52 158
——— *v.* Wilson, 1 T. R. 659 ; 1 R. R. 347 221
Morant *v.* Taylor, 1 Ex. D. 188 ; 45 L. J. M. C. 78 ; 34 L. T. 139 ; 24 W. R. 461 648
More's Case, Cro. Eliz. 26 47
Morewood *v.* Pollok, 1 E. & B. 743 ; 1 C. L. R. 78 ; 22 L. J. Q. B. 250 ; 17 Jur. 881 ; 1 W. R. 304 218
——— *v.* S. Yorkshire R. Co., 3 H. & N. 798 ; 28 L. J. Ex. 114 . 15
——— *v.* Wilkes, 6 C. & P. 144 18
Morgan *v.* Abergavenny, 8 C. B. 768 430
——— *v.* Bain, L. R. 10 C. P. 15 ; 44 L. J. C. P. 47 ; 31 L. T. 616 ; 23 W. R. 239 724
——— *v.* Brown, 4 A. & E. 515 ; 6 N. & M. 57 ; 1 H. & W. 717 ; 5 L. J. M. C. 77 641
——— *v.* Davies, 3 C. P. D. 260 ; 39 L. T. 60 ; 26 W. R. 816 . . 539
——— *v.* Edwards, 5 H. & N. 415 ; 29 L. J. M. C. 108 ; 6 Jur. N. S. 379 671
——— *v.* Hedger, L. R. 5 C. P. 485 ; 40 L. J. M. C. 13 . . 648, 651

PAGE

Morgan *v.* Hill, (1894) 3 Ch. 400 ; 64 L. J. Ch. 6 ; 71 L. T. 557 ; 42 W. R. 618 ; 43 Id. 1 154
——— *v.* Hughes, 2 T. R. 225 640
——— *v.* Ravey, 6 H. & N. 265 ; 2 F. & F. 283 ; 30 L. J. Ex. 131 ; 3 L. T. 784 ; 9 W. R. 376 123
——— *v.* Rowlands, L. R. 7 Q. B. 493 ; 41 L. J. Q. B. 187 ; 26 L. T. 855 ; 20 W. R. 726 . . . . . 563, 564
Morison *v.* Turnour, 18 Ves. 175 320
Morland *v.* Cook, 6 Eq. 252 ; 37 L. J. Ch. 825 ; 18 L. T. 496 ; 16 W. R. 777 . . . . . 89, 266
Morley *v.* Pincombe, 2 Exch. 101 ; 18 L. J. Ex. 272 429
——— *v.* Rennoldson, (1895) 1 Ch. 449 ; 64 L. J. Ch. 485 ; 72 L. T. 308 ; 43 W. R. 518 367
Morrel *v.* Cowan, 7 Ch. D. 151 ; 47 L. J. Ch. 73 ; 37 L. T. 586 ; 26 W. R. 90 296
Morris *v.* Dixon, 4 A. & E. 845 ; 6 N. & M. 438 ; 2 H. & W. 57 . 571
——— *v.* Langdale, 2 B. & P. 284 280
——— *v.* Morris, (1895) A. C. 587 . . . . . *Add.* 17
——— *v.* Salberg, 22 Q. B. D. 614 ; 58 L. J. Q. B. 275 ; 61 L. T. 283 ; 37 W. R. 469 ; 53 J. P. 772 349
Morrish *v.* Murrey, 13 M. & W. 52 ; 2 D. & L. 199 ; 13 L. J. Ex. 261 107
Morritt, *Re*, 18 Q. B. D. 222 ; 56 L. J. Q. B. 139 ; 56 L. T. 42 ; 35 W. R. 277 . . . . . 192, 193
——— *v.* N. E. R. Co., 1 Q. B. D. 302 ; 45 L. J. Q. B. 289 ; 34 L. T. 940 ; 24 W. R. 386 . . . . . 207, 210
Morse *v.* Slue, 2 Lev. 69 ; 1 Vent. 190, 238 ; T. Raym. 220 178 . 181, 199, 256
Mors Le Blanch *v.* Wilson, L. R. 8 C. P. 227 ; 42 L. J. C. P. 70 ; 28 L. T. 415 . . . . . 150, 227
Mortimer *v.* S. Wales R. Co., 1 E. & E. 375 ; 28 L. J. Q. B. 129 ; 5 Jur. N. S. 784 ; 7 W. R. 292 663
Mortimore *v.* Wright, 6 M. & W. 482 ; 9 L. J. Ex. 158 ; 4 Jur. 465 . 145
Morton *v.* Palmer, 51 L. J. Q. B. 7 ; 46 L. T. 285 ; 30 W. R. 115 . 436
——— *v.* Woods, L. R. 3 Q. B. 658 ; 4 Id. 293 ; 9 B. & S. 632, 650 ; 37 L. J. Q. B. 242 ; 38 Id. 81 ; 18 L. T. 791 ; 16 W. R. 979 ; 17 Id. 414 . . . . . 93, 94, 516, 518, 523
Moss *v.* Gallimore, 1 Dougl. 279 . . . . . 497, 526
Mostyn *v.* Fabrigas, 1 Cowp. 161 ; 20 Howell, St. Tr. 82 573
——— *v.* Mostyn, 5 Ch. 457 ; 39 L. J. Ch. 780 ; 22 L. T. 461 ; 18 W. R. 657 146
Moufflet *v.* Cole, L. R. 8 Ex. 32 ; 7 Id. 70 ; 41 L. J. Ex. 28 ; 42 Id. 8 ; 25 L. T. 839 ; 28 Id. 678 ; 20 W. R. 339 ; 21 Id. 175 404
Mouldsdale *v.* Birchall, 2 W. Bl. 820 770
Moule *v.* Garrett, L. R. 5 Ex. 132 ; 7 Id. 101 ; 39 L. J. Ex. 69 ; 41 Id. 62 ; 26 L. T. 367 ; 20 W. R. 416 . . . . . 70, 166
Mountjoy's Case, 5 Co. Rep. 3 b 54
Mountstephen *v.* Lakeman, L. R. 5 Q. B. 613 ; 7 Id. 196 ; L. R. 7 H. L. 17 ; 39 L. J. Q. B. 275 ; 18 W. R. 1001 290
Moxham, The M., 1 P. D. 43, 107 ; 46 L. J. A. 17 ; 34 L. T. 559 ; 24 W. R. 650 . . . . . 605, 606
Moxon *v.* Atkins, 3 Camp. 200 ; 13 R. R. 789 546
Mulcarry *v.* Eyres, Cro. Car. 511 41
Mulliner *v.* Florence, 3 Q. B. D. 484 ; 47 L. J. Q. B. 700 ; 38 L. T. 167 ; 26 W. R. 385 . . . . . 125, 126, 192, 195, 228
Mumford *v.* Collier, 25 Q. B. D. 279 ; 59 L. J. Q. B. 552 ; 2 Meg. 305 ; 38 W. R. 716 524
——— *v.* Gething, 7 C. B. N. S. 305 ; 29 L. J. C. P. 105 ; 6 Jur. N. S. 428 ; 1 L. T. 61 ; 8 W. R. 187 . . . 294, 403, 407, 408, 409
Muncey *v.* Dennis, 1 H. & N. 216 ; 26 L. J. Ex. 66 538
Munday *v.* Asprey, 13 Ch. D. 855 ; 49 L. J. Ch. 216 ; 42 L. T. 143 ; 28 W. R. 317 299

PAGE

Munden *v.* Duke of Brunswick, 10 Q. B. 656 ; 16 L. J. Q. B. 300 ; 11 Jur. 801 626
Municipal Society *v.* Smith, 22 Q. B. D. 70 ; 58 L. J. Q. B. 61 ; 37 W. R. 42 . . . . . 64, 511
Munroe *v.* Pilkington, 2 B. & S. 11 ; 31 L. J. Q. B. 81 ; 8 Jur. N. S. 557 ; 6 L. T. 21 608
Munster *v.* Lamb, 11 Q. B. D. 588 ; 52 L. J. Q. B. 726 ; 49 L. T. 252 ; 32 W. R. 243 ; 47 J. P. 805 265
——— *v.* S. E. R. Co. 4 C. B. N. S. 676 ; 27 L. J. C. P. 308 ; 4 Jur. N. S. 738 201
Murphy *v.* Boese, L. R. 10 Ex. 126 ; 44 L. J. Ex. 40 ; 32 L. T. 122 ; 23 W. R. 474 322
——— *v.* O'Sullivan, 11 Ir. Jur. N. S. 111 304
Murray *v.* Currie, L. R. 6 C. P. 24 ; 40 L. J. C. P. 26 ; 23 L. T. 557 ; 19 W. R. 104 353
——— *v.* Glasgow & S. W. R. Co., 11 Court of Sess. Cases, 4th series, 205 ; 4 Nev. & Mac. 456 203
Muschamp *v.* Lancaster & P. J. R. Co., 8 M. & W. 421 ; 2 Railw. Cas. 607 ; 5 Jur. 656 224
Musgrave *v.* Pulido, 5 App. Cas. 102 ; 49 L. J. P. C. 20 ; 41 L. T. 629 ; 28 W. R. 373 . . . . . 585, 624
Muskett *v.* Hill, 5 B. N. C. 694 ; 7 Scott, 855 ; 9 L. J. C. P. 201 . 90
Muspratt *v.* Gregory, 1 M. & W. 633 ; 3 Id. 677 ; 1 T. & G. 1086 ; 7 L. J. Ex. 385 428
Musurus Bey *v.* Gadban, (1894) 2 Q. B. 352 ; 63 L. J. Q. B. 621 ; 71 L. T. 51 ; 42 W. R. 545 ; 9 R. 519 . . . . . 630, 631
Myers *v.* Sarl, 3 E. & E. 306 ; 30 L. J. Q. B. 9 ; 7 Jur. N. S. 97 ; 9 W. R. 96 . . . . . 538, 555, 556
Mytton *v.* Mid. R. Co., 4 H. & N. 615 ; 28 L. J. Ex. 385 ; 7 W. R. 737 224

N.

Naden, *Ex p.*, 9 Ch. 670 ; 43 L. J. Bk. 121 ; 30 L. T. 575, 743 ; 22 W. R. 768, 936 368
Nailor *v.* Scott, 2 Ld. Raym. 1558 532
Naish *v.* Tatlock, 2 H. Bl. 319 ; 3 R. R. 384 141
Nargett *v.* Nias, 1 E. & E. 439 ; 28 L. J. Q. B. 143 ; 5 Jur. N. S. 198 434
Nash *v.* Hodgson, 6 De G. M. & G. 474 ; 25 L. J. Ch. 186 ; 1 Jur. N. S. 946 565
—— *v.* Lucas, L. R. 2 Q. B. 590 ; 8 B. & S. 531 ; 16 L. T. 610 . . 108
National Bank *v.* Silke, (1891) 1 Q. B. 435 ; 60 L. J. Q. B. 199 ; 63 L. T. 787 ; 39 W. R. 361 458
——— Prov. Bank *v.* Marshall, 40 Ch. D. 112 ; 58 L. J. Ch. 229 ; 60 L. T. 341 ; 37 W. R. 183 401
——— Telephone Co. *v.* Baker, (1893) 2 Ch. 186 ; 62 L. J. Ch. 699 ; 68 L. T. 283 ; 57 J. P. 373 ; 3 R. 318 828
Neale *v.* Day, 28 L. J. Ch. 45 ; 4 Jur. N. S. 1225 ; 7 W. R. 45 . . 19
——— *v.* Ratcliff, 15 Q. B. 916 ; 20 L. J. Q. B. 130 ; 15 Jur. 166 . 30
——— *v.* Wyllie, 3 B. & C. 533 151
Needham & Beaumont's Case, 1 And. 233 9
Neilson *v.* Harford, 8 M. & W. 806 ; 11 L. J. Ex. 20 560
——— *v.* James, 9 Q. B. D. 546 ; 51 L. J. Q. B. 369 ; 46 L. T. 791 . 554
Nelson *v.* Dahl, 12 Ch. D. 576 ; 6 App. Cas. 38 ; 50 L. J. Ch. 411 ; 41 L. T. 365 ; 44 Id. 381 ; 28 W. R. 57 ; 29 Id. 543 559
Nene Co. *v.* Dunkley, 4 Ch. D. 1 297
Ness *v.* Stephenson, 9 Q. B. D. 245 ; 47 J. P. 134 436
Netherlands Steamboat Co. *v.* Styles, 9 Moo. P. C. 286 . . . 276
Neve *v.* Hollands, 18 Q. B. 262 ; 21 L. J. Q. B. 289 ; 16 Jur. 933 . 568
Nevill's Case, 6 Ch. 43 ; 40 L. J. Ch. 1 ; 23 L. T. 577 ; 19 W. R. 36. 166
Nevin *v.* Great S. & W. R. Co., 30 L. R. Ir. 125 . . . . 217, 218

PAGE

New Club Co., *Re*, 34 Ch. D. 646 ; 56 L. J. Ch. 332 ; 56 L. T. 792 ; 35 W. R. 421 433
—— Eberhardt Co., *Re*, 43 Ch. D. 118 ; 59 L. J. Ch. 73 ; 62 L. T. 301 ; 38 W. R. 97 299
—— River Co. *v.* Johnson, 29 L. J. M. C. 93 ; 2 E. & E. 435 ; 6 Jur. N. S. 374 ; 1 L. T. 295 ; 8 W. R. 179 273
Newbould *v.* Coltman, 6 Exch. 189 ; 20 L. J. M. C. 149 462
———— *v.* Smith, 29 Ch. D. 882 ; 33 Id. 127 ; 14 App. Cas. 423 ; 55 L. J. Ch. 788 ; 53 L. T. 137 ; 55 Id. 194 ; 61 Id. 814 ; 33 W. R. 690 ; 34 Id. 690 568
Newbury *v.* Armstrong, 6 Bing. 201 294
Newcastle *v.* A.-G., 12 Cl. & F. 402 ; 5 Beav. 307 ; 6 Jur. 789 . . 30
Newell *v.* Radford, L. R. 3 C. P. 52 ; 37 L. J. C. P. 1 ; 17 L. T. 118 ; 16 W. R. 79 . . . . . 295, 298
——— *v.* Van Praagh, L. R. 9 C. P. 96 ; 43 L. J. C. P. 94 ; 29 L. T. 891 ; 22 W. R. 377 335
Newington *v.* Levy, L. R. 5 C. P. 607 ; 6 Id. 180 ; 39 L. J. C. P. 334 ; 40 Id. 29 ; 23 L. T. 70, 595 ; 18 W. R. 1198 ; 19 Id. 473 . . 340
Newman *v.* Baker, 8 C. B. N. S. 200 670
———— *v.* Bendyshe, 10 A. & E. 11 ; 2 P. & D. 340 ; 8 L. J. M. C. 58 641
———— *v.* Hardwicke, 8 A. & E. 124 ; 3 N. & P. 368 ; 7 L. J. M. C. 101 ; 2 Jur. 493 640
———— *v.* Newman, 4 M. & S. 66 ; 1 Stark. 101 371
Newsom *v.* Thornton, 6 East, 17 ; 2 Smith, 207 ; 8 R. R. 378 . 727, 741
Newstead *v.* Searles, 1 Atk. 265 28
Newton *v.* Harland, 1 M. & Gr. 644 ; 1 Scott, N. R. 473 ; 2 Jur. 350 133, 134
——— *v.* Marsden, 31 L. J. Ch. 690 ; 8 Jur. N. S. 1034 ; 6 L. T. 155 ; 10 W. R. 438 367
Nicholls *v.* Bastard, 2 C. M. & R. 659 ; T. & G. 156 ; 1 Gale, 295 ; 5 L. J. Ex. 7 344
——— *v.* Le Feuvre, 2 B. N. C. 83 ; 1 Hodges, 255 ; 2 Scott, 146 ; 4 L. J. C. P. 281 727
Nichols *v.* Haywood, Dyer, 59 a. 778
——— *v.* Marsland, L. R. 10 Ex. 255 ; 2 Ex. D. 1 ; 46 L. J. Ex. 174 ; 35 L. T. 725 ; 25 W. R. 173 829
——— *v.* Regent's Canal Co., 71 L. T. 249, 836 ; 63 L. J. Q. B. 641. 570
——— *v.* Stretton, 10 Q. B. 346 ; 11 Jur. 1009 413
Nicholson *v.* Gooch, 5 E. & B. 999 ; 25 L. J. Q. B. 137 ; 2 Jur. N. S. 303 386
———— *v.* Harper, (1895) 2 Ch. 415 ; 73 L. T. 19 ; 43 W. R. 550 . 745
———— *v.* Revill, 4 A. & E. 675 ; 6 N. & M. 192 ; 1 Har. & W. 756 ; 5 L. J. K. B. 129 782
———— *v.* Willan, 5 East, 507 ; 2 Smith, 107 ; 15 R. R. 745. . 205
Nickalls *v.* Merry. See *Merry* v. *Nickalls.*
Nicklin *v.* Williams, 10 Exch. 259 ; 2 C. L. R. 1304 ; 23 L. J. Ex. 335 446
Nield *v.* L. & N. W. R. Co., L. R. 10 Ex. 4 ; 44 L. J. Ex. 15 ; 23 W. R. 60. . . . . 266, 824
Nielsen *v.* Wait, 16 Q. B. D. 67 ; 55 L. J. Q. B. 87 ; 54 L. T. 344 ; 34 W. R. 33. 547
Nifa, The, (1892) P. 411 ; 62 L. J. A. 12 ; 69 L. T. 56 554
Nind *v.* Nineteenth Century Society, (1894) 2 Q. B. 226 ; 63 L. J. Q. B. 106, 636 ; 70 L. T. 316, 831 ; 42 W. R. 349, 481 ; 58 J. P. 732 ; 9 R. 468 51
Nitro-Phosphate Co. *v.* L. & St. K. Docks, 9 Ch. D. 503 ; 37 L. T. 330 ; 39 Id. 133 ; 27 W. R. 267 . . . . . 205, 266, 829
Noble *v.* Durell, 3 T. R. 271 552
——— *v.* Kennoway, 2 Dougl. 510 . . . . . 478, 541
——— *v.* National Discount Co., 5 H. & N. 225 ; 29 L. J. Ex. 210 . 140
Noel *v.* Hart, 8 C. & P. 230 287
Noke *v.* Awder, Cro. Eliz. 373, 436 ; Moore, 419 . . 65, 72, 91, 95

PAGE
Norcutt *v.* Dodd, Cr. & Ph. 100 ; 10 L. J. Ch. 296 ; 5 Jur. 835 . . 23
Norden Steam Co. *v.* Dempsey, 1 C. P. D. 654 ; 45 L. J. C. P. 764 ; 24 W. R. 984 . . . . . 547, 548, 554
Nordenfelt *v.* Maxim Nordenfelt Co., (1893) 1 Ch. 630 ; (1894) A. C. 535 ; 62 L. J. Ch. 273, 749 ; 63 Id. 908 ; 67 L. T. 469 ; 68 Id. 833 ; 71 Id. 489 ; 41 W. R. 604 ; 42 Id. 238 ; 2 R. 298...404, 408, 410, 412, 413
Norman *v.* Binnington, 25 Q. B. D. 475 ; 59 L. J. Q. B. 490 ; 63 L. T. 108 ; 38 W. R. 702 220
——— *v.* Cole, 3 Esp. 253 136
——— *v.* Phillips, 14 M. & W. 277 ; 14 L. J. Ex. 306 ; 9 Jur. 832 . 221
Norris *v.* Chambres, 29 Beav. 246 ; 3 De G. F. & J. 583 ; 7 Jur. N. S. 689 ; 3 L. T. 720 ; 9 W. R. 794 603
North *v.* Bassett, (1892) 1 Q. B. 333 ; 61 L. J. Q. B. 177 ; 66 L. T. 189 ; 40 W. R. 223 ; 56 J. P. 389 546
——— London Co. *v.* Jacques, 49 L. T. 659 ; 32 W. R. 283 ; 48 J. P. 405 51
——— Staffordshire R. Co. *v.* Peek. See *Peek* v. *N. Staffordshire R. Co.*
——— -Western Bank *v.* Poynter, (1895) A. C. 56 ; 64 L. J. P. C. 27 ; 72 L. T. 93 196
Northam *v.* Bowden, 11 Exch. 70 ; 24 L. J. Ex. 237 344
Northumberland Avenue Hotel, *Re*, 33 Ch. D. 16 ; 54 L. T. 76, 777 ; 56 Id. 833 350
Norton *v.* Florence Land Co., 7 Ch. D. 332 ; 38 L. T. 377 ; 26 W. R. 123 . . . . . 603, 623
——— *v.* Syms, Moore, 856 ; Hob. 12 . . . . . 371, 396
——— *v.* Wood, 1 Russ. & M. 178 339
Norval *v.* Pascoe, 34 L. J. Ch. 82 ; 10 Jur. N. S. 792 ; 10 L. T. 809 ; 12 W. R. 973 . . . . . 60, 91
Norwich *v.* Norfolk R. Co., 4 E. & B. 395 ; 24 L. J. Q. B. 105 ; 1 Jur. N. S. 344 ; 3 C. L. R. 519 378
Nottingham Co. *v.* Butler, 16 Q. B. D. 778 ; 15 Id. 261 ; 54 L. J. Q. B. 545 ; 55 Id. 280 ; 54 L. T. 444 ; 34 W. R. 405 88
Nouvion *v.* Freeman, 15 App. Cas. 1 ; 35 Ch. D. 704 ; 37 Id. 244 ; 57 L. J. Ch. 367 ; 59 Id. 337 ; 56 L. T. 829 ; 58 Id. 242 ; 62 Id. 189 ; 38 W. R. 581 608
Novelli *v.* Rossi, 2 B. & Ad. 757 785
Novello *v.* Toogood, 1 B. & C. 554 ; 2 D. & R. 833 437
Nowell *v.* Worcester, 9 Exch. 457 ; 23 L. J. Ex. 139 ; 18 Jur. 64 . 380
Nugent *v.* Kirwan, 1 Jebb. & S. 97 429
——— *v.* Smith, 1 C. P. D. 19, 423 ; 45 L. J. C. P. 19, 697 ; 33 L. T. 731 ; 34 Id. 827 ; 24 W. R. 237 ; 25 Id. 117 . . . 199, 205, 220
Nunn *v.* Wilsmore, 8 T. R. 521 ; 5 R. R. 434 . . . . . 14, 18
Nuttall *v.* Bracewell, L. R. 2 Ex. 1 ; 4 H. & C. 714 ; 36 L. J. Ex. 1 ; 12 Jur. N. S. 989 ; 15 L. T. 313 346
Nye *v.* Moseley, 6 B. & C. 133 ; 9 D. & R. 165 368

O.

Oak Pits Co., *Re*, 21 Ch. D. 322 ; 51 L. J. Ch. 768 ; 47 L. T. 7 ; 30 W. R. 759 433
Oakeley *v.* Ooddeen, 2 F. & F. 856 470
Oakley *v.* Monck, 4 H. & C. 251 ; 3 Id. 706 ; L. R. 1 Ex. 159 ; 34 L. J. Ex. 137 ; 35 Id. 87 ; 11 Jur. N. S. 376 ; 12 L. T. 465 ; 14 Id. 20 ; 13 W. R. 721 ; 14 Id. 406 506
——— *v.* Portsmouth Co., 11 Exch. 618 ; 25 L. J. Ex. 99 ; 4 W. R. 236 204
O'Brien *v.* Lewis, 32 L. J. Ch. 665 ; 9 Jur. N. S. 620, 764 ; 8 L. T. 380, 683 ; 11 W. R. 716, 673 114
O'Bryne *v.* Hartington, Ir. R. 11 C. L. 445 630
Ockford *v.* Barelli, 20 W. R. 116 ; 25 L. T. 504 331

PAGE

Ockford *v.* Freston, 6 H. & N. 466 ; 30 L. J. Ex. 89 ; 7 Jur. N. S. 78 ; 3 L. T. 705 ; 9 W. R. 315 114
Odell *v.* Wake, 3 Camp. 394 ; 14 R. R. 763 70
Ogden *v.* Benas, L. R. 9 C. P. 513 ; 43 L. J. C. P. 259 ; 30 L. T. 683 ; 22 W. R. 805 458
Ogg *v.* Shunter, 1 C. P. D. 47 ; L. R. 10 C. P. 159 ; 44 L. J. C. P. 161 ; 45 Id. 44 ; 32 L. T. 114 ; 33 Id. 492 ; 23 W. R. 319 ; 24 Id. 100 737
O'Grady *v.* Cardwell, 21 W. R. 340 630
Oland *v.* Burdwick, Cro. Eliz. 460 ; 5 Co. Rep. 116 a ; Moore, 394 . 533
Oldershaw *v.* King, 2 H. & N. 399, 517 ; 27 L. J. Ex. 120 ; 3 Jur. N. S. 1152 . . . . . 292, 295
Oliver *v.* Hunting, 44 Ch. D. 205 ; 59 L. J. Ch 255 ; 62 L. T. 108 ; 38 W. R. 618 297
Olliver *v.* King, 25 L. J. Ch. 427 ; 1 Jur. N. S. 1066 ; 2 Id. 312 ; 4 W. R. 382 15
Oneley's Case, Dyer, 355 b 137
Onslow's Case, 2 Vent. 37 . . . . . 236, 241
Onslow *v.* Corrie, 2 Madd. 330 70
——— *v.* Raply, 3 Lev. 29 239
Oom *v.* Bruce, 12 East, 225 ; 11 R. R. 367 385
Oppenheim *v.* Russell, 3 B. & P. 42 ; 6 R. R. 604 . . . 732, 733
——— *v.* White Lion Hotel Co., L. R. 6 C. P. 515 ; 40 L. J. C. P. 231 ; 25 L. T. 93 ; 20 W. R. 34 . . . . . 123, 186
Orchis, The, 15 P. D. 38 ; 59 L. J. A. 31 ; 62 L. T. 407 ; 38 W. R. 472 . . . . . 142, 159
Orr *v.* Union Bank of Scotland, 1 Macq. 513 ; 2 C. L. R. 1566 . . 140
Orr-Ewing *v.* Orr-Ewing, 22 Ch. D. 456 ; 9 App. Cas. 34 ; 52 L. J. Ch. 529 ; 48 L. T. 555 ; 31 W. R. 464 622
Osbaldiston *v.* Simpson, 13 Sim. 513 ; 7 Jur. 734 385
Osborn *v.* Gillett, L. R. 8 Ex. 88 ; 42 L. J. Ex. 53 ; 28 L. T. 197 ; 21 W. R. 409 . . . . . 267, 279, 280
Osborne *v.* Rogers, 1 Wms. Saund. 264 139
Osgood *v.* Strode, 2 P. Wms. 245 28
O'Sullivan *v.* Thomas, (1895) 1 Q. B. 698 ; 64 L. J. Q. B. 398 ; 72 L. T. 285 ; 43 W. R. 269 386
Ougier *v.* Jennings, 1 Camp. 505, n. ; 10 R. R. 739, n. . . . 541
Outhwaite *v.* Luntley, 4 Camp. 179 781
Owen *v.* Body, 5 A. & E. 28 ; 6 N. & M. 448 ; 5 L. J. K. B. 191 . 17
——— *v.* Burnett, 4 Tyr. 133 ; 2 C. & M. 353 ; 3 L. J. Ex. 76 . . 210
——— *v.* Owen, 3 H. & C. 88 ; 33 L. J. Ex. 237 ; 10 Jur. N. S. 884 ; 11 L. T. 137 26
Owens *v.* Denton, 5 Tyr. 359 ; 1 C. M. & R. 711 ; 4 L. J. Ex. 68 . 384
Oxley *v.* James, 13 M. & W. 209 ; 13 L. J. Ex. 358 61
——— *v.* Watts, 1 T. R. 12 ; 1 R. R. 133 131

P.

Padstow Association, *Re*, 20 Ch. D. 137 ; 51 L. J. Ch. 344 ; 45 L. T. 774 ; 30 W. R. 326 370
Page *v.* Defries, 7 B. & S. 137 353
Paget *v.* Ede, 18 Eq. 118 ; 43 L. J. Ch. 571 ; 30 L. T. 228 ; 22 W. R. 625 603
——— *v.* Perchard, 1 Esp. 205 12
Pain, *Ex p.*, 5 B. & C. 251 650
Painter *v.* Liverpool Gas Co., 3 A. & E. 433 ; 6 N. & M. 736 ; 2 H. & W. 233 ; 5 L. J. M. C. 108 652
Paley *v.* Birch, 16 L. T. 410 ; 8 B. & S. 336 665
Palliser's Case, unreported 595
Palmer *v.* Edwards, 1 Dougl. 187, n. 97

PAGE

Palmer *v.* Ekins, 2 Ld. Raym. 1550 91
——— *v.* Grand Junction R. Co., 4 M. & W. 749 ; 7 Dowl. 232 ; 1 H. & H. 489 ; 8 L. J. Ex. 129 ; 3 Jur. 559 200
——— *v.* Hutchinson, 6 App. Cas. 619 ; 50 L. J. P. C. 62 ; 45 L. T. 180 630
——— *v.* L. B. & S. C. R. Co., L. R. 6 C. P. 194 ; 40 L. J. C. P. 133 . 203
——— *v.* Wick Co., (1894) A. C. 318 ; 71 L. T. 163 ; 6 R. 245 . 154, 390
Panton *v.* Williams, 2 Q. B. 169 ; 1 G. & D. 504 ; 10 L. J. Ex. 545 . 261
Paradine *v.* Jane, Styl. 47 629
Pardington *v.* S. Wales R. Co., 1 H. & N. 392 ; 26 L. J. Ex. 105 ; 2 Jur. N. S. 1210 ; 5 W. R. 8 213
Pardo *v.* Bingham, 4 Ch. 735 ; 39 L. J. Ch. 170 ; 20 L. T. 464 ; 17 W. R. 419 . . . . . 616, 621
Pargeter *v.* Harris, 7 Q. B. 708 ; 15 L. J. Q. B. 113 ; 10 Jur. 260 ... 93, 94
Parke, *Ex p.*, 18 Eq. 381 ; 43 L. J. Bk. 139 ; 30 L. T. 618 ; 22 W. R. 768 437
Parker *v.* Carter, 4 Hare, 400 . . . . . 26, 30
——— *v.* G. W. R. Co., 7 Scott, N. R. 835 ; 7 M. & Gr. 253 ; 13 L. J. C. P. 105 ; 8 Jur. 194 200
——— *v.* Ibbetson, 4 C. B. N. S. 346 ; 27 L. J. C. P. 236 ; 4 Jur. N. S. 536 ; 6 W. R. 519 551
——— *v.* Lewis, 8 Ch. 1035 ; 43 L. J. Ch. 281 ; 28 L. T. 91 ; 29 Id. 199 ; 21 W. R. 928 150
——— *v.* S. E. R. Co., 2 C. P. D. 416 ; 46 L. J. C. P. 768 ; 25 W. R. 564 208
Parkhurst *v.* Foster, 1 Salk. 387 ; 1 Ld. Raym. 479 ; 5 Mod. 427 ; Carth. 417 . . . . . 124, 125
Parkins *v.* Scott, 1 H. & C. 153 ; 31 L. J. Ex. 331 ; 8 Jur. N. S. 593 ; 6 L. T. 394 ; 10 W. R. 562 280
Parkinson *v.* Potter, 16 Q. B. D. 152 ; 55 L. J. Q. B. 153 ; 53 L. T. 818 ; 34 W. R. 215 ; 50 J. P. 470 630
Parlement Belge, The, 5 P. D. 197 ; 4 Id. 129 ; 48 L. J. A. 18 ; 40 L. T. 222 ; 42 Id. 273 ; 27 W. R. 692 ; 28 Id. 642 . . 625, 627, 628
Parnell *v.* Stedman, C. & E. 153 18
Parr *v.* Eliason, 1 East, 92 ; 3 Esp. 210 28
Parry *v.* Nicholson, 13 M. & W. 788 ; 2 D. & L. 640 ; 14 L. J. Ex. 119 781
Parsloe *v.* Baily, 1 Salk. 76 ; 2 Ld. Raym. 1039 325
Parsons *v.* Gingell, 4 C. B. 545 ; 16 L. J. C. P. 227 ; 11 Jur. 437 . 429
Partington *v.* Woodcock, 6 A. & E. 690 ; 5 N. & M. 672 ; 1 H. & W. 262 505
Partridge *v.* Bank of England, 9 Q. B. 396 ; 13 L. J. Q. B. 281 ; 8 Jur. 803 . . . . . 459, 464
——— *v.* Scott, 3 M. & W. 220 ; 1 H. & H. 31 ; 7 L. J. Ex. 101 270, 814
Pascal, *Ex p.*, 1 Ch. D. 509 ; 45 L. J. Bk. 81 ; 34 L. T. 10 ; 24 W. R. 263 . . . . . 607, 618
Pasley *v.* Freeman, 3 T. R. 51 ; 1 R. R. 634 258
Passenger *v.* Brookes, 1 B. N. C. 587 ; 7 C. & P. 110 ; 1 Scott, 560 . 137
Paterson *v.* Powell, 9 Bing. 320, 620 ; 2 M. & Scott, 399 ; 2 L. J. C. P. 68 474
Patman *v.* Harland, 17 Ch. D. 353 ; 50 L. J. Ch. 642 ; 44 L. T. 728 ; 29 W. R. 707 87
Patria, The, L. R. 3 A. & E. 436 ; 41 L. J. A. 23 ; 24 L. T. 849. . 609
Patrick *v.* Colerick, 3 M. & W. 483 ; 7 L. J. Ex. 135 ; 2 Jur. 377 . 135
Patscheider *v.* G. W. R. Co., 3 Ex. D. 153 ; 38 L. T. 149 ; 26 W. R. 268 225
Patten *v.* Rea, 2 C. B. N. S. 606 ; 26 L. J. C. P. 235 ; 3 Jur. N. S. 892 ; 5 W. R. 689 351
Patterson *v.* Tash, 2 Str. 1178 693
Pattinson *v.* Luckley, L. R. 10 Ex. 330 ; 44 L. J. Ex. 180 ; 33 L. T. 360 ; 24 W. R. 224 . . . . . 787, 788
Pattle *v.* Anstruther, 69 L. T. 175 ; 41 W. R. 625 4 R. 470 . . 982

PAGE
Paul, *Re*, 24 Q. B. D. 247 ; 59 L. J. Q. B. 30 ; 61 L. T. 835 . . 538
Paull *v.* Simpson, 9 Q. B. 365 ; 15 L. J. Q. B. 382 ; 11 Jur. 13 . . 47
Pauncefoot's Case, unreported 5, 18
Pawle *v.* Gunn, 4 B. N. C. 445 ; 6 Scott, 286 ; 1 Arn. 200 ; 7 L. J. C. P. 206 . . . . . 141, 142
Payne *v.* Brecon, 3 H. & N. 572 ; 27 L. J. Ex. 495 ; 6 W. R. 801...377, 379
——— *v.* Johnson, cited 1 Tyr. 284 301
——— *v.* Mortimer, 28 L. J. Ch. 437, 716 ; 5 Jur. N. S. 307, 749 ; 7 W. R. 378, 646 28
——— *v.* Wilson, (1895) 1 Q. B. 653 ; (1895) 2 Q. B. 537 ; 64 L. J. Q. B. 328 ; 72 L. T. 110 ; 73 Id. 12 ; 43 W. R. 250, 657 746
Paynter *v.* Williams, 1 C. & M. 810 ; 3 Tyr. 894 ; 2 L. J. M. C. 105 . 143
Paxton *v.* Popham, 9 East, 408 363
Peachey *v.* Rowland, 13 C. B. 182 814
Peacock, *Ex p.*, 8 Ch. 682 ; 42 L. J. Bkcy. 78 ; 28 L. T. 830 ; 21 W. R. 755 . . . . . 334, 335
——— *v.* Purvis, 2 B. & B. 362 ; 5 Moore, 79 432
——— *v.* The Queen, 4 C. B. N. S. 264 ; 27 L. J. C. P. 224 ; 6 W. R. 517 . . . . . 671, 672
——— *v.* Rhodes, 2 Dougl. 634 . . . . . 457, 752
Pearce *v.* Brooks, L. R. 1 Ex. 213 ; 35 L. J. Ex. 134 ; 12 Jur. N. S. 342 ; 14 L. T. 288 ; 14 W. R. 614 368
——— *v.* Morrice, 2 A. & E. 84 ; 4 N. & M. 48 ; 4 L. J. K. B 21 . 381
Pearse *v.* Pearse, 9 Sim. 430 468
Pearson, *Re*, (1892) 2 Q. B. 263 ; 61 L. J. Q. B. 585 ; 67 L. T. 367 ; 9 M. B. R. 185 ; 40 W. R. 532 607
——— *v.* Scott, 9 Ch. D. 198 ; 47 L. J. Ch. 705 ; 38 L. T. 747 ; 26 W. R. 796 . . . . . 549, 559
——— *v.* Skelton, 1 M. & W. 504 ; 1 T. & G. 848 . . . 155, 390
Pease *v.* Chaytor, 1 B. & S. 658 ; 3 Id. 620 ; 32 L. J. M. C. 121 ; 9 Jur. N. S. 664 ; 8 L. T. 613 ; 11 W. R. 563 . . . . . 642, 657
Pedley *v.* Davis, 10 C. B. N. S. 492 ; 30 L. J. C. P. 374 ; 8 Jur. N. S. 263 ; 5 L. T. 253 642
——— *v.* Morris, 61 L. J. Q. B. 21 ; 65 L. T. 526 ; 40 W. R. 42 . 265
Peek *v.* N. Stafford. R. Co., 32 L. J. Q. B. 241, 270 ; 29 Id. 97 ; 27 Id. 465 ; E. B. & E. 958, 986 ; 10 H. L. C. 473 ; 4 Jur. N. S. 1078 ; 6 Id. 370 ; 9 Id. 914 ; 1 L. T. 407 ; 8 Id. 768 ; 6 W. R. 797 ; 8 Id. 364 ; 11 Id. 1023 . . . 205, 210, 213, 214, 216, 218, 297, 551
Peer *v.* Humphrey, 2 A. & E. 495 ; 4 N. & M. 430 ; 4 L. J. K. B. 100 455
Peerless, *Re*, 1 Q. B. 143 650
Peeters *v.* Opie, 2 Wms. Saund. (1871 ed.) 742 137
Peirce *v.* Corf, L. R. 9 Q. B. 210 ; 43 L. J. Q. P. 52 ; 29 L. T. 919 ; 22 W. R. 299 . . . . . 297, 322
Pellatt *v.* Boosey, 31 L. J. C. P. 281 ; 8 Jur. N. S. 1107 . 37, 39, 338
Penedo *v.* Johnson, 22 W. R. 103 ; 29 L. T. 452 629
Penfold *v.* Abbott, 32 L. J. Q. B. 67 ; 9 Jur. N. S. 517 ; 7 L. T. 384 ; 11 W. R. 169 . . . . . 65, 161
Penhall *v.* Elwin, 1 Sm. & Giff. 258 ; 1 W. R. 273 19
P. & O. Steam Nav. Co. *v.* Shand, 3 Moo. P. C. N. S. 272 ; 13 W. R. 1049 210
Penley *v.* Watts, 7 M. & W. 601 ; 10 L. J. Ex. 229 . . . 150, 166
Penn *v.* Baltimore, 1 Ves. Sen. 444 603
Pennant's Case, 3 Co. Rep. 64 a 41
Pennell *v.* Attenborough, 4 Q. B. 868 ; D. & M. 145 ; 12 L. J. Q. B. 370 ; 7 Jur. 927 197
——— *v.* Dawson, 18 C. B. 355 13
——— *v.* Uxbridge, 31 L. J. M. C. 92 ; 8 Jur. N. S. 99 ; 5 L. T. 685 ; 10 W. R. 319 671
Pennington, *Re*, 59 L. T. 774 ; 5 M. B. R. 216, 268 18
Penny, *Re*, 7 E. & B. 660 ; 26 L. J. Q. B. 225 ; 5 W. R. 612 . . 663
Penton *v.* Browne, 1 Sid. 186 ; 1 Keb. 698 106

PAGE

Percival *v.* Stamp, 9 Exch. 167 ; 2 C. L. R. 282 ; 23 L. J. Ex. 25 ; 2 W. R. 14 113
Perham, *Re*, 5 H. & N. 30 ; 29 L. J. M. C. 33 ; 5 Jur. N. S. 1221 . 650
Perls *v.* Saalfield, (1892) 2 Ch. 149 ; 61 L. J. Ch. 409 ; 66 L. T. 666 ; 40 W. R. 548 412
Perring *v.* Harris, 2 M. & Rob. 5 231
——— *v.* Hone, 4 Bing. 28 ; 12 Moore, 135 . . . . . 781, 782
Perrott *v.* Perrott, 14 East, 423 785
Perry *v.* Attwood, 6 E. & B. 691 ; 25 L. J. Q. B. 408 ; 2 Jur. N. S. 1071 ; 4 W. R. 608 332
——— *v.* Barnett, 15 Q. B. D. 388 ; 14 Id. 467 ; 54 L. J. Q. B. 351, 466 ; 53 L. T. 585 . . . . . 549, 554, 559
——— *v.* Fitzhowe, 8 Q. B. 757 134
——— *v.* Skinner, 2 M. & W. 471 ; M. & H. 122 ; 6 L. J. Ex. 124 ; 1 Jur. 433 350
Persse *v.* Persse, 7 Cl. & F. 279 ; 1 West, 110 ; 4 Jur. 358 . . 26, 30
Peru (Republic of) *v.* Weguelin, 20 Eq. 140 ; 44 L. J. Ch. 583 ; 32 L. T. 426 ; 23 W. R. 776 628
Peruvian Guano Co. *v.* Bockwoldt, 23 Ch. D. 225 ; 52 L. J. Ch. 714 ; 48 L. T. 7 ; 31 W. R. 851 623
Peter *v.* Compton, Skin. 353 . . . . . 303, 306
——— *v.* Rich, 1 Cha. R. 19 151
Peto *v.* Brighton R. Co., 32 L. J. Ch. 677 ; 1 H. & M. 468 ; 9 L. T. 227 ; 11 W. R. 874 339
Phelan *v.* Tedcastle, 15 L. R. Ir. 169 298
Phelps *v.* L. & N. W. R. Co., 19 C. B. N. S. 321 ; 34 L. J. C. P. 259 ; 11 Jur. N. S. 652 ; 12 L. T. 496 ; 13 W. R. 782 202
Phelps Co. *v.* Comber, 29 Ch. D. 813 ; 26 Id. 755 ; 53 L. J. Ch. 1134 ; 54 Id. 1017 ; 51 L. T. 16 ; 52 Id. 872 ; 33 W. R. 829 733
Philips *v.* Beale, 26 Ch. D. 621 ; 54 L. J. Ch. 80 ; 50 L. T. 433 ; 32 W. R. 665 602
——— *v.* Biggs, Hard. 164 . . . . . 154, 384
Phillips *v.* Allan, 8 B. & C. 477 ; 2 M. & Ry. 576 619
——— *v.* Briard, 1 H. & N. 21 ; 25 L. J. Ex. 233 558
——— *v.* Clark, 2 C. B. N. S. 156 ; 26 L. J. C. P. 168 ; 3 Jur. N. S. 467 ; 5 W. R. 582 220
——— *v.* Dickson, 8 C. B. N. S. 391 154
——— *v.* Edwards, 3 H. & N. 813 ; 28 L. J. Ex. 52. 223
——— *v.* Eyre, L. R. 6 Q. B. 1 ; 4 Id. 225 ; 9 B. & S. 343 ; 10 Id. 1004 ; 38 L. J. Q. B. 113 ; 40 Id. 28 ; 19 L. T. 770 ; 22 Id. 869 ; 17 W. R. 375 . . . . . 602, 605, 618
——— *v.* Henson, 3 C. P. D. 26 ; 47 L. J. C. P. 273 ; 26 W. R. 214 . 436
——— *v.* Huth, 6 M. & W. 572 ; 10 L. J. Ex. 65 744
——— *v.* Innes, 4 Cl. & F. 234 550
——— *v.* Mullings, 7 Ch. 244 ; 41 L. J. Ch. 211 ; 20 W. R. 129 . 16
——— *v.* Naylor, 3 H. & N. 14 ; 28 L. J. Ex. 225 ; 5 Jur. N. S. 966 ; 7 W. R. 504 260
——— *v.* Whitsed, 2 E. & E. 804 ; 29 L. J. Q. B. 164 ; 6 Jur. N. S. 727 ; 2 L. T. 278 ; 8 W. R. 494 497
Philpot *v.* St. George's Hospital, 6 H. L. C. 338 ; 21 Beav. 134 ; 25 L. J. Ch. 33 ; 27 Id. 70 ; 1 Jur. N. S. 1102 ; 3 Id. 1269 ; 5 W. R. 845 369
Philpott *v.* Lehain, 35 L. T. 855 340
Phœnix, *Re*, 4 Ch. D. 108 ; 44 L. J. Ch. 683 ; 46 Id. 115 ; 33 L. T. 403 ; 35 Id. 776 ; 24 W. R. 19 ; 25 Id. 187 724
Phosphate Co. *v.* Green, L. R. 7 C. P. 43 ; 25 L. T. 636 . 350, 351, 380
Pianciani *v.* L. & S. W. R. Co., 18 C. B. 226 119
Pickard *v.* Smith, 10 C. B. N. S. 470 ; 4 L. T. 470 . . . . 800, 816
Picker *v.* London and County Bank, 18 Q. B. D. 515 ; 56 L. J. Q. B. 299 ; 35 W. R. 469 463
Pickering *v.* Ilfracombe Rail. Co., L. R. 3 C. P. 235 ; 37 L. J. C. P. 118 ; 17 L. T. 650 ; 16 W. R. 458 372

PAGE

Pickering *v.* James, L. R. 8 C. P. 489 ; 42 L. J. C. P. 217 ; 29 L. T. 210 ; 21 W. R. 786 285
Pickford *v.* Grand Junction R. Co., 8 M. & W. 372 ; 9 Dowl. 766 ; 10 L. J. Ex. 342 ; 2 Rail. Cas. 592 ; 5 Jur. 731 . . . 202
——— *v.* Grand Junction R. Co., 10 M. & W. 399; 3 Rail. Cas. 193 200
Pierce *v.* Bartrum, 1 Cowp. 269 393
Piggot *v.* Eastern Counties R. Co., 3 C. B. 229; 15 L. J. C. P. 235 ; 10 Jur. 571 825
Piggott *v.* Birtles, 1 M. & W. 441 ; 2 Gale, 18 ; T. & G. 729 ; 5 L. J. Ex. 193 434
Pigot's Case, 11 Co. Rep. 27 a . . 749, 751, 754, 776, 778, 783, 785
Pigot *v.* Cubley, 15 C. B. N. S. 701 ; 33 L. J. C. P. 134 ; 10 Jur. N. S. 318 ; 9 L. T. 804 ; 12 W. R. 467 192
Pike *v.* Ongley, 18 Q. B. D. 708 ; 56 L. J. Q. B. 373 ; 35 W. R. 534...545, 557
Pilkington *v.* Scott, 15 M. & W. 657 ; 15 L. J. Ex. 329 . . 406, 414
Pillans *v.* Van Mierop, 3 Burr. 1664 771
Pinhorn *v.* Souster, 8 Exch. 763 ; 22 L. J. Ex. 18, 266 ; 1 W. R. 336 521
Pinnel's Case, 5 Co. Rep. 117 a 327, 328, 329, 337
Pitcher *v.* Bailey, 8 East, 171 390
——— *v.* Tovey, 4 Mod. 71 ; 1 Salk. 80 ; 1 Show. 340 . . . 69
Pitt *v.* Dacre, 3 Ch. D. 295 ; 45 L. J. Ch. 796 ; 24 W. R. 943 . . 617
—— *v.* Purssord, 8 M. & W. 538 ; 5 Jur. 611 . . . . . 157, 158
Pittard *v.* Oliver, (1891) 1 Q. B. 474 ; 60 L. J. Q. B. 219 ; 64 L. T. 758 ; 39 W. R. 311 ; 55 J. P. 100 266
Pixley *v.* Clark, 32 Barbour's Rep. (N. Y.) 268 812
Place *v.* Fagg, 4 M. & Ry. 277 426
Planck *v.* Anderson, 5 T. R. 37 274
Playfair *v.* Musgrove, 14 M. & W. 239 ; 3 D. & L. 72 ; 15 L. J. Ex. 26 ; 9 Jur. 783 132
Playford *v.* U. K. Telegraph Co., L. R. 4 Q. B. 706 ; 10 B. & S. 759 ; 38 L. J. Q. B. 249 ; 21 L. T. 21 ; 17 W. R. 968 222
Plevins *v.* Downing, 1 C. P. D. 220 ; 45 L. J. C. P. 695 ; 35 L. T. 263 300
Pluck *v.* Digges, 5 Bligh, N. S. 31 ; 2 Dow. & Cl. 180 96
Pole *v.* Harrobin, 9 East, 416, n. 363, 367
Pollen *v.* Brewer, 7 C. B. N. S. 371 ; 6 Jur. N. S. 509 . . . 134
Pollock *v.* Stacy, 9 Q. B. 1033 ; 16 L. J. Q. B. 132 ; 11 Jur. 267...96, 97, 98
Pontifex *v.* Foord, 12 Q. B. D. 152 ; 53 L. J. Q. B. 321 ; 49 L. T. 808 ; 32 W. R. 316 151
——— *v.* Mid. R. Co., 3 Q. B. D. 23 ; 47 L. J. Q. B. 28 ; 37 L. T. 403 ; 26 W. R. 209 223
Ponting *v.* Noakes, (1894) 2 Q. B. 281 ; 63 L. J. Q. B. 549 : 70 L. T. 842 ; 42 W. R. 508 ; 58 J. P. 559 ; 10 R. 265 . . . . 272, 825
Poole's Case, Moore, 810 419
———, 1 Salk. 368 426
Poole *v.* Hill, 6 M. & W. 835 ; 9 Dowl. 300 ; 10 L. J. Ex. 81 . . 551
Poole, Mayor of, *v.* Whitt, 15 M. & W. 571 ; 16 L. J. Ex. 22 . . 507
Pooley *v.* Quilter, 2 De G. & J. 327 ; 27 L. J. Ch. 180 ; 4 Jur. N. S. 45 ; 6 W. R. 216 369
Pope *v.* Biggs, 9 B. & C. 245 ; 4 M. & Ry. 193 505
Popham *v.* Bathurst, Amb. 68 452
——— *v.* Pickburn, 7 H. & N. 891 ; 31 L. J. Ex. 133 ; 8 Jur. N. S. 179 ; 5 L. T. 846 ; 10 W. R. 324 264
Popplewell *v.* Hodkinson, L. R. 4 Ex. 248 ; 38 L. J. Ex. 126 ; 20 L. T. 578 ; 17 W. R. 806 273
Portalis *v.* Tetley, 5 Eq. 140 ; 37 L. J. Ch. 139 ; 17 L. T. 344 ; 16 W. R. 503 741
Porter *v.* French, 9 Ir. L. R. 514 . . . . . 60, 97
Portmore *v.* Bunn, 1 B. & C. 694 ; 3 D. & R. 145 . . . 79, 90, 96
Portugal (King of) *v.* Russell, 31 L. J. Ch. 34 ; 3 Giff. 287 ; 5 L. T. 277 ; 7 Jur. N. S. 1143 ; 10 W. R. 36 629

PAGE
Pothonier *v.* Dawson, Holt, 383 192
Pott *v.* Todhunter, 2 Coll. C. C. 76 ; 9 Jur. 589 . . . . 29, 30
Potter *v.* Duffield, 18 Eq. 4 ; 43 L. J. Ch. 472 ; 22 W. R. 585 . . 298
Poultney *v.* Holmes, 1 Str. 405 . . . . . 97, 98
Poulton *v.* L. & S. W. R. Co., L. R. 2 Q. B. 534 ; 36 L. J. Q. B. 294 ; 17 L. T. 11 ; 8 B. & S. 616 352
Powell, *Ex p.*, 1 Ch. D. 501 ; 45 L. J. Bk. 100 ; 34 L. T. 224 ; 24 W. R. 378 540
——— *v.* Aiken, 4 K. & J. 343 527
——— *v.* Cobb, 29 Ch. D. 486 ; 54 L. J. Ch. 962 ; 52 L. T. 183...601, 602
——— *v.* Divett, 15 East, 29 ; 13 R. R. 358 785
——— *v.* Fall, 5 Q. B. D. 597 ; 49 L. J. Q. B. 428 ; 43 L. T. 562...826, 828
——— *v.* Horton, 2 B. N. C. 668 ; 2 Hodges, 12 ; 3 Scott, 110 ; 5 L. J. C. P. 204 547
Power *v.* Wigmore, L. R. 7 C. P. 386 ; 27 L. T. 148 672
Powers *v.* Fowler, 4 E. & B. 511 297
Powles *v.* Hider, 6 E. & B. 207 ; 2 Jur. N. S. 472 ; 4 W. R. 492 . 353
——— *v.* Page, 3 C. B. 16 ; 15 L. J. C. P. 217 ; 10 Jur. 526 . . 334
Pownal *v.* Ferrand, 6 B. & C. 439 ; 9 D. & R. 603 149
Powsely *v.* Blackman, Cro. Jac. 659 ; Palmer, 201 515
Preston *v.* Merceau, 2 W. Bl. 1249 313
Price *v.* Easton, 4 B. & Ad. 433 ; 1 N. & M. 303 ; 2 L. J. K. B. 51 . 139
——— *v.* Green. See *Green* v. *Price* 414
——— *v.* Harwood, 3 Camp. 108 108
——— *v.* Jenkins, 4 Ch. D. 483 ; 5 Id. 619 ; 46 L. J. Ch. 214, 805 ; 36 L. T. 237 ; 37 Id. 51 ; 25 W. R. 429 . . . . 26, 28
——— *v.* Neal, 3 Burr. 1354 ; 1 W. Bl. 390 752
——— *v.* Shute, 2 Molloy (De Jure Mar.), c. 10, s. 28...753, 755, 764, 765, 779
——— *v.* Williams, 1 M. & W. 6 ; 1 Gale, 362 ; T. & G. 197 ; 5 L. J. Ex. 129 551
——— *v.* Worwood, 4 H. & N. 512 ; 28 L. J. Ex. 329 ; 5 Jur. N. S. 472 . . . . . 39, 45
Prince *v.* Oriental Bank, 3 App. Cas. 325 ; 47 L. J. P. C. 42 ; 38 L. T. 41 ; 26 W. R. 543 785
——— of Wales Ass. Co. *v.* Harding, E. B. & E. 183 ; 27 L. J. Q. B. 297 ; 4 Jur. N. S. 851 . . . . . 379, 380
Prioleau *v.* U. S. of America, 2 Eq. 659 ; 36 L. J. Ch. 36 ; 14 L. T. 700 ; 14 W. R. 1012 629
Prior's Case, The 56, 64, 72, 73
Prior *v.* Hembrow, 8 M. & W. 873 ; 10 L. J. Ex. 371 152
Pritchard *v.* Hitchcock, 6 Scott, N. R. 851 ; 6 M. & Gr. 151 ; 12 L. J. C. P. 322 326
Proctor *v.* Sargent, 2 M. & Gr. 20 ; 2 Scott, N. R. 289 ; 10 L. J. C. P. 34 403
——— *v.* Webster, 16 Q. B. D. 112 ; 55 L. J. Q. B. 150 ; 53 L. T. 765 265
Prodgers *v.* Langham, 1 Sid. 133 27
Prole *v.* Wiggins, 3 B. N. C. 230 ; 3 Scott, 601 ; 2 Hodges, 204 ; 6 L. J. C. P. 2 . . . . . 363, 367
Propert *v.* Parker, 1 Russ. & M. 625 320
Prosser *v.* Rowe, 2 C. & P. 421 279
Pryce *v.* Belcher, 3 C. B. 58 ; 4 Id. 866 ; 4 D. & L. 238 ; 15 L. J. C. P. 305 ; 16 Id. 264 ; 11 Jur. 675 . . . . . 259, 285
Pugh *v.* Griffith, 7 A. & E. 827 ; 3 N. & P. 187 ; 7 L. J. Q. B. 169 ; 2 Jur. 614 . . . . . 106, 109
Pulbrook *v.* Lawes, 1 Q. B. D. 284 ; 45 L. J. Q. B. 178 ; 34 L. T. 95 308
Pulling *v.* G. E. R. Co., 9 Q. B. D. 110 ; 51 L. J. Q. B. 453 ; 30 W. R. 798 ; 46 J. P. 617 267
Pulvertoft *v.* Pulvertoft, 18 Ves. 84 ; 11 R. R. 151 29
Punnett, *Ex p.*, 16 Ch. D. 226 ; 50 L. J. Ch. 212 ; 44 L. T. 226 ; 29 W. R. 129 . . . . . 518, 523

PAGE

Purcell *v.* Sowler, 2 C. P. D. 215 ; 1 Id. 781 ; 46 L. J. C. P. 308 ; 36 L. T. 416 ; 25 W. R. 362 264
Pyke, *Ex p.*, 8 Ch. D. 754 ; 47 L. J. Bk. 100 ; 38 L. T. 923 ; 26 W. R. 806 369
Pym *v.* G. N. R. Co., 4 B. & S. 396 ; 2 Id. 760 ; 31 L. J. Q. B. 249 ; 32 Id. 377 ; 8 Jur. N. S. 819 ; 10 Id. 199 ; 6 L. T. 537 ; 8 Id. 734 ; 10 W. R. 737 ; 11 Id. 922 267

Q.

Quarman *v.* Burnett, 6 M. & W. 499 ; 9 L. J. Ex. 308 ; 4 Jur. 969 209, 277
Quartz Hill Co. *v.* Eyre, 11 Q. B. D. 674 ; 52 L. J. Q. B. 488 ; 49 L. T. 249 ; 31 W. R. 668 . . . . . 261, 262
Quilter *v.* Mapleson, 9 Q. B. D. 672 ; 52 L. J. Q. B. 44 ; 47 L. T. 561 ; 31 W. R. 75 51
Quincey *v.* Sharpe, 1 Ex. D. 72 ; 45 L. J. Ex. 347 ; 34 L. T. 495 ; 24 W. R. 373 570
Quinlan *v.* Barber, Bat. 47 279

R.

R. *v.* Abingdon, 1 Esp. 226 ; 5 R. R. 733 265
— *v.* Agardsley, 5 Dowl. 19 242
— *v.* Allan, 4 B. & S. 915 ; 33 L. J. M. C. 98 ; 10 Jur. N. S. 796 ; 9 L. T. 761 659
— *v.* Allen, unreported (see 5 D. & R. 490) 661
— *v.* ——, 15 East, 333 658
— *v.* Allington, 2 Str. 678 638
— *v.* Arnould, 8 E. & B. 550 ; 27 L. J. M. C. 92 ; 4 Jur. N. S. 162 ; 6 W. R. 61 644
— *v.* Ashwell, 16 Q. B. D. 190 ; 55 L. J. M. C. 65 ; 53 L. T. 773 ; 34 W. R. 297 ; 50 J. P. 181 ; 16 Cox, C. C. 1 230
— *v.* Badger, 6 E. & B. 137 ; 25 L. J. M. C. 81 ; 2 Jur. N. S. 419 . 664
— *v.* Barton, 13 Q. B. 389 ; 18 L. J. M. C. 56 ; 13 Jur. 232 ; 3 New Sess. Cas. 470 654
— *v.* Bass, 5 T. R. 251 659
— *v.* Battams, 1 East, 298 659
— *v.* Bellamy, 1 B. & C. 500 654
— *v.* Berkeley, 1 Ken. 80 659
— *v.* Berry, 28 L. J. M. C. 86 ; Bell, C. C. 46 ; 8 Cox, C. C. 121 ; 5 Jur. N. S. 320 ; 7 W. R. 229 652
— *v.* Binney, 1 E. & B. 810 ; 1 C. L. R. 236 ; 22 L. J. M. C. 127 ; 17 Jur. 854 655
— *v.* Bird, 2 Show. 87 106
— *v.* Bloxam, 1 A. & E. 386 ; 3 N. & M. 385 ; 3 L. J. M. C. 115 . 659
— *v.* Bolton, 1 Q. B. 66 ; 4 P. & D. 679 ; 10 L. J. M. C. 49 ; 5 Jur. 1154. . . . . 649, 660, 663, 664
— *v.* Boteler, 33 L. J. M. C. 101 ; 4 B. & S. 959 ; 10 Jur. N. S. 798 ; 28 J. P. 453 ; 12 W. R. 466 644
— *v.* Boughey, 4 T. R. 281 ; 2 R. R. 381 659
— *v.* Boultbee, 1 A. & E. 198 ; 6 N. & M. 26 ; 5 L. J. M. C. 57 . 658
— *v.* Bradley, 70 L. T. 379 ; 63 L. J. M. C. 183 ; 58 J. P. 199 ; 17 Cox, C. C. 739 ; 10 R. 183 668
— *v.* Bradshaw, 29 L. J. M. C. 176 ; 6 Jur. N. S. 629 ; 8 W. R. 435 . 644
— *v.* Brewers' Co., 3 B. & C. 172 ; 4 D. & R. 892 242
— *v.* Brickhall, 33 L. J. M. C. 156 ; 10 Jur. N. S. 677 ; 10 L. T. 385 ; 12 W. R. 826 647

PAGE

R. *v.* Bridge, 24 Q. B. D. 609 ; 59 L. J. M. C. 49 ; 62 L. T. 297 ; 38 W. R. 464 ; 54 J. P. 629 ; 17 Cox, C. C. 66 672
— *v.* Bridger, 1 M. & W. 145 ; T. & G. 437 ; 5 L. J. Ex. 127 . . 18
— *v.* Bristol JJ., 3 E. & B. 479, n. ; 18 Jur. 426, n. 644, 662
— *v.* ——— & Ex. R. Co., 1 P. & D. 170, n. ; 11 A. & E. 202, n. . 668
— *v.* Brown, 7 E. & B. 757 ; 26 L. J. M. C. 183 ; 3 Jur. N. S. 745 ; 5 W. R. 625 ; 21 J. P. 357 644
— *v.* Browne, 13 Q. B. 654 644
— *v.* Buckinghamshire JJ., 3 Q. B. 800 ; 2 G. & D. 560 ; 12 L. J. M. C. 29 ; 7 Jur. 256 . . . . . 660, 662
— *v.* Bunkall, 33 L. J. M. C. 75 ; L. & C. 371 ; 9 Cox, C. C. 419 ; 10 Jur. N. S. 216 ; 9 L. T. 778 ; 12 W. R. 414 230
— *v.* Cambridge (Recorder of), 8 E. & B. 637 ; 27 L. J. M. C. 160 ; 4 Jur. N. S. 334 ; 6 W. R. 80 663
— *v.* Cambridgeshire JJ., 3 B. & Ad. 887 ; 1 L. J. M. C. 97 . . 659
— *v.* ———————, 4 A. & E. 111 ; 5 N. & M. 440 ; 1 Har. & W. 600 . . . . . 668, 669
— *v.* Central C. C. (JJ. of), 18 Q. B. D. 314 ; 17 Id. 598 ; 55 L. J. M. C. 183 ; 56 Id. 25 ; 55 L. T. 486 ; 56 Id. 352 ; 35 W. R. 243 ; 50 J. P. 727 ; 51 Id. 229 ; 16 Cox, C. C. 196 660
— *v.* Chandler, 1 Salk. 378 ; 1 Ld. Raym. 581 . . . . . 650, 651
— *v.* Chantrell, L. R. 10 Q. B. 587 ; 44 L. J. M. C. 94 ; 33 L. T. 305 ; 23 W. R. 707 . . . . . 658, 660, 661
— *v.* Cheltenham Commissioners, 1 Q. B. 467 ; 1 G. & D. 167 ; 10 L. J. M. C. 99 ; 4 Jur. 1060 . . . . . 663, 668
— *v.* Cheshire JJ., 5 B. & Ad. 439 ; 2 N. & M. 827 ; 2 L. J. M. C. 95 646
— *v.* ———————, 1 P. & D. 88 ; 8 A. & E. 398 ; 8 L. J. M. C. 1 663, 670
— *v.* Christopher, 28 L. J. M. C. 35 ; Bell, C. C. 27 ; 8 Cox, 91 ; 5 Jur. N. S. 24 ; 7 W. R. 60 190
— *v.* Clarke, 1 Cowp. 35 . . . . . 651, 653
— *v.* Coggan, 6 East, 431 ; 2 Smith, 417 ; 8 R. R. 509 242
— *v.* Cotton, 15 Q. B. 569 ; 4 New Sess. Cas. 291 ; 19 L. J. M. C. 233 ; 14 Jur. 788 644
— *v.* Cowper, 24 Q. B. D. 60, 533 ; 59 L. J. Q. B. 26, 265 ; 62 L. T. 583 ; 38 W. R. 207, 408 323
— *v.* Cox, 2 Burr. 786 635
— *v.* Cridland, 7 E. & B. 853 ; 27 L. J. M. C. 28 ; 3 Jur. N. S. 1213 653, 664, 665
— *v.* Crisp, 7 East, 389 ; 3 Smith, 377 650
— *v.* Croke, 1 Cowp. 26 649
— *v.* Cutbush, L. R. 2 Q. B. 379 ; 36 L. J. M. C. 70 ; 16 L. T. 282 ; 10 Cox, C. C. 489 655
— *v.* Davies, 5 T. R. 626 ; 2 R. R. 683 658
— *v.* Dayman, 7 E. & B. 672 ; 26 L. J. M. C. 128 ; 3 Jur. N. S. 744 ; 5 W. R. 758 . . . . . 644, 662, 670
— *v.* Denbighshire JJ., 1 B. & Ad. 616 669
— *v.* Dickenson, 7 E. & B. 831 ; 26 L. J. M. C. 204 ; 3 Jur. N. S. 1076 ; 5 W. R. 654 661
— *v.* Dimpsey, 2 T. R. 96 654
— *v.* Dobbyn, 2 Salk. 474 650
— *v.* Doutre, 9 App. Cas. 745 ; 53 L. J. P. C. 85 ; 51 L. T. 669 . 146
— *v.* Drury, (1894) 2 Ir. R. 489 659
— *v.* Dullingham, 8 A. & E. 858 ; 1 P. & D. 172 ; 8 L. J. Q. B. 37 . 242
— *v.* Dunn, 7 E. & B. 220 ; 26 L. J. M. C. 74 ; 3 Jur. N. S. 341 . 644
— *v.* E. Counties R. Co., 10 A. & E. 531 ; 2 P. & D. 648 ; 8 L. J. Q. B. 340 662
— *v.* E. Counties R. Co., 10 M. & W. 58 ; 6 Jur. 875 640
— *v.* ———————, 5 E. & B. 974 ; 24 L. J. M. C. 49 ; 2 Jur. N. S. 161 644

PAGE

R. *v.* Edwards, 13 Q. B. D. 586 ; 53 L. J. M. C. 149 ; 51 L. T. 586 . 656
— *v.* Elwell, 2 Str. 794 ; 2 Ld. Raym. 1514 ; 1 Sess. Cas. 360 . . 654
— *v.* Ely JJ., 5 E. & B. 489 ; 25 L. J. M. C. 1 ; 1 Jur. N. S. 1017 ; 4 W. R. 5 655
— *v.* Farmer, (1892) 1 Q. B. 637 ; 61 L. J. M. C. 65 ; 65 L. T. 736 ; 40 W. R. 228 ; 56 J. P. 341 ; 17 Cox, C. C. 413 . . . 664
— *v.* Fletcher, 2 Q. B. D. 43 ; 46 L. J. M. C. 4 ; 35 L. T. 538 ; 25 W. R. 149 660
— *v.* ———, 51 L. T. 334 ; 32 W. R. 828 652
— *v.* Fuller, 1 Ld. Raym. 509 ; 12 Mod. 309 650
— *v.* Gage, 1 Str. 546 ; 8 Mod. 64 653
— *v.* Gillyard, 12 Q. B. 527 ; 17 L. J. M. C. 153 ; 12 Jur. 655 . 669, 670
— *v.* Glossop, 4 B. & Ald. 616 653
— *v.* Glyde, L. R. 1 C. C. R. 139 ; 11 Cox, C. C. 103 ; 37 L. J. M. C. 107 ; 18 L. T. 613 ; 16 W. R. 1174 190
— *v.* Goodenough, 2 A. & E. 463 659
— *v.* Gravesend, 3 B. & Ad. 240 ; 1 L. J. M. C. 20 381
— *v.* Great Marlow, 2 East, 244 ; 6 R. R. 420 . . . . 663, 667
— *v.* Hall, 1 T. R. 320 . . . . . 651, 653
— *v.* Hanson, 4 B. & Ald. 519 657
— *v.* Harris, 7 T. R. 238 653
— *v.* Harrison, 3 Burr. 1323 ; 1 W. Bl. 372 393
— *v.* ———, 8 T. R. 508 ; 5 R. R. 424 650
— *v.* Hartley Union, 1 Q. B. 677 ; 10 L. J. M. C. 161 ; 1 G. & D. 732 649
— *v.* Hassall, 30 L. J. M. C. 175 ; L. & C. 58 ; 8 Cox, C. C. 491 ; 7 Jur. N. S. 1064 ; 4 L. T. 561 ; 9 W. R. 708 230
— *v.* Hawks, 2 Str. 858 653
— *v.* Heber, 2 Str. 915 637
— *v.* Hellier, 17 Q. B. 229 ; 21 L. J. M. C. 3 ; 15 Jur. 901 . . 655
— *v.* Hendon (Lord of the Manor of), 2 T. R. 484 ; 1 R. R. 527 242
— *v.* Hewes, 3 A. & E. 725 ; 5 L. J. M. C. 45 662
— *v.* Higginson, 31 L. J. M. C. 189 ; 2 B. & S. 471 ; 8 Jur. N. S. 1176 644
— *v.* Higham, 7 E. & B. 557 ; 26 L. J. M. C. 116 ; 3 Jur. N. S. 691 ; 5 W. R. 507 646
— *v.* Hodgson, 9 L. T. 290 659
— *v.* Holbrook, 4 Q. B. D. 42 ; 47 L. J. Q. B. 35 ; 37 L. T. 530 ; 26 W. R. 144 ; 13 Cox, C. C. 650 154
— *v.* Huggins, 2 Ld. Raym. 1574 ; 2 Str. 882 439
— *v.* Hughes, 4 Q. B. D. 614 ; 48 L. J. M. C. 151 ; 40 L. T. 685...649, 652
— *v.* Huntley, 3 E. & B. 172 ; 2 C. L. R. 246 ; 23 L. J. M. C. 106 ; 18 Jur. 745 655
— *v.* Hutchings, 5 Q. B. D. 353 ; 6 Id. 300 ; 49 L. J. M. C. 64 ; 50 Id. 35 ; 42 L. T. 766 ; 44 Id. 364 ; 28 W. R. 595 ; 29 Id. 724 ; 45 J. P. 504 648
— *v.* Ingham, 17 Q. B. 884 ; 21 L. J. M. C. 125 ; 16 Jur. 526 . . 644
— *v.* Ipswich (Recorder of), 8 Dowl. 103 ; 1 W. W. & H. 337 . . 657
— *v.* Ivens, 7 C. & P. 213 125
— *v.* James, 1 East, 303, n. 659
— *v.* Jarvis, 1 Burr. 148 651
— *v.* Jennings, (1896) 1 Q. B. 64 . . . . . *Add.* 652
— *v.* Johnson, 1 Str. 261 652
— *v.* Jukes, 8 T. R. 536 ; 5 R. R. 445 . . . . . 651, 657
— *v.* Kent, 2 Ld. Raym. 1546 650
— *v.* Kent JJ., 3 B. & Ad. 250 ; 1 L. J. M. C. 29 659
— *v.* Keyn, 2 Ex. D. 63 ; 46 L. J. M. C. 17 ; 13 Cox, C. C. 403 . 607
— *v.* King-by, 15 J. P. 65 653
— *v.* Kingston-upon-Thames JJ., E. B. & E. 256 ; 27 L. J. M. C. 199 ; 4 Jur. N. S. 758 ; 6 W. R. 551 644
— *v.* Lambarde, L. R. 1 Q. B. 388 ; 35 L. J. M. C. 190 ; 14 W. R. 680 672
— *v.* Lancashire JJ., 4 B. & Ald. 289 659
— *v.* ———, 3 P. & D. 86 ; 11 A. & E. 144 ; 1 Jur. 121 . 659

PAGE
R. *v.* Leicester JJ., 7 B. & C. 6 382
— *v.* Lesley, 29 L. J. M. C. 97 ; Bell, C. C. 220 ; 8 Cox, C. C. 269 ; 6 Jur. N. S. 202 ; 1 L. T. 452 ; 8 W. R. 220 629
— *v.* Lewis, 8 A. & E. 881 ; 1 P. & D. 112 ; 8 L. J. M. C. 4 . . 646
— *v.* Lightfoot, 6 E. & B. 822 ; 25 L. J. M. C. 115 ; 2 Jur. N. S. 786; 4 W. R. 655 652
— *v.* Linford, 7 E. & B. 950 644
— *v.* Lovet, 7 T. R. 152 638
— *v.* Lundie, 31 L. J. M. C. 157 ; 8 Jur. N. S. 640 ; 5 L. T. 830 ; 10 W. R. 267 646
— *v.* McDonald, 15 Q. B. D. 323 ; 52 L. T. 583 ; 33 W. R. 735 ; 49 J. P. 695 ; 15 Cox, C. C. 757 230
— *v.* Mallinson, 2 Burr. 679 652
— *v.* Manchester & Leeds R. Co., 1 P. & D. 164 ; 8 A. & E. 413 ; 3 N. & P. 439 ; 1 W. W. & H. 458 ; 7 L. J. Q. B. 192 ; 8 Id. 66 ; 2 Jur. 857 . . . . . 659, 669
— *v.* Marsh, 2 B. & C. 717 ; 2 D. & R. M. C. 182 ; 4 D. & R. 260...651, 661
— *v.* Marsham, (1892) 1 Q. B. 371 ; 61 L. J. M. C. 52 ; 65 L. T. 778 ; 40 W. R. 84 ; 56 J. P. 164 644
— *v.* Metropolitan R. Co., 32 L. J. Q. B. 367 663
— *v.* Middlesex JJ., 5 B. & Ad. 1113 ; 3 N. & M. 110 ; 3 L. J. M. C. 32 662
— *v.* ———, 9 A. & E. 540 ; 1 P. & D. 402 662
— *v.* ———, 2 Q. B. D. 516 ; 46 L. J. M. C. 225 ; 36 L. T. 402 ; 25 W. R. 510 661
— *v.* Moore, 30 L. J. M. C. 77 ; L. & C. 1 ; 8 Cox, C. C. 416 ; 7 Jur. N. S. 172 ; 9 W. R. 276 190
— *v.* Morrison, 28 L. J. M. C. 210; Bell, C. C. 158; 8 Cox, C. C. 194; 5 Jur. N. S. 604 ; 7 W. R. 554 . . . . . 193, 197
— *v.* Neville, 2 B. & Ad. 299 660
— *v.* Nunneley, E. B. & E. 852 ; 27 L. J. M. C. 260 ; 4 Jur. N. S. 1146. . . . . 664, 666
— *v.* Padwick, 8 E. & B. 704 ; 27 L. J. M. C. 113 ; 4 Jur. N. S. 360; 6 W. R. 224 644
— *v.* Pagham Commissioners, 8 B. & C. 355 ; 2 M. & Ry. 468 . 266, 824
— *v.* Pain, Comb. 358 652
— *v.* Paty, 2 Ld. Raym. 1104 ; 2 Salk. 504 281
— *v.* Paynter, 7 E. & B. 328 ; 26 L. J. M. C. 102 ; 3 Jur. N. S. 511 ; 5 W. R. 267 ; 21 J. P. 626 . . . . . 644, 670
— *v.* Pease, 4 B. & Ad. 30 ; 2 L. J. M. C. 26 825
— *v.* Percy, L. R. 9 Q. B. 64 ; 43 L. J. M. C. 45 ; 22 W. R. 72 . . 644
— *v.* Perrott, 2 M. & S. 379 ; 15 R. R. 280 651
— *v.* Phillimore, 14 Q. B. D. 474, n. ; 51 L. T. 205 ; 32 W. R. 593 ; 48 J. P. 774 644
— *v.* Picton, 2 East, 198 654
— *v.* Pitt, 10 A. & E. 272 ; 2 P. & D. 385 ; 8 L. J. Q. B. 277 ; 3 Jur. 1028. 243
— *v.* Powell, 1 Q. B. 352 ; 4 P. & D. 719 243
— *v.* Price, 5 Q. B. D. 300 ; 49 L. J. M. C. 49 ; 42 L. T. 439 ; 28 W. R. 615 ; 44 J. P. 248 656
— *v.* Pullen, 1 Salk. 369 650
— *v.* Read, 9 A. & E. 619 ; 1 P. & D. 413 ; 8 L. J. M. C. 19 . . 640
— *v.* Reeve, 1 W. Bl. 231 657
— *v.* Rennett, 2 T. R. 197 ; 8 R. R. 809, n. 242
— *v.* Roberts, 3 Keb. 578 256
— *v.* Robinson, 28 L. J. M. C. 58 ; 5 Jur. N. S. 203; 8 Cox, C. C. 115; Bell, C. C. 34 ; 7 W. R. 203 431
— *v.* Robson, 31 L. J. M. C. 22 ; L. & C. 93 ; 9 Cox, C. C. 29 ; 8 Jur. N. S. 64 ; 5 L. T. 402 ; 10 W. R. 61 230
— *v.* Rochester, 7 E. & B. 910 ; 27 L. J. Q. B. 45 ; 3 Jur. N. S. 1097 644

PAGE

R. *v.* Rudge, 16 Q. B. D. 459 ; 55 L. J. M. C. 112 ; 53 L. T. 851 ; 34 W. R. 207 ; 50 J. P. 755 660
— *v.* Rymer, 2 Q. B. D. 136 ; 46 L. J. M. C. 108 ; 35 L. T. 774 ; 13 Cox, C. C. 378 ; 25 W. R. 415 125
— *v.* Saddlers Co., 3 E. & E. 42 ; 10 H. L. C. 404 ; 30 L. J. Q. B. 186 ; 32 Id. 337 ; 33 Id. 68 ; 6 Jur. N. S. 1113 ; 7 Id. 138 ; 9 Id. 1081 ; 2 L. T. 503 ; 4 Id. 54 ; 9 Id. 60 ; 11 W. R. 1004 669
— *v.* St. George's, Bloomsbury, 4 E. & B. 520 ; 3 C. L. R. 550 ; 24 L. J. M. C. 49 ; 1 Jur. N. S. 231 ; 3 W. R. 170 . . . 650
— *v.* St. Gregory, 2 A. & E. 99 ; 4 N. & M. 137 ; 4 L. J. M. C. 9 . 381
— *v.* St. James, Westminster, 2 A. & E. 241 ; 4 L. J. M. C. 15 . 662, 670
— *v.* St. Mary, 13 East, 57, n. 654
— *v.* St. Nicholas, 3 A. & E. 79 ; 4 N. & M. 624 ; 4 L. J. M. C. 97 . 654
— *v.* St. Olave's D. B., 8 E. & B. 529 664
— *v.* Salomons, 1 T. R. 249 ; 1 R. R. 194 653
— *v.* Sandon, 3 E. & B. 547 ; 23 L. J. M. C. 129 ; 18 Jur. 401 . . 657
— *v.* Scot, 3 T. R. 602 255
— *v.* Scott, 33 L. J. M. C. 15 ; 4 B. & S. 368 ; 8 L. T. 662 . . 640
— *v.* Searle, 2 M. & M. 75 . . . . . 491, 492
— *v.* Sevenoaks, 7 Q. B. 136 ; 14 L. J. M. C. 92 ; 9 Jur. 489 ; 1 New Sess. Cas. 595 659
— *v.* Sheffield & M. R. Co., 11 A. & E. 194 ; 3 P. & D. 111 ; 9 L. J. Q. B. 13 . . . . . 663, 668
— *v.* Sheward, 9 Q. B. D. 741 ; 5 Id. 179 ; 49 L. J. Q. B. 329, 716 ; 42 L. T. 363 ; 28 W. R. 506 659
— *v.* Shickle, L. R. 1 C. C. R. 158 432
— *v.* Shrewsbury JJ., 9 Dowl. 501 ; 10 L. J. M. C. 8 ; 5 Jur. 291 ; 11 A. & E. 159. 659
— *v.* Simpson, 1 Str. 44 ; 10 Mod. 248 653
— *v.* Slade, 21 Q. B. D. 433 ; 57 L. J. M. C. 120 ; 59 L. T. 640 ; 37 W. R. 141 431
— *v.* ——, (1895) 2 Q. B. 247 ; 72 L. T. 568 648
— *v.* Smith, 8 T. R. 588 . . . . . 638, 664
— *v.* ——, L. R. 10 Q. B. 604 647
— *v.* Somersetshire JJ., 1 D. & R. 443 669
— *v.* ——————, 5 B. & C. 816 ; 6 D. & R. 469 667
— *v.* ——————, 22 Q. B. D. 625 ; 58 L. J. M. C. 155 ; 60 L. T. 834 ; 37 W. R. 492 655
— *v.* S. Holland Drainage Comrs., 1 P. & D. 79 ; 8 A. & E. 429 ; 8 L. J. Q. B. 64 . . . . . 659, 669
— *v.* Spencer, 9 A. & E. 485 ; 8 L. J. M. C. 17 660
— *v.* Stimpson, 4 B. & S. 301 ; 32 L. J. M. C. 208 ; 8 L. T. 536 664, 665, 666
— *v.* Stoke-upon-Trent, 5 Q. B. 303 ; D. & M. 357 ; 13 L. J. M. C. 41 ; 8 Jur. 34 550
— *v.* Stone, 1 East, 639 . . . . . 638, 650, 652
— *v.* Surrey JJ., L. R. 5 Q. B. 466 ; 39 L. J. M. C. 145 . . 659, 668
— *v.* Symonds, 1 East, 189 654
— *v.* Theed, 2 Str. 919 638
— *v.* Totnes Union, 7 Q. B. 690 ; 2 New Sess. Cas. 82 ; 14 L. J. M. C. 148 ; 9 Jur. 660 652
— *v.* Totness JJ., 2 L. M. & P. 230 ; 15 Jur. 227 664
— *v.* Treasury (Lords of), 10 A. & E. 179 ; 2 P. & D. 369 ; 8 L. J. Q. B. 249 ; 3 Jur. 1167 662
— *v.* ——————, 10 A. & E. 374 ; 2 P. & D. 498 . . . 662
— *v.* Treble, 2 Taunt. 328 781
— *v.* Trelawney, 1 T. R. 222 650
— *v.* Venables, 2 Str. 630 638
— *v.* Walsall, 3 Q. B. D. 457 ; 38 L. T. 665 ; 26 W. R. 705 . . 658
— *v.* Warnford, 5 D. & R. 489 661

PAGE
R. *v.* Warwickshire JJ., 6 E. & B. 837 ; 25 L. J. M. C. 119 ; 2 Jur. N. S. 930 ; 4 W. R. 650 . . . . . 657, 668
— *v.* West Riding Yorks. JJ., 5 T. R. 629 . . . . . 663, 667
— *v.* ———————, 1 A. & E. 563 ; 3 N. & M. 802 ; 3 L. J. M. C. 117 . . . . . 657, 658
— *v.* Wheatman, 1 Dougl. 345 650
— *v.* Williams, 18 Q. B. 393 ; 21 L. J. M. C. 150 ; 16 Jur. 1065 . 653
— *v.* Wilson, 5 M. & Ry. 140 ; 10 B. & C. 80 98
— *v.* ———, 1 A. & E. 627 ; 4 N. & M. 243 ; 4 L. J. M. C. 19 . . 662
— *v.* Wiltshire JJ., 12 A. & E. 793 ; 4 P. & D. 406 ; 10 L. J. M. C. 17 ; 5 Jur. 217 . . . . . 652, 653, 654
— *v.* Wood, 5 E. & B. 49 ; 24 L. J. M. C. 130 ; 1 Jur. N. S. 802 ; 3 W. R. 419 . . . . . 644, 667
— *v.* Woodward, 31 L. J. M. C. 91 ; L. & C. 122 ; 9 Cox, C. C. 95 ; 8 Jur. N. S. 104 ; 5 L. T. 686 ; 10 W. R. 298 351
— *v.* Worcester JJ., 3 E. & B. 477 ; 23 L. J. M. C. 113 ; Id. Q. B. 259 ; 18 Jur. 424 657
Raikes *v.* Todd, 8 A. & E. 846 ; 1 P. & D. 138 ; 8 L. J. Q. B. 35 . 295
Raitt *v.* Mitchell, 4 Camp. 146 541
Ram Coomar Coondoo's Case, 2 App. Cas. 186 260
Ramkissenseat *v.* Barker, 1 Atk. 51 579
Ramsay *v.* Gilchrist, (1892) A. C. 412 ; 61 L. J. P. C. 72 ; 66 L. T. 806 ; 56 J. P. 711 30
——— *v.* Margrett, (1894) 2 Q. B. 18 ; 63 L. J. Q. B. 513 ; 70 L. T. 788 ; 1 Manson, 184 13
Randall *v.* Rigby, 4 M. & W. 130 ; 6 Dowl. 650 ; 1 H. & H. 231 ; 7 L. J. Ex. 240 . . . . . 84, 90
Randle *v.* Gould, 8 E. & B. 457 ; 27 L. J. Q. B. 57 ; 4 Jur. N. S. 304 ; 6 W. R. 108 366
Rannie *v.* Irvine, 7 M. & Gr. 969 ; 8 Scott, N. R. 674 ; 14 L. J. C. P. 10 ; 8 Jur. 1051 . . . . . 403, 413
Raper *v.* Birkbeck, 15 East, 17 ; 13 R. R. 354 785
Raphael *v.* Bank of England, 17 C. B. 161 ; 25 L. J. C. P. 33 ; 4 W. R. 10 . . . . . 469, 470
——— *v.* Pickford, 5 M. & Gr. 551 ; 6 Scott, N. R. 478 ; 12 L. J. C. P. 176 ; 7 Jur. 815 223
Rapier *v.* London Tram. Co., (1893) 2 Ch. 588 ; 63 L. J. Ch. 36 ; 69 L. T. 361 ; 2 R. 448 828
Ratcliff *v.* Davis, Yel. 178 . . . . . 191, 193
Ratcliffe *v.* Burton, 3 B. & P. 223 ; 6 R. R. 771 . . . 105, 106, 109
Rawley *v.* Rawley, 1 Q. B. D. 461 ; 45 L. J. Q. B. 675 ; 35 L. T. 191 ; 24 W. R. 995 622
Rawson *v.* Eicke, 7 A. & E. 451 ; 2 N. & P. 423 ; W. W. & D. 675 ; 7 L. J. Q. B. 17 503
Rawstron *v.* Taylor, 11 Exch. 369 ; 25 L. J. Ex. 33 273
Ray *v.* Jones, 19 C. B. N. S. 416 ; 34 L. J. C. P. 306 ; 11 Jur. N. S. 812 ; 12 L. T. 737 ; 13 W. R. 1018 339
Raymond *v.* Fitch, 5 Tyr. 985 ; 1 Gale, 337 ; 2 C. M. & R. 588 ; 5 L. J. Ex. 45 73
Rayner *v.* Mitchell, 2 C. P. D. 357 ; 25 W. R. 633 353
Rayson *v.* S. London Trams., (1893) 2 Q. B. 304 ; 62 L. J. Q. B. 593 ; 69 L. T. 491 ; 42 W. R. 21 ; 4 R. 522 260
Read's Case, Cro. Eliz. 645 425
Read *v.* Anderson, 13 Q. B. D. 779 ; 10 Id. 100 ; 52 L. J. Q. B. 214 ; 53 Id. 532 ; 48 L. T. 74 ; 51 Id. 55 ; 31 W. R. 453 ; 32 Id. 950 ; 47 J. P. 311 ; 49 Id. 4 147
—— *v.* Brookman, 3 T. R. 151 . . . . . 750, 753
—— *v.* Burley, Cro. Eliz. 596 428
—— *v.* Edwards, 34 L. J. C. P. 31 ; 17 C. B. N. S. 245 ; 11 L. T. 311 827
—— *v.* Victoria Station & P. R. Co., 32 L. J. Ex. 167 ; 1 H. & C. 826 ; 9 Jur. N. S. 1061 ; 11 W. R. 1032 663

PAGE

Reader *v.* Kingham, 13 C. B. N. S. 344 ; 32 L. J. C. P. 108 ; 9 Jur. N. S. 797 ; 7 L. T. 789 ; 11 W. R. 366 290
Readhead *v.* Mid. R. Co., L. R. 4 Q. B. 379 ; 2 Id. 412 ; 36 L. J. Q. B. 181 ; 38 Id. 169 ; 16 L. T. 485 ; 8 B. & S. 371 ; 9 Id. 519 ; 15 W. R. 831 ; 17 Id. 737 . . . . . 200, 220, 230
Reading *v.* Menham, 1 M. & Rob. 234 . . . . . 191, 556
Reay *v.* Richardson, 2 C. M. & R. 422 ; 5 Tyr. 931 ; 1 Gale, 219 ; 4 L. J. Ex. 236 334
—— *v.* White, 1 C. & M. 748 ; 3 Tyr. 596 ; 2 L. J. Ex. 229 . . 334
Rede *v.* Farr, 6 M. & S. 121 . . . . . 41, 43
Reece *v.* Strousberg, 54 L. T. 133 ; 50 J. P. 292 504
Reed *v.* Blades, 5 Taunt. 212 . . . . . 12, 13
—— *v.* Wilmot, 7 Bing. 577 14
Reedie *v.* L. & N. W. R. Co. 4 Exch. 244 ; 6 Railw. Cas. 184 ; 20 L. J. Ex. 65 277
Reeve *v.* Palmer, 5 C. B. N. S. 84 ; 27 L. J. C. P. 327 ; 28 Id. 168 ; 4 Jur. N. S. 929 ; 5 Id. 916 ; 7 W. R. 325 199
—— *v.* Yeates, 1 H. & C. 435 ; 31 L. J. M. C. 241 ; 8 Jur. N. S. 751 ; 10 W. R. 779 648
Reeves *v.* Capper, 5 B. N. C. 136 ; 6 Scott, 877 ; 1 Arn. 427 ; 2 Jur. 1067 . . . . . 14, 195, 196
——— *v.* Hearne, 1 M. & W. 323 ; 2 Gale, 4 ; 5 L. J. Ex. 156 . . 336
——— *v.* Reeves, 9 Mod. 128 28
Regent Stores, *Re*, 8 Ch. D. 616 ; 38 L. T. 493 ; 26 W. R. 425 . . 433
Reichel *v.* Oxford, 14 App. Cas. 259 ; 35 Ch. D. 48 ; 56 L. J. Ch. 1023 ; 59 Id. 66 ; 56 L. T. 539 ; 61 Id. 131 369
Reid *v.* Dickons, 3 B. & Ad. 499 ; 2 N. & M. 369 564
Reigate (Mayor of) *v.* Hart, L. R. 3 Q. B. 244 ; 37 L. J. M. C. 70 ; 18 L. T. 237 ; 9 B. & S. 129 ; 16 W. R. 896. 655
Reiner *v.* Salisbury, 2 Ch. D. 378 ; 24 W. R. 843 603
Remmett *v.* Lawrence, 15 Q. B. 1004 ; 20 L. J. Q. B. 25 ; 14 Jur. 1067 23
Renals *v.* Cowlishaw, 9 Ch. D. 125 ; 11 Id. 866 ; 48 L. J. Ch. 33, 830 ; 41 L. T. 116 ; 28 W. R. 9 . . . . . 87, 88
Rendlesham *v.* Robarts, 23 Beav. 321 ; 28 L. J. Ch. 948 ; 5 Jur. N. S. 1031 ; 7 W. R. 563 419
Rennie *v.* Robinson, 7 Moore, 539 ; 1 Bing. 147 91
Renteria *v.* Ruding, 1 M. & M. 511 . . . . . 460, 461
Reuss *v.* Picksley, L. R. 1 Ex. 342 ; 35 L. J. Ex. 218 ; 12 Jur. N. S. 628 ; 15 L. T. 25 ; 14 W. R. 924 ; 4 H. & C. 588 299
Reuter *v.* Electric Co., 6 E. & B. 341 ; 26 L. J. Q. B. 46 ; 2 Jur. N. S. 1245 ; 4 W. R. 564 350
Revis *v.* Smith, 18 C. B. 126 ; 25 L. J. C. P. 195 ; 2 Jur. N. S. 614 ; 4 W. R. 506 265
Reynolds *v.* Clarke, 2 Ld. Raym. 1399 ; 1 Str. 634 440
——— *v.* Hall, 28 L. J. Ex. 257 ; 4 H. & N. 519 788
——— *v.* Pitt, 19 Ves. 134 51
——— *v.* Wheeler, 10 C. B. N. S. 561 ; 30 L. J. C. P. 350 ; 7 Jur. N. S. 1290 ; 4 L. T. 472 151
Rhymney R. Co. *v.* Rhymney Iron Co., 25 Q. B. D. 146 ; 59 L. J. Q. B. 414 ; 63 L. T. 407 ; 38 W. R. 764 203
Rich *v.* Kneeland, Cro. Jac. 330 199
Richards *v.* Harper, L. R. 1 Ex. 199 ; 35 L. J. Ex. 130 ; 12 Jur. N. S. 770 ; 14 W. R. 643 85
——— *v.* Hayward, 2 M. & Gr. 574 ; 2 Scott, N. R. 670 ; 10 L. J. C. P. 108 814
——— *v.* L. B. & S. C. R. Co., 7 C. B. 839 ; 18 L. J. C. P. 257 ; 13 Jur. 986 201
——— *v.* Rose, 9 Exch. 218 ; 2 C. L. R. 311 ; 23 L. J. Ex. 3 ; 17 Jur. 1036 272
——— *v.* West Middlesex Co., 15 Q. B. D. 660 ; 54 L. J. Q. B. 551 ; 33 W. R. 902 ; 49 J. P. 631 352

PAGE
Richardson *v.* Dunn, 8 C. B. N. S. 655 ; 30 L. J. C. P. 44 ; 2 L. T. 430 280
——— *v.* Evans, 3 Madd. 218 34
——— *v.* Goss, 3 B. & P. 119 ; 6 R. R. 727 727
——— *v.* Hall, 1 B. & B. 50 ; 3 Moore, 307 141
——— *v.* Horton, 7 Beav. 112 ; 5 Id. 87 ; 6 Id. 185 ; 12 L. J. Ch. 333 ; 13 Id. 186 ; 7 Jur. 1144 22
——— *v.* N. E. R. Co., L. R. 7 C. P. 75 ; 41 L. J. C. P. 60 ; 26 L. T. 131 ; 20 W. R. 461 200
——— *v.* Rowntree, (1894) A. C. 217 ; 63 L. J. Q. B. 283 ; 70 L. T. 817 ; 58 J. P. 493 ; 6 R. 95 209
Riche *v.* Ashbury Co., L. R. 9 Ex. 224 ; L. R. 7 H. L. 653 ; 43 L. J. Ex. 177 ; 44 Id. 185 ; 31 L. T. 339 ; 33 Id. 450 ; 23 W. R. 7 ; 24 Id. 794 . . . . . 350, 378, 380, 381
Riches *v.* Evans, 9 C. & P. 640 14
Richmond *v.* Smith, 8 B. & C. 9 ; 2 M. & Ry. 235 122
Rickards *v.* Murdock, 10 B. & C. 527 . . . . . 487, 490, 491, 492
Ricket *v.* Metropolitan R. Co., 5 B. & S. 149 ; L. R. 2 H. L. 175 ; 34 L. J. Q. B. 257 ; 36 Id. 205 ; 11 Jur. N. S. 260 ; 12 L. T. 79 ; 16 Id. 542 ; 13 W. R. 455 ; 15 Id. 937. 274
Rider *v.* Wood, 29 L. J. M. C. 1 ; 5 Jur. N. S. 1354 ; 1 L. T. 30 ; 8 W. R. 23 672
Ridgway *v.* Wharton, 6 H. L. C. 238 ; 3 De G. M. & G. 677 ; 27 L. J. Ch. 46 ; 4 Jur. N. S. 173 ; 2 W. R. 137 ; 5 Id. 804. 296
Ridler *v.* Ridler, 22 Ch. D. 74 ; 52 L. J. Ch. 343 ; 48 L. T. 396 ; 31 W. R. 93 ; 47 J. P. 279 26
Ridley *v.* Ridley, 34 L. J. Ch. 462 ; 11 Jur. N. S. 475 ; 12 L. T. 481 ; 15 W. R. 829 304
Rigby *v.* Connol, 14 Ch. D. 482 ; 49 L. J. Ch. 328 ; 42 L. T. 139 ; 28 W. R. 650 370
——— *v.* Hewitt, 5 Exch. 240 ; 19 L. J. Ex. 291. 277
Riley *v.* Horne, 5 Bing. 217 ; 2 M. & P. 331 202
Risbourg *v.* Bruckner, 3 C. B. N. S. 812 ; 27 L. J. C. P. 90 ; 6 W. R. 215 161
Rishton *v.* Whatmore, 8 Ch. D. 467 ; 47 L. J. Ch. 629 ; 26 W. R. 827 321
Rist *v.* Faux, 4 B. & S. 409 ; 32 L. J. Q. B. 386 ; 10 Jur. N. S. 202 ; 8 L. T. 737 ; 11 W. R. 918 266
River Steamer Co., *Re*, 6 Ch. 822 ; 25 L. T. 319 ; 19 W. R. 1130...569, 571
Rix, *Re*, 4 D. & R. 352 664
Roach *v.* Thompson, 1 M. & M. 487 ; 4 C. & P. 194 149
——— *v.* Wadham, 6 East, 289 ; 2 Smith, 376 . . . . . 74, 75
Robbins *v.* Jones, 15 C. B. N. S. 221 ; 33 L. J. C. P. 1 ; 9 L. T. 523 ; 12 W. R. 248 ; 10 Jur. N. S. 239 347
Robert *v.* Harnage, 6 Mod. 228 ; 2 Ld. Raym. 1043 ; 2 Salk. 659 . 591
Roberts, *Ex p.*, 50 J. P. 567 659
——— *v.* Barker, 1 C. & M. 808 ; 3 Tyr. 945 ; 2 L. J. Ex. 268 . . 556
——— *v.* Crowe, L. R. 7 C. P. 629 ; 41 L. J. C. P. 198 ; 27 L. T. 238 166
——— *v.* Davey, 4 B. & Ad. 664 ; 1 N. & M. 443 ; 2 L. J. K. B. 141...42, 43
——— *v.* Shaw, 4 B. & S. 44 ; 32 L. J. Q. B. 308 ; 10 Jur. N. S. 147 ; 8 L. T. 634 ; 11 W. R. 829 567
Robertson *v.* Amazon, &c. Co., 7 Q. B. D. 598 ; 51 L. J. Q. B. 68 ; 46 L. T. 146 ; 4 Asp. M. C. 496 ; 30 W. R. 308. . . . 230
——— *v.* Clarke, 1 Bing. 445 ; 8 Moore, 622. 546
——— *v.* Jackson, 2 C. B. 412 ; 15 L. J. C. P. 28 ; 10 Jur. 98 . 547
Robins *v.* Gray, (1895) 2 Q. B. 78, 501 ; 73 L. T. 252 125
Robinson *v.* G. W. R., 35 L. J. C. P. 123 216
——— *v.* Kilvert, 41 Ch. D. 88 ; 58 L. J. Ch. 392 ; 61 L. T. 60 ; 37 W. R. 545 . . . . . 161, 268
——— *v.* L. & S. W. R. Co., 19 C. B. N. S. 51 ; 34 L. J. C. P. 234 ; 11 Jur. N. S. 390 ; 12 L. T. 347 ; 13 W. R. 660 . . 213
——— *v.* M'Donnel, 2 B. & Ald. 134 15
——— *v.* Mollett, L. R. 7 H. L. 802 ; L. R. 5 C. P. 646 ; 7 Id. 84 ; 39 L. J. C. P. 290 ; 41 Id. 65 ; 44 Id. 362 . . . . 542, 549, 557

PAGE

Robinson *v.* Ommanney, 23 Ch. D. 285 ; 21 Id. 780 ; 51 L. J. Ch. 894 ; 52 Id. 440 ; 47 L. T. 78 ; 49 Id. 19 ; 30 W. R. 939 ; 31 Id. 525 372
——— *v.* Walter, Poph. 127 ; 3 Bulstr. 269 ; 1 Ro. Rep. 449 . 119, 125
Robson *v.* Douglas, Freem. 535 ; 3 Lev. 20 344
Rodger *v.* Comptoir d'Escompte, L. R. 2 P. C. 393 ; 5 Moore, P. C. N. S. 538 ; 38 L. J. P. C. 30 ; 21 L. T. 33 ; 17 W. R. 468...735, 736, 739
Rodgers *v.* Maw, 15 M. & W. 444 ; 4 D. & L. 66 ; 16 L. J. Ex. 137 . 158
——— *v.* Parker, 18 C. B. 112 132
——— *v.* Richards, (1892) 1 Q. B. 555 ; 66 L. T. 261 ; 40 W. R. 331 ; 56 J. P. 281 ; 17 Cox, C. C. 474 647
Roe *v.* Birkenhead R. Co., 7 Exch. 36 ; 21 L. J. Ex. 9 ; 6 Railw. Cas. 795 351
—— *v.* Galliers, 2 T. R. 133 ; 1 R. R. 445 . . . . . 46, 47
—— *v.* Harrison, 2 T. R. 425 ; 1 R. R. 513 . . . . . 34, 37, 45
—— *v.* Hayley, 12 East, 464 ; 11 R. R. 455 65
—— *v.* Lees, 2 W. Bl. 1171 533
—— *v.* Minshall, B. N. P. 96 c 39
—— *v.* Mitton, 2 Wils. 356 27
—— *v.* Reade, 8 T. R. 118 496
—— *v.* Sales, 1 M. & S. 297 46
—— *v.* York, 6 East, 86 ; 2 Smith, 166 ; 8 R. R. 413 786
Rogers *v.* Dejoncourt, 7 Ir. L. R. 482 ; 8 Id. 450 350
——— *v.* Grazebrook, 8 Q. B. 895 514
——— *v.* Hull Dock Co., 34 L. J. Ch. 165 ; 10 Jur. N. S. 1245 ; 11 L. T. 42, 463 ; 12 W. R. 1101 ; 13 Id. 217 . . . 553
——— *v.* Humphreys, 4 A. & E. 299 ; 5 N. & M. 511 ; 1 H. & W. 625 ; 5 L. J. K. B. 65 . . . . . 61, 505
——— *v.* Lambert (No. 1), 24 Q. B. D. 573 ; 59 L. J. Q. B. 259 ; 62 L. T. 694 ; 38 W. R. 542 ; 54 J. P. 501 . . 195
——— *v.* ——— (No. 2), (1891) 1 Q. B. 318 ; 60 L. J. Q. B. 187 ; 64 L. T. 406 ; 39 W. R. 114 ; 55 J. P. 452 . . . 195
——— *v.* Maddocks, (1892) 3 Ch. 346 ; 62 L. J. Ch. 219 ; 67 L. T. 329 413
——— *v.* Parrey, 2 Bulst. 136 394
——— *v.* Rajendro Dutt, 13 Moo. P. C. 209 630
——— *v.* Rice, (1892) 2 Ch. 170 ; 61 L. J. Ch. 573 ; 60 L. T. 640 ; 40 W. R. 489 51
Rolla, The, 6 Rob. 364 350
Rollason *v.* Rollason, 34 Ch. D. 495 ; 56 L. J. Ch. 768 ; 56 L. T. 303 ; 35 W. R. 607 197
Ronneberg *v.* Falkland Islands Co., 34 L. J. C. P. 34 ; 17 C. B. N. S. 1 ; 10 Jur. N. S. 940 ; 10 L. T. 530 ; 12 W. R. 914 . . . 149
Roope *v.* D'Avigdor, 10 Q. B. D. 412 ; 48 L. T. 761 ; 47 J. P. 248 . 279
Rooth *v.* N. E. R. Co., L. R. 2 Ex. 173 ; 36 L. J. Ex. 83 ; 15 L. T. 624 ; 15 W. R. 695 . . . . . 216, 224
——— *v.* Wilson, 1 B. & Ald. 59 189
Roper *v.* Lendon, 1 E. & E. 825 ; 28 L. J. Q. B. 260 ; 5 Jur. N. S. 491 ; 7 W. R. 441 341
Roret *v.* Lewis, 5 D. & L. 371 ; 17 L. J. Ex. 99 260
Roscorla *v.* Thomas, 3 Q. B. 234 ; 2 G. & D. 508 ; 11 L. J. Q. B. 214 ; 6 Jur. 929 147
Rosevear Co., *Ex p.*, 11 Ch. D. 560 ; 48 L. J. Bkcy. 100 ; 40 L. T. 730 ; 27 W. R. 591 . . . . . 728, 729
Rosewarne *v.* Billing, 15 C. B. N. S. 316 ; 33 L. J. C. P. 55 ; 10 Jur. N. S. 496 ; 9 L. T. 441 ; 12 W. R. 104 147
Rosher *v.* Rosher, 26 Ch. D. 801 ; 53 L. J. Ch. 722 ; 51 L. T. 785 ; 32 W. R. 821 417
——— *v.* Williams, 20 Eq. 210 ; 44 L. J. Ch. 419 ; 32 L. T. 387 ; 26 W. R. 561 25
Rosling *v.* Muggeridge, 16 M. & W. 181 ; 4 D. & L. 298 ; 16 L. J. Ex. 38 334
Ross *v.* Fedden, L. R. 7 Q. B. 661 ; 41 L. J. Q. B. 270 ; 26 L. T. 966 824
—— *v.* Hill, 2 C. B. 877 ; 3 D. & L. 788 ; 15 L. J. C. P. 182 ; 10 Jur. 435 200

PAGE

Ross *v.* Rugge-Price, 1 Ex. D. 269 ; 45 L. J. Ex. 777 ; 34 L. T. 535 ; 24 W. R. 786 286
Rossiter *v.* Miller, 3 App. Cas. 1124 ; 5 Ch. D. 648 ; 48 L. J. Ch. 10 ; 46 Id. 228, 737 ; 39 L. T. 173 ; 37 Id. 14 ; 36 Id. 304 ; 26 W. R. 865 ; 25 Id. 870 . . . . . 298, 302
Rosslyn's Trusts, *Re*, 16 Sim. 391 ; 18 L. J. Ch. 98 ; 13 Jur. 27 . 420
Roswell *v.* Prior, 12 Mod. 635 439
Rotheram Co., *Re*, 25 Ch. D. 103 ; 53 L. J. Ch. 290 ; 50 L. T. 219 ; 32 W. R. 131 140
Rothschild *v.* Currie, 1 Q. B. 43 ; 4 P. & D. 737 ; 10 L. J. Q. B. 77 ; 5 Jur. 865 612
Rouquette *v.* Overmann, L. R. 10 Q. B. 525 ; 44 L. J. Q. B. 221 ; 33 L. T. 420 . . . . . 606, 611, 612
Rouse *v.* Bradford Bank, (1894) 2 Ch. 32 ; (1894) A. C. 586 ; 63 L. J. Ch. 337 ; 69 L. T. 828 ; 70 Id. 427 ; 71 Id. 522 ; 43 W. R. 78 ; 7 R. 127 334
Rousillon *v.* Rousillon, 14 Ch. D. 351 ; 49 L. J. Ch. 338 ; 42 L. T. 679 ; 28 W. R. 623 ; 44 J. P. 663 . . . . . 404, 411
Rowbotham *v.* Wilson, 8 H. L. C. 348 ; 6 E. & B. 593 ; 8 Id. 123 ; 25 L. J. Q. B. 362 ; 27 Id. 61 ; 30 Id. 49 ; 2 Jur. N. S. 736 ; 3 Id. 1297 ; 6 Id. 965 ; 2 L. T. 642 ; 4 W. R. 638 ; 5 Id. 820 . 89, 269
Rowcliffe *v.* Leigh, 6 Ch. D. 256 ; 46 L. J. Ch. 60 ; 37 L. T. 557 ; 25 W. R. 783 559
Rowe *v.* Pickford, 8 Taunt. 83 ; 1 Moore, 526 727
Rowley *v.* Horne, 3 Bing. 2 ; 10 Moore, 247 205
——— *v.* Rowley, L. R. 1 H. L. Sc. 63 ; 35 L. J. Mat. 110 . . 377
Royal Aquarium *v.* Parkinson, (1892) 1 Q. B. 431 ; 61 L. J. Q. B. 409 ; 66 L. T. 513 ; 40 W. R. 450 ; 56 J. P. 404 266
Royal British Bank *v.* Turquand, 6 E. & B. 327 ; 5 Id. 248 ; 24 L. J. Q. B. 327 ; 1 Jur. N. S. 1086 ; 2 Id. 663 380
Ruddiman *v.* Smith, 60 L. T. 708 ; 37 W. R. 528 ; 53 J. P. 518 352, 824
Rudge *v.* Birch, 1 T. R. 622 770
Rudyard's Case, 2 Vent. 2 375
Rumball *v.* Metropolitan Bank, 2 Q. B. D. 194 ; 46 L. J. Q. B. 346 ; 36 L. T. 240 ; 25 W. R. 366 . . . . . 462, 465, 466
Rumsey *v.* N. E. R. Co., 14 C. B. N. S. 641 ; 32 L. J. C. P. 244 ; 10 Jur. N. S. 208 ; 8 L. T. 666 ; 11 W. R. 911 200
Russel *v.* Langstaffe, 2 Dougl. 514 703
Russell, *Ex p.*, 19 Ch. D. 588 ; 51 L. J. Ch. 521 ; 46 L. T. 113 ; 30 W. R. 584 21
——— *v.* Hammond, 1 Atk. 13 20
——— *v.* Shenton, 3 Q. B. 449 ; 2 G. & D. 573 ; 11 L. J. Q. B. 289 ; 6 Jur. 1083 826
Rustomjee *v.* The Queen, 2 Q. B. D. 69 ; 1 Id. 487 ; 45 L. J. Q. B. 249 ; 46 Id. 238 ; 34 L. T. 278 ; 36 Id. 190 ; 24 W. R. 428 ; 25 Id. 338. 625
Ruttinger *v.* Temple, 4 B. & S. 491 ; 33 L. J. Q. B. 1 ; 9 Jur. N. S. 1239 ; 9 L. T. 256 ; 12 W. R. 9 145
Ryall *v.* Rolle, 1 Atk. 165 ; 1 Ves. Sen. 348 195
Ryan *v.* Shilcock, 7 Exch. 72 ; 21 L. J. Ex. 55 ; 15 Jur. 1200 . . 108
Rylands *v.* Fletcher. See *Fletcher* v. *Rylands*.

S.

Sadler *v.* Nixon, 5 B. & Ad. 936 ; 3 N. & M. 258 ; 3 L. J. K. B. 101 153
St. Cloud, The, Brown & Lush. 4 ; 8 L. T. 54 739
St. Cross *v.* De Walden, 6 T. R. 338 . . . . . 552, 553
St. James, Westminster (Governors of) *v.* Battersea Overseers, 6 Jur. N. S 100 ; 6 C. B. N. S. 878 ; 29 L. J. M. C. 26 671

PAGE

St. Pancras *v.* Batterbury, 2 C. B. N. S. 477 ; 26 L. J. C. P. 243 ; 3 Jur. N. S. 1106 285
Sainter *v.* Ferguson, 7 C. B. 716 ; 18 L. J. C. P. 217 ; 13 Jur. 828 . 407
Sale *v.* Lambert, 18 Eq. 1 ; 43 L. J. Ch. 470 ; 22 W. R. 478 . . 298
Salomons *v.* Nissen, 2 T. R. 674 703
Salvin *v.* N. Brancepeth Co., 9 Ch. 705 ; 44 L. J. Ch. 149 ; 31 L. T. 154 ; 22 W. R. 904 268
Sampson *v.* Easterby. See *Easterby* v. *Sampson* 66
——— *v.* Hoddinott, 1 C. B. N. S. 590 ; 26 L. J. C. P. 148 ; 3 Jur. N. S. 243 ; 5 W. R. 230 273
Sandgate L. B. *v.* Pledge, 14 Q. B. D. 730 ; 52 L. T. 546 ; 33 W. R. 565 ; 49 J. P. 342, 670 672
Sandon *v.* Jervis, E. B. & E. 935, 942 ; 28 L. J. Ex. 156 ; 5 Jur. N. S. 860 ; 7 W. R. 290 . . . . . 106, 108, 109
Sandys *v.* Hodgson, 10 A. & E. 472 ; 2 P. & D. 435 ; 9 L. J. Q. B. 31 431
Santler *v.* Heard, 2 W. Bl. 1031 600
Santos *v.* Illidge, 6 C. B. N. S. 841 ; 8 Id. 861 ; 28 L. J. C. P. 317 ; 29 Id. 348 ; 5 Jur. N. S. 1358 ; 6 Id. 1348 ; 3 L. T. 155 ; 8 W. R. 705 605
Sapsford *v.* Fletcher, 4 T. R. 511 . . . . . 157, 162, 163
Sargent *v.* Morris, 3 B. & Ald. 277 221
Sarl *v.* Bourdillon, 26 L. J. C. P. 78 ; 1 C. B. N. S. 188 ; 2 Jur. N. S. 1208 ; 5 W. R. 196 320
Saunders *v.* Merryweather, 3 H. & C. 902 ; 35 L. J. Ex. 115 ; 11 Jur. N. S. 655 ; 13 W. R. 814 512
——— *v.* Wakefield, 4 B. & Ald. 595 . . . . . 291, 318
——— *v.* Wharton, 32 L. J. Ch. 224 ; 4 Giff. 179 ; 9 Cox, C. C. 279 ; 9 Jur. N. S. 570 ; 7 L. T. 704 18
Saunderson *v.* Jackson, 2 B. & P. 238 ; 5 R. R. 580 320
Savignac *v.* Cuff, 2 T. R. 66, cited 677, 686, 700, 703
Savile *v.* Roberts, 1 Ld. Raym. 374 ; 3 Id. 264 ; Raym. Ent. 374, 396 ; 5 Mod. 394, 405 ; 12 Id. 208 ; 1 Salk. 13 ; 3 Id. 16 ; Carth. 416 ; Holt, 8, 150, 193 ; 2 Vin. 25, pl. 42 260
Saxon Life Ass. Co., *Re*, 32 L. J. Ch. 206 ; 30 Id. 137 ; 7 L. T. 22, 404 ; 2 J. & H. 408 ; 10 W. R. 724 ; 11 Id. 59 380
Say & Seale *v.* Stephens, Cro. Car. 135 239
Sayers *v.* Collyer, 24 Ch. D. 180 ; 28 Id. 103 ; 58 L. J. Ch. 1 ; 51 L.T. 723 ; 32 W. R. 200 ; 33 Id. 91 88
Scaife *v.* Farrant, L. R. 10 Ex. 358 ; 44 L. J. Ex. 36, 234 ; 32 L. T. 563 ; 33 Id. 278 ; 23 W. R. 469, 840 . . . 199, 208
——— *v.* Tobin, 3 B. & Ad. 523 ; 1 L. J. K. B. 183 461
Scaltock *v.* Harston, 1 C. P. D. 106 ; 45 L. J. C. P. 125 ; 34 L. T. 130; 24 W. R. 431 50
Scarfe *v.* Morgan, 4 M. & W. 270 ; 1 H. & H. 292 ; 7 L. J. Ex. 324 ; 2 Jur. 569 374
Scattergood *v.* Sylvester, 15 Q. B. 506 ; 19 L. J. Q. B. 447 ; 14 Jur. 977 473
Schibsby *v.* Westenholz, L. R. 6 Q. B. 155; 40 L. J. Q. B. 73 ; 24 L.T. 93 ; 19 W. R. 587 608
Schlencker *v.* Moxsy, 3 B. & C. 789 ; 5 D. & R. 747 158
Schmidt *v.* R. Mail Co., 45 L. J. Q. B. 646 218
Scholey *v.* Walton, 12 M. & W. 510 ; 13 L. J. Ex. 122 ; 8 Jur. 319 567
Scholfield *v.* Londesborough, (1895) 1 Q. B. 536 ; (1894) 2 Q. B. 660 ; 63 L. J. Q. B. 649 ; 64 Id. 293 ; 71 L. T. 86 ; 72 Id. 46 ; 43 W. R. 331 ; 10 R. 376 ; 14 Id. 281, 780, 783, 784
Schotsmans *v.* L. & Y. R. Co., 2 Ch. 332 ; 1 Eq. 349 ; 35 L. J. Ch. 100; 36 Id. 361 ; 13 L. T. 733 ; 16 Id. 189 ; 14 W. R. 270 ; 15 Id. 537 722, 729
Schreiber *v.* Dinkel, 54 L. T. 911 27
Schuster *v.* McKellar, 7 E. & B. 704 ; 26 L. J. Q. B. 281 ; 3 Jur. N. S. 1320 ; 5 W. R. 657 . . . . . 555, 729, 733, 736

PAGE

Schuster *v.* Wheelright, 8 C. B. N. S. 383 ; 29 L. J. C. P. 222 ; 6 Jur. N. S. 944 601
Schwan, The, (1892) P. 419 ; 69 L. T. 34 219
Scobie *v.* Collins, (1895) 1 Q. B. 375 ; 64 L. J. Q. B. 10 ; 71 L. T. 775 519
Scott *v.* Avery, 5 H. L. C. 811 ; 8 Exch. 487 ; 25 L. J. Ex. 308 ; 22 Id. 157, 287 ; 17 Jur. 810 ; 2 Jur. N. S. 815 ; 4 W. R. 746 . 340
—— *v.* Bell, 2 Lev. 70 27
—— *v.* Brown, 51 L. T. 747 134
—— *v.* ——, (1892) 2 Q. B. 724 ; 61 L. J. Q. B. 738 ; 67 L. T. 782 ; 41 W. R. 116 ; 57 J. P. 213 ; 4 R. 42 . . . 364, 368, 387
—— *v.* Buckley, 16 L. T. 573 108
—— *v.* Irving, 1 B. & Ad. 605 549
—— *v.* Liverpool, 3 De G. & J. 334 ; 27 L. J. Ch. 641 ; 28 Id. 230 ; 4 Jur. N. S. 402 ; 5 Id. 105 ; 7 W. R. 153 341
—— *v.* London Dock Co., 3 H. & C. 596 ; 34 L. J. Ex. 17, 220 ; 11 Jur. N. S. 204 ; 13 W. R. 410 ; 13 L. T. 148 . . 798, 810
—— *v.* Mercantile Ins. Co., 66 L. T. 811 341
—— *v.* Pettit, 3 B. & P. 469 ; 7 R. R. 804 727
—— *v.* Seymour, 1 H. & C. 219 ; 31 L. J. Ex. 457 ; 8 Jur. N. S. 568 ; 6 L. T. 607 ; 10 W. R. 739 . . . . . 607, 620
—— *v.* Shepherd, 2 W. Bl. 892 ; 3 Wils. 403 . . . . 266, 438
—— *v.* Stansfield, L. R. 3 Ex. 220 ; 37 L. J. Ex. 155 ; 18 L. T. 572 ; 16 W. R. 911 . . . . . 265, 284, 631
Scottish N. E. R. Co. *v.* Stewart, 3 Macq. 382 ; 5 Jur. N. S. 607 ; 7 W. R. 458 366
Scrutton *v.* Childs, 36 L. T. 212 554
Seaborne *v.* Maddy, 9 C. & P. 497 144
Seamen *v.* Netherclift, 1 C. P. D. 540 ; 46 L. J. C. P. 128 ; 35 L. T. 784 ; 25 W. R. 159 265
Sear *v.* House Soc., 16 Ch. D. 387 ; 50 L. J. Ch. 77 ; 43 L. T. 531 ; 29 W. R. 192 ; 45 J. P. 204 48
Searle *v.* Laverick, L. R. 9 Q. B. 122 ; 43 L. J. Q. B. 43 ; 30 L. T. 89 ; 22 W. R. 367 199
Searles *v.* Scarlett, (1892) 2 Q. B. 56 ; 61 L. J. Q. B. 573 ; 66 L. T. 837 ; 40 W. R. 696 ; 56 J. P. 789 264
Seath *v.* Moore, 11 App. Cas. 350 ; 55 L. J. P. C. 54 ; 54 L. T. 690 ; 5 Asp. M. C. 586 148
Seaton *v.* Deerhurst, (1895) 1 Q. B. 853 ; 64 L. J. Q. B. 430 ; 72 L. T. 453 ; 43 W. R. 436 335
Sedgwick *v.* Daniell, 2 H. & N. 319 ; 27 L. J. Ex. 116 153
Seers *v.* Hind, 1 Ves. 294 47
Sellin *v.* Price, L. R. 2 Ex. 189 ; 36 L. J. Ex. 93 ; 16 L. T. 21 ; 15 W. R. 749 784
Semayne's Case, 5 Co. Rep. 91 99
Semple *v.* Pink, 1 Exch. 74 ; 16 L. J. Ex. 237 295
Senior *v.* Armitage, Holt, N. P. 197 536
—— *v.* Butt, 1 Tyr. 283, cited 301
Seton *v.* Slade, 7 Ves. 265 ; 6 R. R. 124 315
Sewell *v.* Burdick, *see* Burdick *v.* Sewell 193, 684, 702
Seymour *v.* Bridge, 14 Q. B. D. 460 ; 54 L. J. Q. B. 347 554
———— *v.* Greenwood, 6 H. & N. 359 ; 7 Id. 355 ; 30 L. J. Ex. 189, 327 ; 4 L. T. 835 ; 9 W. R. 518, 785 . . . . . 342, 351
Shackell *v.* Chorlton, (1895) 1 Ch. 378 ; 64 L. J. Ch. 353 ; 72 L. T. 188 ; 43 W. R. 394 433
———— *v.* Rosier, 2 B. N. C. 634 ; 3 Scott, 59 ; 5 L. J. C. P. 193 . . . 156, 372
———— *v.* West, 2 E. & E. 326 ; 29 L. J. M. C. 45 ; 1 L. T. 28 ; 6 Jur. N. S. 95 ; 8 W. R. 22 . . . . . 197, 671
Shadwell *v.* Shadwell, 9 C. B. N. S. 159 ; 30 L. J. C. P. 145 ; 7 Jur. N. S. 311 ; 3 L. T. 628 ; 9 W. R. 163 . . . . . 139, 267
Shardlow *v.* Cotterell, 20 Ch. D. 90 ; 51 L. J. Ch. 353 ; 45 L. T. 572 ; 30 W. R. 143 . . . . . 297, 298

PAGE
Sharman *v.* Brandt, L. R. 6 Q. B. 720 ; 40 L. J. Q. B. 312 ; 19 W. R. 936 322
Sharp *v.* Grey, 9 Bing. 457 ; 2 M. & Scott, 620 ; 2 L. J. C. P. 45 . 200
—— *v.* Waterhouse, 7 E. & B. 816 ; 27 L. J. Q. B. 70 ; 3 Jur. N. S. 1022 72
Sharpe *v.* San Paulo, 8 Ch. 597 ; 27 L. T. 699 ; 29 Id. 9 341
Sharrod *v.* L. & N. W. R. Co., 4 Exch. 580 ; 7 D. & L. 213 ; 14 Jur. 23 ; 6 Railw. Cas. 239 445
Shattack *v.* Carden, 6 Exch. 725 ; 2 L. M. & P. 466 ; 21 L. J. Ex. 200 23
Shaw *v.* Benson, 11 Q. B. D. 563 ; 52 L. J. Q. B. 575 ; 49 L. T. 651 . 370
—— *v.* Bran, 1 Stark. 319 18
—— *v.* G. W. R. Co., (1894) 1 Q. B. 373 ; 70 L. T. 218 ; 42 W. R. 285 ; 58 J. P. 318 ; 10 R. 85 . . . . . 207, 209, 210
—— *v.* Y. & N. Mid. R. Co., 13 Q. B. 347 ; 18 L. J. Q. B. 181 ; 13 Jur. 385 ; 6 Railw. Cas. 87 . . . . . 208, 210, 212
—— *v.* Woodcock, 7 B. & C. 73 ; 9 D. & R. 839 301
Shears *v.* Rogers, 3 B. & Ad. 363 . . . . . 11, 20, 22
Shedden *v.* Patrick, 1 Macq. 535 ; 1 Paterson, 332 669
Sheers *v.* Brooks, 2 H. Bl. 120 ; 3 R. R. 357 107
Sheffield *v.* London J. S. Bank, 13 App. Cas. 333 ; 34 Ch. D. 95 ; 56 L. J. Ch. 569 ; 57 Id. 986 ; 55 L. T. 678 ; 58 Id. 735 ; 35 W. R. 220 ; 37 Id. 33 472
Shelling *v.* Farmer, 1 Str. 646 594
Shelton *v.* Springett, 11 C. B. 452 145
Shenstone *v.* Hilton, (1894) 2 Q. B. 452 ; 63 L. J. Q. B. 584 ; 71 L. T. 339 ; 10 R. 390 746
Shepherd *v.* Berger, (1891) 1 Q. B. 597 ; 60 L. J. Q. B. 395 ; 64 L. T. 435 ; 39 W. R. 330 ; 55 J. P. 532 45
———— *v.* Bristol & E. R. Co., L. R. 3 Ex. 189 ; 37 L. J. Ex. 113 ; 18 L. T. 528 ; 16 W. R. 982 224
———— *v.* Harrison, L. R. 5 H. L. 116 ; L. R. 4 Q. B. 196, 493 ; 38 L. J. Q. B. 105, 177 ; 40 Id. 148 ; 20 L. T. 24 ; 24 Id. 857 ; 17 W. R. 609, 770 ; 20 Id. 1 729
———— *v.* Hills, 11 Exch. 55 ; 25 L. J. Ex. 6 285
Sheppard *v.* Gilmore, 57 L. J. Ch. 6 ; 57 L. T. 614 88
———— *v.* Gosnold, Vaugh. 159 255
———— *v.* Hong Kong Bank, 20 W. R. 459 48
———— *v.* Union Bank, 7 H. & N. 661 ; 31 L. J. Ex. 154 ; 8 Jur. N. S. 264 ; 5 L. T. 757 ; 10 W. R. 299 744
Sheridan *v.* New Quay Co., 4 C. B. N. S. 618 ; 28 L. J. C. P. 58 ; 5 Jur. N. S. 248 . . . . . 195, 733, 737
———— *v.* M. G. W. R. Co., 24 L. R. Ir. 146 . . . . . 217, 218
Shiells *v.* Blackburne, 1 H. Bl. 159 ; 2 R. R. 750 . . . 184, 185, 227
Shillibeer *v.* Glyn, 2 M. & W. 143 ; 2 Gale, 212 ; 6 L. J. Ex. 21 . 182
Shillito *v.* Hobson, 30 Ch. D. 396 ; 55 L. J. Ch. 741 ; 53 L. T. 746 ; 34 W. R. 286 194
Shipley *v.* Kymer, 1 M. & S. 484 741
Shipton *v.* Casson, 5 B. & C. 378 334
Shorland *v.* Govett, 5 B. & C. 485 ; 8 D. & R. 257 133
Short *v.* Kalloway, 11 A. & E. 28 149
—— *v.* Simpson, L. R. 1 C. P. 248 ; 1 H. & R. 181 ; 35 L. J. C. P. 147 ; 12 Jur. N. S. 258 ; 13 L. T. 674 ; 14 W. R. 307 . . . 739, 740
Shortrede *v.* Cheek, 1 A. & E. 57 ; 3 N. & M. 866 ; 3 L. J. K. B. 125 293
Shower *v.* Pilck, 4 Exch. 478 ; 19 L. J. Ex. 113 148
Shrewsbury's Countess of) Case, 5 Co. Rep. 13 b ; Cro. Eliz. 777, 784 170
Shroder *v.* Myers, 34 W. R. 261 601
Shurmur *v.* Sedgwick, 24 Ch. D. 597 ; 53 L. J. Ch. 87 ; 49 L. T. 156 ; 31 W. R. 884 . . . . . 26, 27
Sibree *v.* Tripp, 15 M. & W. 23 ; 15 L. J. Ex. 318 . 325, 326, 331, 332
Siddons *v.* Short, 2 C. P. D. 572 ; 46 L. J. C. P. 795 ; 37 L. T. 230 . 272
Sidebotham *v.* Holland, (1895) 1 Q. B. 378 ; 64 L. J. Q. B. 200 ; 72 L. T. 62 ; 43 W. R. 228 305

PAGE
Sidwell *v.* Mason, 2 H. & N. 306; 26 L. J. Ex. 407; 3 Jur. N. S. 649; 5 W. R. 729 570
Sievewright *v.* Archibald, 17 Q. B. 103; 20 L. J. Q. B. 529; 15 Jur. 947 302
Siffken *v.* Wray, 6 East, 371; 2 Smith, 480 724
Siggers *v.* Evans, 5 E. & B. 367; 24 L. J. Q. B. 305; 1 Jur. N. S. 851 17
Sigourney *v.* Lloyd, 8 B. & C. 622; 5 Bing. 525; 3 M. & Ry. 58; 3 M. & P. 229; 3 Y. & J. 220 457
Sills *v.* Brown, 9 C. & P. 601 492
Simmonds *v.* Humble, 13 C. B. N. S. 258; 9 L. T. 168 319
Simon *v.* Metivier, 1 W. Bl. 599 321
Simons *v.* G. W. R. Co., 18 C. B. 805; 26 L. J. C. P. 25; 2 C. B. N. S. 620 . . . . . 213, 214, 216, 217, 223
Simpkin Simeon's Case, 3 Bulstr. 165; Hob. 47; 1 Roll. Rep. 81; Cro. Eliz. 436 57
Simpson *v.* Bloss, 7 Taunt. 246; 2 Marsh. 542 387
——— *v.* Clayton, 4 B. N. C. 758; 6 Scott, 469; 1 Arn. 299; 8 L. J. C. P. 59; 2 Jur. 892 . . . . . 60, 65
——— *v.* Eggington, 10 Exch. 845; 24 L. J. Ex. 312 338
——— *v.* Fogo, 1 H. & M. 195; 1 J. & H. 18; 32 L. J. Ch. 249; 9 Jur. N. S. 403; 8 L. T. 61; 11 W. R. 418 608
——— *v.* Hartopp, Willes, 512 421
Sims *v.* Landray, (1894) 2 Ch. 318; 63 L. J. Ch. 535; 70 L. T. 530; 42 W. R. 621; 8 R. 582 . . . . . 299, 321
—— *v.* Thomas, 12 A. & E. 536; 4 P. & D. 233; 9 L. J. Q. B. 399; 4 Jur. 1181 23
Singer Co. *v.* Clark, 5 Ex. D. 37; 49 L. J. Ex. 224; 41 L. T. 591; 28 W. R. 170; 44 J. P. 59 . . . . . 197, 200
Singleton *v.* E. Counties R. Co., 7 C. B. N. S. 287 275
——— *v.* Williamson, 7 H. & N. 747; 31 L. J. Ex. 287; 8 Jur. N. S. 60, 157; 5 L. T. 644; 10 W. R. 174, 301 . . 130, 131, 827
Sirdar Gurdyal Singh *v.* Faridkote (Rajah of), (1894) A. C. 670; 11 R. 607, 608
Six Carpenters' Case, 8 Co. Rep. 146 a 127
Skaife *v.* Jackson, 3 B. & C. 421; 3 D. & R. 290 328
Skarf *v.* Soulby, 1 Mac. & G. 364; 1 Hall & T. 426; 18 L. J. Ch. 8; 19 Id. 30; 16 Sim. 344; 13 Jur. 1109 20
Skeate *v.* Beale, 11 A. & E. 983; 3 P. & D. 597; 9 L. J. Q. B. 233; 4 Jur. 766 141
Skeet *v.* Lindsay, 2 Ex. D. 314; 46 L. J. Ex. 249; 36 L. T. 98; 25 W. R. 322 570
Skelton *v.* L. & N. W. R. Co., L. R. 2 C. P. 631; 36 L. J. C. P. 249; 16 L. T. 563; 15 W. R. 925 182
Skinner *v.* Gunton, 1 Wms. Saund. 228 b 260
Skinners Co. *v.* Knight, (1891) 2 Q. B. 542; 60 L. J. Q. B. 629; 65 L. T. 240; 40 W. R. 57 50
Slater *v.* Baker, 2 Wils. 359 . . . . . 439, 442
—— *v.* Jones, L. R. 8 Ex. 186; 42 L. J. Ex. 122; 29 L. T. 56; 21 W. R. 815 . . . . . 335, 340
Slattery *v.* Dublin-Wicklow R. Co., 3 App. Cas. 1155; 39 L. T. 365; 27 W. R. 191 276
Sleap *v.* Newman, 12 C. B. N. S. 116; 6 L. T. 386 . . . . 47, 56
Sleath *v.* Wilson, 9 C. & P. 607 353
Slim *v.* G. N. R. Co., 14 C. B. 647; 2 C. L. R. 864; 23 L. J. C. P. 166; 18 Jur. 1119 200
Slipper *v.* Tottenham R. Co., 4 Eq. 112; 36 L. J. Ch. 841; 16 L. T. 446; 15 W. R. 861 47
Slubey *v.* Heyward, 2 H. Bl. 504; 3 R. R. 486 730
Small *v.* Moates, 9 Bing. 574; 2 M. & Scott, 674 733
Smartle *v.* Williams, 3 Lev. 387; 1 Salk. 245, 280; Holt, 478; Comb. 247 . . . . . 28, 504, 525

PAGE

Smith *v.* Arnold, 3 Salk. 4 67
—— *v.* Baker, (1891) A. C. 325 ; 60 L. J. Q. B. 683 ; 65 L. T. 467 ; 40 W. R. 392 277
—— *v.* Bickmore, 4 Taunt. 474 386
—— *v.* Bromley, 2 Dougl. 695, n. ; B. N. P. 133 385
—— *v.* Cherrill, 4 Eq. 390 ; 36 L. J. Ch. 738 ; 16 L. T. 517 ; 15 W. R. 919 29
—— *v.* Clegg, 27 L. J. Ex. 300 554
—— *v.* Compton, 3 B. & Ad. 407 ; 1 L. J. K. B. 146 . . 149, 150
—— *v.* Cook, 1 Q. B. D. 79 ; 45 L. J. Q. B. 122 ; 33 L. T. 722 ; 24 W. R. 206 198
—— *v.* Crawshaw, Cro. Car. 15 ; Sir W. Jones, 93 256
—— *v.* Cuff, 6 M. & S. 160 385
—— *v.* Dearlove, 6 C. B. 132 ; 17 L. J. C. P. 219 ; 12 Jur. 377... 124, 125
—— *v.* Dobson, 3 M. & Gr. 59 ; 3 Scott, N. R. 336 276
—— *v.* Eggington, 7 A. & E. 167 ; 6 Dowl. 38 ; 2 N. & P. 143 ; 6 L. J. K. B. 206 ; 1 Jur. 607 132
—— *v.* ————, L. R. 9 C. P. 145 ; 43 L. J. C. P. 140 ; 30 L. T. 521 60
—— *v.* Garland, 2 Mer. 123 25
—— *v.* Goodwin, 4 B. & Ad. 413 ; 1 N. & M. 371 ; 2 L. J. K. B. 192 130
—— *v.* Gordon, C. & E. 105 337
—— *v.* Goss, 1 Camp. 282 . . . . . 727, 733
—— *v.* Gronow, (1891) 2 Q. B. 394 ; 60 L. J. Q. B. 776 ; 65 L. T. 117 ; 40 W. R. 46 47
—— *v.* Horne, 2 Moo. 18 ; 8 Taunt. 144 ; Holt, N. P. 643 . . 205
—— *v.* Kenrick, 7 C. B. 515 ; 13 Jur. 362 ; 18 L. J. C. P. 172 ... 794, 799, 812, 814, 815, 818, 820, 821, 822
—— *v.* Lindo, 4 C. B. N. S. 395 ; 5 Id. 587 ; 27 L. J. C. P. 196 ; 4 Jur. N. S. 484 ; 6 W. R. 552, 748 . . . . . 147, 374
—— *v.* L. & S. W. R. Co., L. R. 6 C. P. 14 ; 40 L. J. C. P. 21 ; 23 L. T. 678 ; 19 W. R. 230 825
—— *v.* Mawhood, 14 M. & W. 452 ; 15 L. J. Ex. 149 . . . 374
—— *v.* Monteith, 13 M. & W. 427 ; 2 D. & L. 358 ; 14 L. J. Ex. 22 ; 9 Jur. 310 332
—— *v.* Neale, 2 C. B. N. S. 67 ; 26 L. J. C. P. 143 ; 3 Jur. N. S. 516 297, 299
—— *v.* N. Metropolitan Trams, 55 J. P. 630 352
—— *v.* Pocklington, 1 Tyr. 309 ; 1 C. & J. 445 512
—— *v.* Reynolds, 66 L. T. 808 . . . . . 147, 546, 548
—— *v.* Roche, 6 C. B. N. S. 223 ; 28 L. J. C. P. 237 ; 5 Jur. N. S. 918 ; 7 W. R. 413 145
—— *v.* Simonds, Comb. 64 68
—— *v.* Sydney, L. R. 5 Q. B. 203 ; 39 L. J. Q. B. 144 ; 22 L. T. 16 ; 18 W. R. 628 261
—— *v.* Thackerah, L. R. 1 C. P. 564 ; 35 L. J. C. P. 276 ; 12 Jur. N. S. 545 ; 14 L. T. 761 ; 14 W. R. 832 . . . . 270, 271
—— *v.* Trowsdale, 3 E. & B. 83 ; 2 C. L. R. 874 ; 23 L. J. Q. B. 107 ; 18 Jur. 552 341
—— *v.* Union Bank, 1 Q. B. D. 31 ; L. R. 10 Q. B. 291 ; 44 L. J. Q. B. 117 ; 45 Id. 149 ; 32 L. T. 456 ; 33 Id. 557 ; 23 W. R. 652 ; 24 Id. 194 458
—— *v.* Walton, 8 Bing. 235 ; 1 M. & Scott, 380 ; 1 L. J. C. P. 85 . 553
—— *v.* Watson, Bunb. 55 300
—— *v.* Webster, 3 Ch. D. 49 ; 45 L. J. Ch. 528 ; 35 L. T. 44 ; 24 W. R. 894 322
—— *v.* Wegnelin, 8 Eq. 198 ; 38 L. J. Ch. 465 ; 20 L. T. 724 ; 17 W. R. 904 . . . . . 609, 626
—— *v.* Westall, 1 Ld. Raym. 316 . . . . . 303, 307
—— *v.* White, 1 Eq. 626 ; 35 L. J. Ch. 454 ; 14 L. T. 350 ; 14 W. R. 510 373
—— *v.* Wilson, 3 B. & Ad. 728 ; 1 L. J. K. B. 194 . . . 550, 552

PAGE
Smith *v.* Wright, 6 H. & N. 821 ; 30 L. J. Ex. 313 ; 7 Jur. N. S. 1167 177
Smurthwaite *v.* Wilkins, 11 C. B. N. S. 842 ; 31 L. J. C. P. 214 ; 5 L. T. 842 ; 10 W. R. 386. 740
Smyth *v.* Smyth, 10 Bing. 406 ; 4 M. & Scott, 180 ; 3 L. J. C. P. 111 413
Snead *v.* Watkins, 1 C. B. N. S. 267 ; 26 L. J. C. P. 57 . . . 125
Snee *v.* Prescot, 1 Atk. 245...676, 681, 684, 685, 687, 693, 695, 696, 697, 703, 705, 710, 718, 720, 734, 738
Sneesby *v.* L. & Y. R. Co., 1 Q. B. D. 42 ; L. R. 9 Q. B. 263 ; 43 L. J. Q. B. 69 ; 45 Id. 1 ; 30 L. T. 492 ; 33 Id. 372 ; 24 W. R. 99 . . 278
Sneider *v.* Norris, 2 M. & S. 286. . . . . 320, 323
Snell *v.* Finch, 13 C. B. N. S. 651 ; 32 L. J. C. P. 117 ; 9 Jur. N. S. 333 ; 7 L. T. 747 ; 11 W. R. 341 504
Snelling *v.* Huntingfield, 1 C. M. & R. 20 ; 4 Tyr. 606 ; 3 L. J. Ex. 232 304
Snow *v.* Peacock, 3 Bing. 406 ; 2 C. & P. 215 ; 11 Moore, 286 . . 469
—— *v.* Saddler, 3 Bing. 610 ; 11 Moore, 506 468
—— *v.* Whitehead, 27 Ch. D. 588 ; 53 L. J. Ch. 885 ; 51 L. T. 253 ; 33 W. R. 128 823
Snowdon, *Ex p.*, 17 Ch. D. 44 ; 50 L. J. Ch. 540 ; 44 L. T. 830 ; 29 W. R. 654 . . . . . 151, 152
Solomon *v.* Vintners Co., 4 H. & N. 585 ; 28 L. J. Ex. 370 ; 5 Jur. N. S. 1177 ; 7 W. R. 613 272
Solomons *v.* Bank of England, 13 East, 135 ; 12 R. R. 341 . . 457
Somerville *v.* Hawkins, 10 C. B. 583 ; 20 L. J. C. P. 131 ; 15 Jur. 450 263
———— *v.* Mirehouse, 1 B. & S. 652 ; 3 L. T. 294 ; 9 W. R. 53...642, 657
Souch *v.* Strawbridge, 2 C. B. 808 ; 15 L. J. C. P. 170 ; 10 Jur. 357 . 304, 305
S. Essex Gas Co., *Re*, 1 Johns. 480 ; 29 L. J. Ch. 43 ; 8 Jur. N. S. 357 ; 7 W. R. 665 379
S. Hetton Co. *v.* N. E. News Ass., (1894) 1 Q. B. 133 ; 63 L. J. Q. B. 293 ; 69 L. T. 844 ; 42 W. R. 332 ; 58 J. P. 196 ; 9 R. 240 . . 262
South Sea Co. *v.* Duncomb, 2 Str. 919 192
S. Staffordshire Co. *v.* Stone, 19 Q. B. D. 168 ; 56 L. J. M. C. 122 ; 57 L. T. 368 ; 36 W. R. 76 ; 51 J. P. 662 ; 16 Cox, C. C. 300 . 673
South Wales Co., *Re*, 2 Ch. D. 763 ; 46 L. J. Ch. 177 ; 35 L. T. 294 . 370
S. Wales R. Co. *v.* Redmond, 10 C. B. N. S. 675 ; 4 L. T. 619 ; 9 W. R. 806 378
S. Yorkshire R. Co. *v.* G. N. R. Co., 9 Exch. 55 378
Southampton *v.* Hertford, 2 V. & B. 54 ; 13 R. R. 18 419
———— Dock Co. *v.* Richards, 1 M. & Gr. 448 ; 1 Scott, N. R. 219 381
Southcote's Case, 4 Co. Rep. 83 b . . 168—173, 175, 178, 182, 189
Southwell *v.* Bowditch, 1 C. P. D. 100, 374 ; 45 L. J. C. P. 374, 630 ; 34 L. T. 133 ; 35 Id. 196 ; 24 W. R. 275, 838 . . . 540, 545, 556
Spalding *v.* Ruding, 6 Beav. 376 ; 12 L. J. Ch. 503 ; 7 Jur. 733 ...736, 739
Spartali *v.* Benecke, 10 C. B. 212 ; 19 L. J. C. P. 293 542
Spence *v.* Healey, 8 Exch. 668 ; 22 L. J. Ex. 249 341
Spencer's Case, 5 Co. Rep. 16 52
Spencer *v.* Boyes, 4 Ves. 370 ; 4 R. R. 215 72
———— *v.* Marlborough, 3 Bro. P. C. 232 418
———— *v.* Parry, 3 A. & E. 331 ; 4 N. & M. 771 ; 1 H. & W. 179 ; 4 L. J. K. B. 186 . . . . . 160, 161
———— *v.* Slater, 4 Q. B. D. 13 ; 48 L. J. Q. B. 204 ; 39 L. T. 424 ; 27 W. R. 134 17
Spice *v.* Bacon, 2 Ex. D. 463 ; 46 L. J. Ex. 713 ; 36 L. T. 896 ; 25 W. R. 840 119
Spicer *v.* Cooper, 1 Q. B. 424 ; 1 G. & D. 52 ; 10 L. J. Q. B. 241 ; 5 Jur. 1036 547
—— *v.* Martin, 14 App. Cas. 12 ; 34 Ch. D. 1 ; 56 L. J. Ch. 393 ; 58 Id. 307 ; 55 L. T. 821 ; 60 Id. 546 ; 37 W. R. 689 . . . 88

PAGE

Spieres *v.* Parker, 1 T. R. 141 ; 1 R. R. 165 651
Spill *v.* Maule, L. R. 4 Ex. 232 ; 38 L. J. Ex. 138 ; 20 L. T. 675 ; 17 W. R. 805 263
Spiller *v.* Paris Co., 7 Ch. D. 368 ; 26 W. R. 456 350
Spirett *v.* Willows, 3 D. J. & S. 293 ; 34 L. J. Ch. 365 ; 11 Jur. N. S. 70 ; 5 Giff. 49 ; 10 L. T. 450 ; 11 Id. 614 ; 12 W. R. 734 ; 13 Id. 329 21
Spottiswoode's Case, 6 De G. M. & G. 345 ; 3 W. R. 264 . . . 152
Sprowle *v.* Legge, 1 B. & C. 16 553
Sprye *v.* Porter, 7 E. & B. 58 ; 26 L. J. Q. B. 64 ; 3 Jur. N. S. 330 ; 5 W. R. 81 371
Spurgeon *v.* Collier, 1 Eden, 55 27
Squire *v.* Wheeler, 16 L. T. 93 119
Stackpoole *v.* Stackpoole, 4 Dru. & War. 320 29
Stafford *v.* Gardner, L. R. 7 C. P. 242 ; 25 L. T. 876 ; 20 W. R. 299 538, 539
Staines *v.* Wainwright, 6 B. N. C. 174 ; 8 Scott, 280 ; 9 L. J. C. P. 107 369
Stamford Banking Co. *v.* Smith, (1892) 1 Q. B. 765 ; 61 L. J. Q. B. 405 ; 66 L. T. 306 ; 40 W. R. 355 ; 56 J. P. 229 . . 567, 568, 571
Stanbury *v.* Bott, unreported 634
Standen & Bullock's Case, unreported 6, 24
——— *v.* Chrismas, 10 Q. B. 135 ; 16 L. J. Q. B. 265 ; 11 Jur. 694 59
Stanhope *v.* Thorsby, L. R. 1 C. P. 423 ; H. & R. 459 ; 35 L. J. M. C. 182 ; 12 Jur. N. S. 374 ; 14 L. T. 332 ; 14 W. R. 651 . . 665, 671
Stanley *v.* Ayles, 3 Keb. 444 450
Stansell *v.* Jollard, Selw. N. P. (10th ed.) 435 269
Stanton *v.* Richardson, L. R. 9 C. P. 390 ; 7 Id. 421 ; 41 L. J. C. P. 180 ; 43 Id. 230 ; 27 L. T. 513 ; 30 Id. 643 ; 21 W. R. 71 . . 230
Stapleton *v.* Haymen, 2 H. & C. 918 ; 33 L. J. Ex. 170 ; 10 Jur. N. S. 497 ; 9 L. T. 655 ; 12 W. R. 317 15
Starling *v.* Turner, 2 Lev. 50 . 237, 241, 242, 243, 244, 246, 253, 255
Startup *v.* Dodderidge, 2 Ld. Raym. 1158 ; 2 Salk. 657 . . 532, 533
State Fire Ins. Co., *Re*, 33 L. J. Ch. 123 ; 12 W. R. 904 . . . 380
Steeds *v.* Steeds, 22 Q. B. D. 537 ; 58 L. J. Q. B. 302 ; 60 L. T. 318 ; 37 W. R. 378 . . . . . 341, 342
Steel *v.* Brown, 1 Taunt. 381 ; 1 Camp. 512, n. ; 9 R. R. 795 . . 15
——— *v.* Dixon, 17 Ch. D. 825 ; 50 L. J. Ch. 591 ; 45 L. T. 142 ; 29 W. R. 735 152
Steinman *v.* Magnus, 11 East, 390 ; 2 Camp. 124 335
Stephens, *Ex p.*, 3 Ch. D. 807 ; 35 L. T. 68 ; 25 W. R. 126 . . 21
——— *v.* De Medina, 4 Q. B. 422 ; 3 Railw. Cas. 454 ; 3 G. & D. 110 ; 12 L. J. Q. B. 120. 551
——— *v.* L. & S. W. R. Co., 18 Q. B. D. 121 ; 56 L. J. Q. B. 171 ; 56 L. T. 226 ; 35 W. R. 161 ; 51 J. P. 324 . . 207, 209
——— *v.* Olive, 2 Bro. Ch. C. 90 . . . . . 18, 20
——— *v.* Wilkinson, 2 B. & Ad. 320 720
Stevens *v.* Copp, L. R. 4 Ex. 20 ; 38 L. J. Ex. 31 ; 19 L. T. 454 ; 17 W. R. 166 66
——— *v.* Evans, 1 W. Bl. 283 434
——— *v.* Gourley, 7 C. B. N. S. 99 ; 1 F. & F. 498 ; 6 Jur. N. S. 147 ; 1 L. T. 33 ; 8 W. R. 85 369
——— *v.* G. W. R. Co., 52 L. T. 324 ; 49 J. P. 310 218
——— *v.* Hinshelwood, 55 J. P. 341 352
——— *v.* Hounslow Burial B., 61 L. T. 839 ; 38 W. R. 236 ; 54 J. P. 309 379
——— *v.* Jeacocke, 11 Q. B. 731 ; 17 L. J. Q. B. 163 ; 12 Jur. 477 . 285
——— *v.* Sampson, 5 Ex. D. 53 ; 49 L. J. Q. B. 120 ; 41 L. T. 782 ; 28 W. R. 87 263
——— *v.* Woodward, 6 Q. B. D. 318 ; 50 L. J. Q. B. 231 ; 44 L. T. 153 ; 29 W. R. 506 ; 45 J. P. 603 824

PAGE

Steward *v.* Grommett, 7 C. B. N. S. 191 ; 29 L. J. C. P. 170 ; 6 Jur. N. S. 776 261
Stewart *v.* Aberdein, 4 M. & W. 211 ; 1 H. & H. 284 ; 7 L. J. Ex. 292 550
——— *v.* Ashton, 8 Ir. C. L. R. 35 788
——— *v.* Bell, 5 B. & Ald. 238 478
——— *v.* Cauty, 8 M. & W. 160 ; 10 L. J. Ex. 348 ; 5 Jur. 411 . 550
——— *v.* Eddowes, L. R. 9 C. P. 311 ; 43 L. J. C. P. 204 ; 30 L. T. 333 ; 22 W. R. 534 299
——— *v.* L. & N. W. R. Co., 3 H. & C. 135 ; 33 L. J. Ex. 199 ; 10 Jur. N. S. 805 ; 10 L. T. 302 ; 12 W. R. 689 . . 200, 208
——— *v.* W. India Co., L. R. 8 Q. B. 88, 362 ; 42 L. J. Q. B. 84, 191 ; 27 L. T. 820 ; 28 Id. 742 ; 21 W. R. 381, 953 . . . 541, 559
Stileman *v.* Ashdown, 2 Atk. 477 20
Stimson *v.* Farnham, L. R. 7 Q. B. 175 ; 41 L. J. Q. B. 52 ; 25 L. T. 747 ; 20 W. R. 183 274
Stockdale *v.* Dunlop, 6 M. & W. 224 ; 9 L. J. Ex. 83 ; 4 Jur. 681 . 301
——— *v.* Hansard, 7 C. & P. 731 ; 9 A. & E. 1 ; 11 Id. 253 ; 2 P. & D. 1 ; 8 Dowl. 148, 522 ; 3 Jur. 905 ; 9 L. J. Q. B. 218 . . 286
Stockport *v.* Potter, 3 H. & C. 300 ; 7 H. & N. 160 ; 31 L. J. Ex. 9 ; 7 Jur. N. S. 880 ; 10 Id. 1005 ; 7 L. T. 545 ; 10 Id. 748 ; 11 W. R. 156 . . . . . 268, 346
Stocks *v.* Booth, 1 T. R. 428 ; 1 R. R. 244 347
Stockton Co., *Re*, 10 Ch. D. 335 ; 48 L. J. Ch. 417 ; 40 L. T. 19 ; 27 W. R. 443 521
Stoessiger *v.* S. E. R. Co., 3 E. & B. 549 ; 2 C. L. R. 1595 ; 23 L. J. Q. B. 293 ; 18 Jur. 605 ; 2 W. R. 375 206
Stokes *v.* La Riviere, unreported 687, 700
——— *v.* Lewis, 1 T. R. 20 141
——— *v.* Russell, 3 T. R. 678 ; 1 H. Bl. 562 ; 1 R. R. 732 . . 74, 512
Stokoe *v.* Cowan, 29 Beav. 637 ; 7 Jur. N. S. 901 ; 4 L. T. 695 ; 9 W. R. 801 . . . . . 18, 23
Stone *v.* Freeland, 1 H. Bl. 316, n. 764
Storey *v.* Ashton, L. R. 4 Q. B. 476 ; 10 B. & S. 337 ; 38 L. J. Q. B. 223 ; 17 W. R. 727 353
Storr *v.* Scott, 6 C. & P. 241 287
Stoveld *v.* Hughes, 14 East, 308 ; 12 R. R. 523 727
Strange *v.* Wigney, 6 Bing. 677 ; 4 M. & P. 470 469
Stranks *v.* St. John, L. R. 2 C. P. 376 ; 36 L. J. C. P. 118 ; 16 L. T. 283 ; 15 W. R. 678 161
Straton *v.* Rastall, 2 T. R. 366 328
Strauss *v.* County Hotel Co., 12 Q. B. D. 27 ; 53 L. J. Q. B. 25 ; 49 L. T. 601 ; 32 W. R. 170 124
Stray *v.* Russell, 1 E. & E. 888 ; 28 L. J. Q. B. 279 ; 29 Id. 115 ; 6 Jur. N. S. 168 ; 1 L. T. 162, 443 ; 8 W. R. 240 550
Stretton *v.* Derby, (1894) 1 Ch. 431 ; 63 L. J. Ch. 135 ; 69 L. T. 791 ; 42 W. R. 583 ; 8 R. 608 828
Strick *v.* Swansea Tinplate Co., 36 Ch. D. 558 ; 57 L. J. Ch. 438 ; 57 L. T. 392 ; 35 W. R. 831 415
Strike *v.* Collins, 55 L. T. 182 ; 34 W. R. 459 ; 50 J. P. 741 . . 415
Strong *v.* Stringer, 61 L. T. 470 38
Strousberg *v.* Costa Rica (Republic of), 29 W. R. 125 ; 44 L. T. 199 . 627
Strutt *v.* Tippett, 62 L. T. 475 142
Stubbs *v.* Parsons, 3 B. & Ald. 516 163
Stuckeley *v.* Butler, Hob. 168 48
Studds *v.* Watson, 28 Ch. D. 305 ; 54 L. J. Ch. 626 ; 52 L. T. 129 ; 33 W. R. 118 297
Sturgeon *v.* Wingfield, 15 M. & W. 224 ; 15 L. J. Ex. 212 . . 92, 93
Sturges *v.* Bridgman, 11 Ch. D. 852 ; 48 L. J. Ch. 785 ; 41 L. T. 219 ; 28 W. R. 200 269
Submarine Telegraph Co. *v.* Dickson, 15 C. B. N. S. 759 ; 33 L. J. C. P. 139 ; 10 Jur. N. S. 211 ; 10 L. T. 32 ; 12 W. R. 384 . . . 607

PAGE

Suffell *v.* Bank of England, 9 Q. B. D. 555 ; 7 Id. 270 ; 51 L. J. Q. B. 401 ; 47 L. T. 146 ; 30 W. R. 48, 932 ; 46 J. P. 500 . . 782, 786
Sullivan *v.* Montague, 1 Dougl. 106 779
Sunbolf *v.* Alford, 3 M. & W. 248 ; 1 H. & H. 13 ; 7 L. J. Ex. 60 ; 2 Jur. 110 126
Suse *v.* Pompe, 8 C. B. N. S. 538 ; 30 L. J. C. P. 75 ; 7 Jur. N. S. 166 ; 3 L. T. 17 ; 9 W. R. 15 . . . . . 539, 555
Sussex Peerage Case, 11 Cl. & F. 85 ; 8 Jur. 793 623
Sutton *v.* Buck, 2 Taunt. 302 344
——— *v.* Ciceri, 15 App. Cas. 144 ; 62 L. T. 742 547
——— *v.* Clarke, 6 Taunt. 29 ; 1 Marsh. 429 . 795, 800, 809, 814, 815
——— *v.* G. W. R. Co., L. R. 4 H. L. 226 ; 3 H. & C. 800 ; 38 L. J. Ex. 177 ; 18 W. R. 92 203
——— *v.* Grey, (1894) 1 Q. B. 285 ; 63 L. J. Q. B. 633 ; 69 L. T. 354, 673 ; 42 W. R. 195 . . . . . 288, 291
——— *v.* Rees, 32 L. J. Ch. 437 ; 9 Jur. N. S. 456 ; 8 L. T. 343 ; 11 W. R. 413 433
——— *v.* Tatham, 10 A. & E. 27 ; 2 P. & D. 308 ; 8 L. J. Q. B. 210 141, 147, 548
——— *v.* Temple, 12 M. & W. 52 ; 13 L. J. Ex. 17 230
——— *v.* Toomer, 7 B. & C. 416 ; 1 M. & Ry. 125 . . . 782, 787
Swain *v.* Ayres, 21 Q. B. D. 289 ; 57 L. J. Q. B. 428 ; 36 W. R. 798 50
——— *v.* Shepherd, 1 M. & Rob. 223 221
——— *v.* Wilson, 24 Q. B. D. 252 ; 59 L. J. Q. B. 76 ; 62 L. T. 309 ; 38 W. R. 261 . . . . . 370, 415
Swan *v.* N. British Australasian Co., 7 H. & N. 603 ; 2 H. & C. 175 ; 31 L. J. Ex. 425 ; 32 Id. 273 ; 8 Jur. N. S. 940 ; 10 Id. 102 ; 10 W. R. 841 ; 11 Id. 863 682
Swansea *v.* Thomas, 10 Q. B. D. 48 ; 52 L. J. Q. B. 340 ; 47 L. T. 657 ; 31 W. R. 506 60
Sweet *v.* Lee, 4 Scott, N. R. 77 ; 3 M. & Gr. 452 ; 5 Jur. 1134 . 301, 305, 322
——— *v.* Meredith, 3 Giff. 610 ; 32 L. J. Ch. 147 ; 9 Jur. N. S. 569 ; 7 L. T. 664 369
——— *v.* Sweet, (1895) 1 Q. B. 12 ; 64 L. J. Q. B. 108 ; 71 L. T. 672 ; 43 W. R. 303 367
Sweeting *v.* Pearce, 7 C. B. N. S. 449 ; 9 Id. 534 ; 29 L. J. C. P. 265 ; 30 Id. 109 ; 5 L. T. 79 ; 9 W. R. 343 548
Swift *v.* Swift, 34 L. J. Ch. 209, 394 ; 11 Jur. N. S. 148 ; 11 L. T. 697 ; 12 Id. 435 ; 15 W. R. 378, 731 367
Swire *v.* Leach, 18 C. B. N. S. 479 ; 34 L. J. C. P. 150 ; 11 Jur. N. S. 179 ; 11 L. T. 680 ; 13 W. R. 385 428
Sykes *v.* Beadon, 11 Ch. D. 170 ; 48 L. J. Ch. 522 ; 40 L. T. 243 ; 27 W. R. 464 386
——— *v.* Dixon, 9 A. & E. 693 ; 1 P. & D. 463 ; 8 L. J. Q. B. 102 . 301
Symes *v.* Hughes, 9 Eq. 475 ; 39 L. J. Ch. 304 ; 22 L. T. 462 . . 387
Symonds *v.* Dimsdale, 2 Exch. 533 ; 17 L. J. Ex. 247 ; 12 Jur. 485 . 668
Symons *v.* Mulkern, 30 W. R. 875 ; 46 L. T. 763 . . . 462, 471
Syred *v.* Carruthers, E. B. & E. 469 ; 27 L. J. M. C. 273 ; 4 Jur. N. S. 949 ; 6 W. R. 595 . . . . . 191, 197, 671

T.

Taff Vale R. Co. *v.* Giles, 2 E. & B. 822 ; 2 C. L. R. 132 ; 23 L. J. Q. B. 13 ; 18 Jur. 510 ; 2 W. R. 57 225
Taite *v.* Gosling, 11 Ch. D. 273 ; 48 L. J. Ch. 397 ; 40 L. T. 251 ; 27 W. R. 394 . . . . . 50, 75
Talley *v.* G. W. R. Co., L. R. 6 C. P. 44 ; 40 L. J. C. P. 9 ; 23 L. T. 413 ; 19 W. R. 154 . . . . . 200, 201
Tallis *v.* Tallis, 1 E. & B. 391 ; 22 L. J. Q. B. 185 ; 17 Jur. 1149 . 409

PAGE
Tamvaco *v.* Timothy, C. & E. 1 200
Tancred *v.* Allgood, 4 H. & N. 438 ; 28 L. J. Ex. 362 . . . 89
Tanner *v.* Scovell, 14 M. & W. 28 ; 14 L. J. Ex. 321 . . . 730, 731
——— *v.* Smart, 6 B. & C. 603 ; 9 D. & R. 549 . . . . 563, 564
Tappenden *v.* Randall, 2 B. & P. 467 ; 5 R. R. 682 388
Tarback *v.* Marbury, 2 Vern. 510 ; Eq. Cas. Abr. 148, pl. 3 . 20, 25
Tarleton *v.* Liddell, 17 Q. B. 390 ; 4 De G. & S. 538 ; 20 L. J. Q. B. 507 ; 15 Jur. 1170 30
Tarn *v.* Turner, 39 Ch. D. 456 ; 57 L. J. Ch. 452 ; 58 L. T. 558 ; 37 W. R. 276 509
Tarry *v.* Ashton, 1 Q. B. D. 314 ; 45 L. J. Q. B. 260 ; 34 L. T. 97 ; 24 W. R. 581 830
Tatam *v.* Haslar, 23 Q. B. D. 345 ; 58 L. J. Q. B. 432 ; 38 W. R. 109 472
Tatem *v.* Chaplin, 2 H. Bl. 133 ; 3 R. R. 360 65
Tatlock *v.* Harris, 3 T. R. 174 . . . . . 144, 753, 756, 773
Tattan *v.* G. W. R. Co., 2 E. & E. 844 ; 29 L. J. Q. B. 184 ; 6 Jur. N. S. 800 ; 2 L. T. 596 ; 8 W. R. 606 223
Taunton *v.* Costar, 7 T. R. 431 ; 4 R. R. 481 133
Tayler *v.* Baker, 5 Mod. 136 326
Taylor *v.* Best, 14 C. B. 487 ; 23 L. J. C. P. 89 ; 18 Jur. 402 ; 2 W. R. 259 . . . . . 630, 631
——— *v.* Bowers, 1 Q. B. D. 291 ; 45 L. J. Q. B. 163 ; 34 L. T. 263 ; 24 W. R. 499 . . . . . 387, 388
——— *v.* Caldwell, 3 B. & S. 826 ; 32 L. J. Q. B. 164 ; 8 L. T. 356 ; 11 W. R. 726 169
——— *v.* Chester, L. R. 4 Q. B. 309 ; 10 B. & S. 237 ; 38 L. J. Q. B. 225 ; 21 L. T. 359 387
——— *v.* Clemson, 2 Q. B. 978 ; 2 G. & D. 346 ; 11 L. J. Ex. 447 . 650
——— *v.* Cœnen, 1 Ch. D. 636 ; 34 L. T. 18 23
——— *v.* Cole, 3 T. R. 292 ; 7 Id. 3, n. ; 1 H. Bl. 535 ; 1 R. R. 706 . 133
——— *v.* Crowland Gas Co., 10 Exch. 293 ; 2 C. L. R. 1247 ; 23 L. J. Ex. 233 ; 18 Jur. 913 ; 2 W. R. 563 374
——— *v.* Hawkins, 16 Q. B. 308 ; 20 L. J. Q. B. 313 ; 15 Jur. 746 . 263
——— *v.* Kymer, 3 B. & Ad. 320 ; 1 L. J. K. B. 114 744
——— *v.* M. S. & L. R. Co., (1895) 1 Q. B. 134 ; 64 L. J. Q. B. 6 ; 71 L. T. 596 ; 43 W. R. 120 . . . . . 202, 223
——— *v.* Moseley, 6 C. & P. 273 782
——— *v.* Needham, 2 Taunt. 278 ; 11 R. R. 572 96
——— *v.* Oram, 31 L. J. M. C. 252 ; 1 H. & C. 370 ; 8 Jur. N. S. 748 ; 7 L. T. 68 ; 10 W. R. 800 670
——— *v.* Plumer, 3 M. & S. 562 ; 2 Rose, 457 ; 16 R. R. 361 . . 452
——— *v.* Shum, 1 B. & P. 21 ; 4 R. R. 759 70
——— *v.* Smith, (1893) 2 Q. B. 65 ; 61 L. J. Q. B. 331 ; 67 L. T. 39 ; 40 W. R. 486 297
——— *v.* Stray, 2 C. B. N. S. 175 ; 26 L. J. C. P. 185, 287 ; 3 Jur. N. S. 540, 964 ; 5 W. R. 528, 761 . . . . . 147, 550
——— *v.* Waters, 5 M. & S. 103 113
——— *v.* Zamira, 6 Taunt. 524 . . . . . 156, 158, 161, 162
Teal *v.* Auty, 2 B. & B. 99 ; 4 Moore, 542 308
Teasdale *v.* Braithwaite, 5 Ch. D. 630 ; 4 Id. 85 ; 46 L. J. Ch. 396, 725 ; 35 L. T. 590 ; 36 Id. 601 ; 25 W. R. 222 27
Temperton *v.* Russell, (1893) 1 Q. B. 715 ; 62 L. J. Q. B. 412 ; 69 L. T. 78 ; 41 W. R. 565 ; 57 J. P. 518, 676 ; 4 R. 376 281
Tenant *v.* Elliott, 1 B. & P. 3 ; 4 R. R. 755. 386
——— *v.* Goldwin, 2 Ld. Raym. 1089 ; 1 Salk. 21, 360 ; 6 Mod. 311 ; Holt, 500. . . . . 793, 799, 801, 804, 806, 809, 812, 815, 816
Tennant *v.* Cumberland, 1 E. & E. 401 ; 5 Jur. N. S. 763 ; 7 W. R. 161 651
——— *v.* Field, 8 E. & B. 337 ; 27 L. J. Q. B. 33 ; 3 Jur. N. S. 1178 ; 6 W. R. 11 130
Terry *v.* Hutchinson, L. R. 3 Q. B. 599 ; 9 B. & S. 487 ; 37 L. J. Q. B. 257 ; 18 L. T. 521 ; 16 W. R. 932 267

PAGE
Thackrah *v.* Fergusson, 25 W. R. 307 . . . . . 741, 744
Thames Haven Co. *v.* Rose, 4 M. & Gr. 552 ; 5 Scott, N. R. 524 ; 2 Dowl. N. S. 104 ; 12 L. J. C. P. 90 382
Thames Ironworks Co. *v.* Patent Derrick Co., 1 J. & H. 93 ; 29 L. J. Ch. 714 ; 6 Jur. N. S. 1013 ; 2 L. T. 208 ; 8 W. R. 408 . . . 192
Theideman *v.* Goldschmidt, 1 De G. F. & J. 4 ; 1 Giff. 142 ; 5 Jur. N. S. 855 ; 1 L. T. 50 ; 7 W. R. 627 ; 8 Id. 14 457
Thellusson *v.* Woodford, 4 Ves. 227 ; 11 Ves. 112 ; 1 B. & P. (N. R.) 357 ; 4 R. R. 205 ; 8 R. R. 205 419
Thin *v.* Richards, (1892) 2 Q. B. 141 ; 62 L. J. Q. B. 39 ; 66 L. T. 584 ; 40 W. R. 617 220
Thomas, *Re*, (1894) 1 Q. B. 747 ; 63 L. J. Q. B. 572 ; 70 L. T. 567 . 371
——— *v.* Brown, 1 Q. B. D. 714 ; 45 L. J. Q. B. 811 ; 35 L. T. 237 ; 24 W. R. 821 301
——— *v.* Churton, 2 B. & S. 475 ; 31 L. J. Q. B. 139 ; 8 Jur. N. S. 795 ; 6 L. T. 320 . . . . . 265, 284
——— *v.* Cook, 8 B. & C. 728 ; 3 M. & Ry. 444. . . 151, 289, 301
——— *v.* Day, 4 Esp. 262 ; 6 R. R. 857 199
——— *v.* Harries, 1 M. & Gr. 695 ; 1 Scott, N. R. 524 ; 4 Jur. 723 ; 9 L. J. C. P. 308 130
——— *v.* Hayward, L. R. 4 Ex. 311 ; 38 L. J. Ex. 175 ; 20 L. T. 814 66
——— *v.* Heathorn, 2 B. & C. 477 ; 3 D. & R. 647 . . . 328, 332
——— *v.* Lulham, (1895) 2 Q. B. 400 ; 73 L. T. 146 . . . *Add.* 40
——— *v.* Quartermaine, 18 Q. B. D. 685 ; 17 Id. 414 ; 56 L. J. Q. B. 340 ; 57 L. T. 537 ; 35 W. R. 555 ; 51 J. P. 516 . . 276
——— *v.* Rhymney R. Co., L. R. 6 Q. B. 266 ; 5 Id. 226 ; 39 L. J. Q. B. 141 ; 40 Id. 89 ; 22 L. T. 297 ; 24 Id. 145 ; 18 W. R. 668 ; 19 Id. 668 224
——— *v.* Shillibeer, 1 M. & W. 125 ; T. & G. 290 ; 5 L. J. Ex. 138 . 139
——— *v.* Whip, unreported 452
Thompson, *Re*, 6 H. & N. 193 665
——— *v.* Dominy, 14 M. & W. 403 ; 14 L. J. Ex. 320 . . . 739
——— *v.* Gardner, 1 C. P. D. 777 322
——— *v.* Hakewell, 19 C. B. N. S. 713 ; 35 L. J. C. P. 18 ; 13 L. T. 289 62
——— *v.* Harvey, Comb. 121 356
——— *v.* ———, 4 H. & N. 254 ; 28 L. J. M. C. 163 ; 7 W. R. 281 381
——— *v.* Lacy, 3 B. & Ald. 283 124
——— *v.* Mashiter, 1 Bing. 283 ; 8 Moore, 254 427
——— *v.* Parish, 5 C. B. N. S. 685 ; 28 L. J. C. P. 153 ; 5 Jur. N. S. 986 ; 7 W. R. 210 113
——— *v.* Percival, 5 B. & Ad. 925 ; 3 N. & M. 167 ; 3 L. J. K. B. 98 333
——— *v.* Ross, 5 H. & N. 16 ; 29 L. J. Ex. 1 ; 5 Jur. N. S. 1133 ; 1 L. T. 43 ; 8 W. R. 44 266
——— *v.* Webster, 4 Drew. 628 ; 4 De G. & J. 600 ; 28 L. J. Ch. 700 ; 5 Jur. N. S. 668, 931 ; 7 Id. 531 ; 4 L. T. 750 ; 7 W. R. 596, 648 ; 9 Id. 641 20
Thorne *v.* Heard, (1893) 3 Ch. 530 ; (1894) 1 Ch. 599 ; (1895) A. C. 495 ; 68 L. T. 791 ; 70 Id. 541 ; 73 Id. 291 568
Thornhil *v.* King, Cro. Eliz. 757 47
Thornton *v.* R. E. A. Co., 1 Peake, 25 492
Thorogood *v.* Bryan, 8 C. B. 115 ; 18 L. J. C. B. 336 277
Thorp *v.* Facey, 35 L. J. C. P. 349 ; 12 Jur. N. S. 741 . . . 527
Thorpe *v.* Coleman, 1 C. B. 990 ; 14 L. J. C. P. 260 ; 9 Jur. 903 . 386
——— *v.* Thorpe, Holt, 96 708
Threfall *v.* Berwick, 7 Q. B. 711 ; 10 Id. 210 ; 20 W. R. 1032 ; 41 L. J. Q. B. 266 ; 44 Id. 87 ; 26 L. T. 791 ; 32 Id. 95 . 118, 124, 125
Threlfall, *Re*, 16 Ch. D. 274 ; 50 L. J. Ch. 318 ; 42 L. T. 596 ; 44 Id. 71 ; 28 W. R. 708 ; 29 Id. 128 . . . . . 516, 518

PAGE

Threr *v.* Barton, Moore, 94 61
Thrift *v.* Youle, 2 C. P. D. 432 ; 46 L. J. C. P. 402 ; 36 L. T. 114 . 220
Thunder *v.* Belcher, 3 East, 449 . . . . . 504, 526
Thursby *v.* Plant, 1 Wms. Saund. 237 . . . . . 58, 69, 70
Thwaites *v.* Wilding, 12 Q. B. D. 4 ; 53 L. J. Q. B. 1 ; 49 L. T. 396 ; 32 W. R. 80 436
Tidmarsh *v.* Grover, 1 M. & S. 735 ; 14 R. R. 563 781
Tigress, The, 32 L. J. A. 97 ; Br. & L. Ad. Cas. 38 ; 9 Jur. N. S. 361 ; 8 L. T. 117 ; 11 W. R. 538 . . . . . 697, 705, 722, 725
Till, *Ex p.*, 16 Eq. 97 ; 21 W. R. 574 434
Tillett *v.* Ward, 10 Q. B. D. 17 ; 52 L. J. Q. B. 61 ; 47 L. T. 546 ; 31 W. R. 197 ; 47 J. P. 438 827
Timms *v.* Baker, 49 L. T. 106 46
Tindall *v.* Bell, 11 M. & W. 228 ; 12 L. J. Ex. 160 . . . 149, 150
Tipper *v.* Bicknell, 3 B. N. C. 710 ; 4 Scott, 462 ; 3 Hodges, 98 ; 6 L. J. C. P. 194 130
Tippetts *v.* Heane, 1 C. M. & R. 252 ; 4 Tyr. 772 ; 3 L. J. Ex. 281 . 564
Tipping *v.* St. Helen's Co., 4 B. & S. 608, 616 ; 11 H. L. C. 642 ; 1 Ch. 66 ; 35 L. J. Q. B. 66 ; 12 L. T. 776 ; 11 Jur. N. S. 785 ; 13 W. R. 1083 . . . . . 268, 816
Tobin *v.* The Queen, 33 L. J. C. P. 199 ; 9 Jur. N. S. 1130 ; 10 L. T. 762 ; 12 W. R. 838 630
Todd *v.* Hawkins, 8 C. & P. 88 ; 2 M. & Rob. 20 263
Toleman *v.* Portbury, L. R. 6 Q. B. 245 ; 7 Id. 344 ; 40 L. J. Q. B. 125 ; 41 Id. 98 ; 24 L. T. 24 ; 26 Id. 292 ; 19 W. R. 623 ; 20 Id. 441 37
Toller *v.* Carteret, 2 Vern. 494 ; Eq. Ca. Ab. 134, pl. 5 603
Tomlinson *v.* Gell, 6 A. & E. 564 ; 1 N. & P. 588 ; W. W. & D. 229 ; 6 L. J. K. B. 139 289
Tompson *v.* Dashwood, 11 Q. B. D. 43 ; 52 L. J. Q. B. 425 ; 48 L. T. 943 263
Toms *v.* Luckett, 5 C. B. 23 ; 17 L. J. C. P. 27 ; 11 Jur. 993 . . 436
Tooke *v.* Hollingworth, 5 T. R. 215 ; 2 H. Bl. 501 ; 2 R. R. 573 . 720
Tooker *v.* Beaufort, 1 Burr. 146 326
Topping, *Ex p.*, 34 L. J. Bkcy. 44 ; 4 De G. J. & S. 551 ; 11 Jur. N. S. 210 ; 12 L. T. 787 ; 13 W. R. 445, 1025 566
Toulmin *v.* Anderson, 1 Taunt. 385 342
Tourret *v.* Cripps, 48 L. J. Ch. 567 ; 27 W. R. 706 323
Toussaint *v.* Martinnant, 2 T. R. 100 149
Towerson *v.* Jackson, (1891) 2 Q. B. 484 ; 61 L. J. Q. B. 36 ; 65 L. T. 332 ; 40 W. R. 37 ; 56 J. P. 21 506
Townend *v.* Toker, 1 Ch. 446 ; 35 L. J. Ch. 608 ; 12 Jur. N. S. 477 ; 14 L. T. 531 ; 14 W. R. 806 30
Townsend *v.* Read, 10 C. B. N. S. 308 ; 30 L. J. M. C. 223 ; 4 L. T. 447 ; 9 W. R. 659 670
——— *v.* Westacott, 2 Beav. 340 ; 4 Id. 58 ; 9 L. J. Ch. 241 ; 4 Jur. 187 20
Townshend *v.* Windham, 2 Ves. sen. 1 20
Tozer *v.* Child, 7 E. & B. 377 ; 25 L. J. Q. B. 337 ; 2 Jur. N. S. 928 ; 4 W. R. 513 284
Tranior *v.* Phœnix Co., 65 L. T. 825 341
Trapp *v.* Spearman, 3 Esp. 57 781
Treadwin *v.* G. E. R., L. R. 3 C. P. 308 ; 37 L. J. C. P. 83 ; 17 L. T. 601 ; 16 W. R. 365 206
Tredwen *v.* Holman, 1 H. & C. 72 ; 31 L. J. Ex. 398 ; 8 Jur. N. S. 1080 ; 7 L. T. 127 ; 10 W. R. 652 341
Tregoning *v.* Attenborough, 7 Bing. 97 373
Trelawny *v.* Winchester (Bishop of), 1 Burr. 219 ; 1 Ken. 256 . . 326
Treloar *v.* Bigge, L. R. 9 Ex. 151 ; 43 L. J. Ex. 95 ; 22 W. R. 843 . 48
Trent *v.* Hunt, 9 Exch. 14 ; 22 L. J. Ex. 318 ; 17 Jur. 899 ; 1 W. R. 481 504
Trentham *v.* Deverill, 3 B. N. C. 397 ; 4 Scott, 128 569

PAGE
Treuttel *v.* Barandon, 8 Taunt. 100 457
Trevelian *v.* Pyne, 1 Salk. 107 . . . . . 344, 345
Trimbey *v.* Vignier, 1 B. N. C. 151 ; 4 M. & Scott, 695 ; 6 C. & P. 25. . . . . 610, 615
Triquet *v.* Bath, 3 Burr. 1478 436
Trott *v.* Trott, 29 L. J. P. 156 ; 6 Jur. N. S. 760 ; 2 L. T. 519 ; 8 W. R. 590 324
Trotter *v.* Walker, 13 C. B. N. S. 30 ; 32 L. J. C. P. 60 ; 9 Jur. N. S. 603 323
Troughton, *Re*, 71 L. T. 427 ; 13 R. 22
Trowell *v.* Shenton, 8 Ch. D. 318 ; 47 L. J. Ch. 738 ; 38 L. T. 27, 369 ; 26 W. R. 837 27
Trower *v.* Chadwick, 3 B. N. C. 334 ; 6 Id. 1 ; 3 Scott, 699 ; 8 Id. 1 ; 2 Hodges, 267 ; 6 L. J. C. P. 47 ; 8 L. J. Ex. 286 . 270, 795, 797, 813
Trueman *v.* Fenton, 2 Cowp. 544 . . . . . 143, 144
——— *v.* Loder, 11 A. & E. 589 ; 3 P. & D. 267 ; 9 L. J. Q. B. 165 ; 4 Jur. 934 . . . . . 554, 560
Trufort, *Re*, 36 Ch. D. 600 ; 57 L. J. Ch. 135 ; 57 L. T. 674 ; 36 W. R. 163 608
Trumper *v.* Carwardine, unreported 529
Tucker *v.* Axbridge, 53 J. P. 87 353
——— *v.* Linger, 8 App. Cas. 508 ; 21 Ch. D. 18 ; 51 L. J. Ch. 713 ; 52 Id. 941 ; 46 L. T. 198, 894 ; 49 Id. 373 ; 30 W. R. 425, 578 ; 32 Id. 40 ; 48 J. P. 4 . . . . . 538, 556
——— *v.* Tucker, 4 B. & Ad. 745 ; 1 N. & M. 477 ; 2 L. J. K. B. 143 770
——— *v.* ———, (1894) 1 Ch. 724 ; 3 Id. 429 ; 63 L. J. Ch. 223, 737 ; 70 L. T. 127 ; 42 W. R. 266 568
——— *v.* Wilson, 1 P. Wms. 261 192
Tuff *v.* Warman, 2 C. B. N. S. 740 ; 5 Id. 573 ; 26 L. J. C. P. 263 ; 27 Id. 322 ; 5 Jur. N. S. 222 ; 5 W. R. 685 ; 6 Id. 693 276
Tulk *v.* Moxhay, 2 Phil. 774 ; 11 Beav. 571 ; 18 L. J. Ch. 83 ; 13 Jur. 89 . . . . . 85, 86, 87, 89
Tulloch *v.* Hartley, 1 Y. & C. C. C. 114 621
Turbervil *v.* Stamp, 1 Salk. 13 . . . . . 798, 825
Turnbull *v.* Walker, 67 L. T. 767 ; 5 R. 132 608
Turner *v.* Barnes, 2 B. & S. 435 ; 31 L. J. Q. B. 170 ; 9 Jur. N. S. 199 ; 6 L. T. 418 ; 10 W. R. 561 521
——— *v.* Cameron, L. R. 5 Q. B. 306 ; 10 B. & S. 931 ; 39 L. J. Q. B. 125 ; 22 L. T. 525 ; 18 W. R. 544 427
——— *v.* Cameron Co., 5 Exch. 932 ; 20 L. J. Ex. 71 . . . 513
——— *v.* Davies, 2 Esp. 478 151
——— *v.* Doe, 9 M. & W. 643 ; 7 Id. 226 ; 11 L. J. Ex. 453 . . 43
——— *v.* G. W. R. Co., 34 L. T. 22 ; 13 Cox, C. C. 131 . . . 210
——— *v.* Liverpool Docks, 6 Exch. 543 ; 20 L. J. Ex. 393 . . 737
——— *v.* L. & S. W. R. Co., 17 Eq. 561 ; 43 L. J. Ch. 430 . . 342
——— *v.* Meymott, 1 Bing. 158 ; 7 Moore, 574. 134
——— *v.* Reynall, 14 C. B. N. S. 328 ; 32 L. J. C. P. 164 ; 9 Jur. N. S. 1077 ; 8 L. T. 281 ; 11 W. R. 700 146
——— *v.* Vaughan, 2 Wils. 339. 368
Turney *v.* Dodwell, 3 E. & B. 136 ; 23 L. J. Q. B. 137 ; 2 C. L. R. 666 ; 18 Jur. 187 567
Turquand, *Ex p.*, 14 Q. B. D. 636 ; 54 L. J. Q. B. 242 ; 53 L. T. 579 ; 33 W. R. 437 . . . . . 540, 551
Turrill *v.* Crawley, 13 Q. B. 197 ; 18 L. J. Q. B. 155 ; 13 Jur. 878 . 125
Tweddle *v.* Atkinson, 1 B. & S. 393 ; 30 L. J. Q. B. 295 ; 8 Jur. N. S. 332 ; 4 L. T. 468 ; 9 W. R. 781 139
Twycross *v.* Dreyfus, 5 Ch. D. 605 ; 46 L. J. Ch. 510 ; 36 L. T. 752...626, 628
Twynam *v.* Pickard, 2 B. & Ald. 105 60
Twyne's Case, 3 Co. Rep. 80 ; Moore, 638 1
Tyson *v.* Smith, 9 A. & E. 406 ; 1 P. & D. 307 ; 1 N. & P. 784 ; 6 L. J. K. B. 189. 559

U.

PAGE

Udell *v.* Atherton, 7 H. & N. 172 ; 30 L. J. Ex. 337 ; 7 Jur. N. S. 777 ; 4 L. T. 797 682
Uhde *v.* Walters, 3 Camp. 16 ; 13 R. R. 737 546
Ultzen *v.* Nichols, (1894) 1 Q. B. 92 ; 63 L. J. Q. B. 289 ; 70 L. T. 140 ; 28 W. R. 58 . . . . . 125, 198
Underhay *v.* Read, 20 Q. B. D. 209 ; 57 L. J. Q. B. 129 ; 58 L. T. 79, 457 ; 36 W. R. 298 . . . . . 506, 507
Underwood *v.* Underwood, (1894) P. 204 ; 63 L. J. P. & D. 4, 109 ; 70 L. T. 390 ; 42 W. R. 372 329
United Service Co., *Re*, 6 Ch. 212 ; 40 L. J. Ch. 286 ; 24 L. T. 115 ; 19 W. R. 89, 457 187
U. S. of America *v.* McRae, 8 Eq. 69 ; 38 L. J. Ch. 406 ; 20 L. T. 476 ; 17 W. R. 764 679
——— *v.* Wagner, 2 Ch. 582 ; 3 Eq. 724 ; 36 L. J. Ch. 624 ; 16 L. T. 86, 646 ; 15 W. R. 634, 1026 629
Unwin *v.* Leaper, 1 M. & Gr. 747 ; 10 L. J. C. P. 41 ; 4 Jur. 1037 . 355
Upton & Basset's Case, Cro. Eliz. 445 . . . . . 8, 26
Urmston *v.* Newcomen, 4 A. & E. 899 ; 6 N. & M. 454 ; 5 L. J. K. B. 175 144
——— *v.* Whitelegg, 55 J. P. 453 ; 63 L. T. 455 415
Usill *v.* Hales, 3 C. P. D. 319 ; 47 L. J. C. P. 323 ; 38 L. T. 65 ; 26 W. R. 371 263
Uther *v.* Rich, 10 A. & E. 784 ; 2 P. & D. 579 469

V.

Vadala *v.* Lawes, 25 Q. B. D. 310 ; 62 L. T. 701 ; 63 Id. 128 ; 38 W. R. 594 608
Vallance, *Re*, 26 Ch. D. 353 ; 50 L. T. 474 ; 32 W. R. 918 . . . 368
——— *v.* Dewar, 1 Camp. 503 ; 10 R. R. 738 . . . . 478, 541
——— *v.* Falle, 13 Q. B. D. 109 ; 53 L. J. Q. B. 459 ; 51 L. T. 158 ; 32 W. R. 770 ; 48 J. P. 519 ; 5 Asp. M. C. 280 286
Vallezjo *v.* Wheeler, Lofft, 631 539
Valpy *v.* Gibson, 4 C. B. 837 ; 16 L. J. C. P. 241 ; 11 Jur. 826 . . 727
Van Casteel *v.* Booker, 2 Exch. 691 ; 18 L. J. Ex. 9 . . . 729, 745
Van der Donckt *v.* Thellusson, 8 C. B. 812 ; 19 L. J. C. P. 12 . . 623
Van Toll *v.* S. E. R. Co., 12 C. B. N. S. 75 ; 31 L. J. C. P. 241 ; 8 Jur. N. S. 1213 ; 6 L. T. 244 ; 10 W. R. 578 . . . . 208, 213
Vance *v.* Lowther, 1 Ex. D. 176 ; 45 L. J. Ex. 200 ; 34 L. T. 286 ; 24 W. R. 372 . . . . . 780, 781
Vandenbergh *v.* Spooner, L. R. 1 Ex. 316 ; 4 H. & C. 519 ; 35 L. J. Ex. 201 ; 12 Jur. N. S. 527 ; 14 L. T. 701 ; 14 W. R. 843 298
Vanderzee *v.* Willis, 3 Bro. C. C. 21 193
Vandyck *v.* Hewitt, 1 East, 96 ; 5 R. R. 518 384
Vanquelin *v.* Bouard, 33 L. J. C. P. 78 ; 15 C. B. N. S. 341 ; 10 Jur. N. S. 566 ; 9 L. T. 582 ; 12 W. R. 128 620
Vansittart *v.* Vansittart, 4 K. & J. 62 ; 27 L. J. Ch. 222 ; 4 Jur. N. S. 276, 519 ; 6 W. R. 238, 386 . . . . . 366, 367
Varley *v.* Coppard, L. R. 7 C. P. 505 ; 26 L. T. 882 ; 20 W. R. 972 . 46
Vaughan *v.* Menlove, 3 B. N. C. 468 ; 7 C. & P. 525 ; 4 Scott, 244 ; 3 Hodges, 51 ; 6 L. J. C. P. 92 ; 1 Jur. 215 . . . 272, 825
——— *v.* Taff Vale R. Co., 5 H. & N. 679 ; 29 L. J. Ex. 247 ; 6 Jur. N. S. 899 ; 2 L. T. 394 ; 8 W. R. 549 . . . 825, 828
——— *v.* Wilson, 4 B. N. C. 116 ; 5 Scott, 404 ; 7 L. J. C. P. 22 . 342
Vaughton *v.* L. N. W. R. Co., L. R. 9 Ex. 93 ; 12 Cox, C. C. 580 ; 43 L. J. Ex. 75 ; 30 L. T. 119 ; 22 W. R. 336 210
Vavasseur *v.* Krupp, 9 Ch. D. 351 ; 39 L. T. 437 ; 27 W. R. 176 . 626
Veitch *v.* Russell, 3 Q. B. 928 ; 3 G. & D. 198 ; Car. & M. 362 ; 12 L. J. Q. B. 13 ; 7 Jur. 60 146

PAGE

Venables *v.* Barings, (1892) 3 Ch. 527 ; 61 L. J. Ch. 609 ; 67 L. T. 110; 40 W. R. 699 462
——— *v.* Hardman, 1 E. & E. 79 ; 28 L. J. M. C. 33 ; 4 Jur. N. S. 1108 671
——— *v.* Smith, 2 Q. B. D. 279 ; 46 L. J. Q. B. 470 ; 36 L. T. 509; 25 W. R. 584 353
Vere *v.* Smith, 1 Vent. 121 ; 2 Keb. 761, 779, 830 ; 2 Lev. 5 . 191, 199
Vernon *v.* Hallam, 34 Ch. D. 748 ; 56 L. J. Ch. 115 ; 55 L. T. 676 ; 35 W. R. 156 411
——— *v.* Smith, 5 B. & Ald. 1 65
Vertue *v.* Beasley, 1 M. & Rob. 21 . . . . . 130, 133
Vicars *v.* Wilcocks, 8 East, 1 ; 9 R. R. 361 . . . . 280, 281, 827
Victoria (Speaker of) *v.* Glass, L. R. 3 P. C. 560 ; 7 Moore, P. C. N. S. 449 ; 40 L. J. P. C. 17 ; 24 L. T. 317 ; 20 W. R. 42 286
Victors *v.* Davies, 12 M. & W. 758 ; 1 D. & L. 984 ; 13 L. J. Ex. 214 142
Villers *v.* Beaumont, 1 Vern. 100 ; Eq. Ca. Ab. 23, pl. 2 26
Viney *v.* Bignold, 20 Q. B. D. 172 ; 57 L. J. Q. B. 82 ; 58 L. T. 26 ; 36 W. R. 479 341
Vinkinstone *v.* Ebden, Carth. 357 ; 5 Mod. 356, 359 ; 1 Ld. Raym. 384; 3 Id. 148 ; 1 Salk. 148 424
Virany *v.* Warne, 4 Esp. 47 ; 6 R. R. 839 146
Voinet *v.* Barrett, 55 L. J. Q. B. 39 ; 54 Id. 521 ; 34 W. R. 161 . 608
Voisey, *Ex p.*, 21 Ch. D. 442 ; 52 L. J. Ch. 121 ; 47 L. T. 362 ; 31 W. R. 19 . . . . . 516, 518, 521
Vyvyan *v.* Arthur, 1 B. & C. 410 ; 2 D. & R. 670 66

W.

Waddilove *v.* Barnett, 4 Dowl. 347 ; 2 B. N. C. 538 ; 2 Scott, 763 ; 1 Hodges, 395 ; 5 L. J. C. P. 145 . . . . . 505, 508
Wadham *v.* Postmaster-General, L. R. 6 Q. B. 644 ; 40 L. J. Q. B. 310 ; 24 L. T. 545 ; 19 W. R. 1082 49
Wadsworth *v.* Queen of Spain, 17 Q. B. 171 ; 20 L. J. Q. B. 488 ; 16 Jur. 164 626
Wafer *v.* Mocato, 9 Mod. 112 51
Wain *v.* Warlters, 5 East, 10 ; 1 Smith, 299 ; 7 R. R. 645 ... 291, 293, 299, 306, 310
Wainman *v.* Kynman, 1 Exch. 118 ; 16 L. J. Ex. 232 . . . 564
Waite *v.* Jones. *See* Jones *v.* Waite.
——— *v.* N. E. R. Co., E. B. & E. 719 ; 27 L. J. Q. B. 417 ; 28 Id. 258 ; 4 Jur. N. S. 1300 ; 5 Id. 936 ; 7 W. R. 311 278
Wake *v.* Tinkler, 16 East, 36 770
Wakefield *v.* Brown, 9 Q. B. 209 ; 15 L. J. Q. B. 373 ; 10 Jur. 853 ...70, 71
Wakelin *v.* L. & S. W. R. Co., 12 App. Cas. 41 ; 56 L. J. Q. B. 229 ; 55 L. T. 709 ; 35 W. R. 141 ; 51 J. P. 404 276
Walker *v.* Bartlett, 18 C. B. 845 ; 17 Id. 446 ; 25 L. J. C. P. 156 ; 2 Jur. N. S. 261, 643 ; 4 W. R. 300, 681 166
——— *v.* Butler, 6 E. & B. 506 ; 25 L. J. Q. B. 377 ; 2 Jur. N. S. 687 565
——— *v.* Delacombe, 63 L. J. M. C. 77 673
——— *v.* Giles, 6 C. B. 662 ; 18 L. J. C. P. 323 ; 13 Jur. 588, 753 . 520, 521
——— *v.* G. N. R. Co., 28 L. R. Ir. 69 202
——— *v.* Hastings, 4 Camp. 223 ; 1 Stark. 215 ; 2 Chit. 121 . . 781
——— *v.* Hatton, 10 M. & W. 249 ; 2 Dowl. N. S. 263 ; 11 L. J. Ex. 361 . . . . . 149, 150
——— *v.* Jackson, 10 M. & W. 161 ; 12 L. J. Ex. 165 . . 204, 224
——— *v.* Nevill, 3 H. & C. 403 ; 34 L. J. Ex. 73 ; 11 Jur. N. S. 246 ; 11 L. T. 774 ; 13 W. R. 523 340
——— *v.* Perkins, 3 Burr. 1568 ; 1 W. Bl. 517 368
——— *v.* Rostron, 9 M. & W. 411 ; 11 L. J. Ex. 173 . . . 148

PAGE

Walker *v.* S. E. R. Co., L. R. 5 C. P. 640; 39 L. J. C. P. 346; 23 L. T. 14; 18 W. R. 1032 352
——— *v.* Walker, 54 L. T. 792 420
——— *v.* Willoughby, 6 Taunt. 530; 2 Marsh. 230 108
——— *v.* York. & N. Mid. R. Co., 2 E. & B. 750; 23 L. J. Q. B. 73; 2 C. L. R. 237; 18 Jur. 143; 2 W. R. 11 . . . . . 208, 210
Wall *v.* Cockerell, 29 L. J. Ch. 816; 30 Id. 417; 32 Id. 276; 10 H. L. C. 229; 6 Jur. N. S. 768; 7 Id. 29; 9 Id. 447; 3 L. T. 138, 490; 8 Id. 1; 8 W. R. 441; 11 Id. 442 351
Wallace *v.* A.-G., 33 L. J. Ch. 314; 35 Id. 124; 1 Ch. 1; 10 Jur. N. S. 249; 10 L. T. 51; 12 W. R. 506 413
——— *v.* Telfair, 2 T. R. 188, n. 183
Waller *v.* Lacy, 1 M. & Gr. 54; 1 Scott, N. R. 186; 8 Dowl. 563; 9 L. J. C. P. 217; 4 Jur. 435 570
——— *v.* Loch, 7 Q. B. D. 619; 51 L. J. Q. B. 274; 45 L. T. 242; 30 W. R. 18; 46 J. P. 484 262
Wallis *v.* Day, 2 M. & W. 273; M. & H. 22; 6 L. J. Ex. 92; 1 Jur. 73 406, 414
——— *v.* Littell, 11 C. B. N. S. 369; 31 L. J. C. P. 100; 8 Jur. N. S. 745; 10 W. R. 192 340
Walmsley *v.* Child, 1 Ves. sen. 341 454
Walrond *v.* Hawkins, L. R. 10 C. P. 342; 44 L. J. C. P. 116; 32 L. T. 119; 23 W. R. 390 . . . . . 37, 45
——— *v.* Walrond, 1 Johns. 18; 28 L. J. Ch. 97; 4 Jur. N. S. 1099; 7 W. R. 33 367
Walsall *v.* L. & N. W. R. Co., 4 App. Cas. 30; 3 Q. B. D. 449; 48 L. J. M. C. 57, 166; 38 L. T. 665; 39 Id. 453; 26 W. R. 705; 27 Id. 189 . . . . . 658, 660
Walsby *v.* Anley, 30 L. J. M. C. 121; 7 Jur. N. S. 465; 3 L. T. 666; 9 W. R. 271 650
Walsh *v.* Feely, 1 Jones (Exch. Ir.) 413 97
——— *v.* Walsh, 1 Ir. Eq. 209 433
Walter D. Wallet, The, [1893] P. 202; 62 L. J. P. 88; 69 L. T. 771; 1 R. 627 261
Walter *v.* Cubley, 2 C. & M. 151; 4 Tyr. 87; 3 L. J. Ex. 2 . . . 782
——— *v.* Hanger, Moore, 832 250
——— *v.* James, L. R. 6 Ex. 124; 40 L. J. Ex. 104; 24 L. T. 188; 19 W. R. 472 338
——— *v.* Smith, 5 B. & Ald. 439; 1 D. & R. 1 . . . . . 193, 197
Wannel *v.* Chamber of the City of London, 1 Str. 675; 8 Mod. 267; 3 Burr. 1328 393
Wanstead L. B. *v.* Hill, 13 C. B. N. S. 479; 32 L. J. M. C. 135; 9 Jur. N. S. 972; 7 L. T. 744; 11 W. R. 368 268
Warburton *v.* Ivie, 1 Jones (Exch. Ir.) 313 96
——— *v.* Loveland, 6 Bligh, N. S. 1 27
Ward's Case, 2 Str. 747; 2 Ld. Raym. 1461; 3 Id. 358 758
———, Latch. 4, 77, 84; W. Jones, 69 577
——— *v.* Byrne, 5 M. & W. 548; 9 L. J. Ex. 14; 3 Jur. 1175 . . . 403
——— *v.* Day, 4 B. & S. 337; 5 Id. 359; 33 L. J. Q. B. 254; 10 L. T. 578; 12 W. R. 829 . . . . . 37, 38, 39, 40
——— *v.* Dudley, 57 L. T. 20 427
——— *v.* Lloyd, 6 M. & Gr. 785; 7 Scott, N. S. 499; 1 D. & L. 763; 13 L. J. C. P. 5 365
——— *v.* Lumley, 5 H. & N. 87; 29 L. J. Ex. 325, 372; 6 Jur. N. S. 560; 8 W. R. 543 788
——— *v.* Weeks, 7 Bing. 211; 4 M. & P. 796 280
Warde *v.* Stewart, 1 C. B. N. S. 88; 5 W. R. 6 547
Warden *v.* Jones, 2 De G. & J. 76; 26 L. J. Ch. 427; 27 Id. 190; 4 Jur. N. S. 269 27
Ware *v.* Gardner, 7 Eq. 317; 38 L. J. Ch. 348; 20 L. T. 71; 17 W. R. 439 20

PAGE

Warrington *v.* Early, 2 E. & B. 763 ; 2 C. L. R. 979 ; 23 L. J. Q. B. 47 ; 18 Jur. 42 ; 2 W. R. 78 782
Warwick *v.* Richardson, 10 M. & W. 284 375
——— *v.* Rogers, 5 M. & Gr. 340 ; 6 Scott, N. R. 1 ; 12 L. J. C. P. 113 785
Wason *v.* Walter, L. R. 4 Q. B. 73 ; 38 L. J. Q. B. 34 ; 19 L. T. 409 ; 8 B. & S. 671 ; 17 W. R. 169 . . . . . 262, 264
Waterfall *v.* Penistone, 6 E. & B. 876 ; 26 L. J. Q. B. 100 ; 3 Jur. N. S. 15 ; 4 W. R. 726 427
Waters *v.* Tompkins, 2 C. M. & R. 723 ; T. & G. 137 ; 5 L. J. Ex. 61 569
Watkins *v.* Birch, 4 Taunt. 823 13
——— *v.* Rymill, 10 Q. B. D. 178 ; 52 L. J. Q. B. 121 ; 48 L. T. 426 ; 31 W. R. 337 ; 47 J. P. 357 209
——— *v.* Towers, 2 T. R. 275 600
Watling *v.* Oastler, L. R. 6 Ex. 73 ; 40 L. J. Ex. 43 ; 23 L. T. 815 ; 19 W. R. 388 275
Watson, *Ex p.*, 5 Ch. D. 35 ; 46 L. J. Bkcy. 97 ; 36 L. T. 75 ; 25 W. R. 489 . . . . . 727, 733
——— *v.* Swann, 11 C. B. N. S. 756 ; 31 L. J. C. P. 210 . . . 349
——— *v.* Turner, B. N. P. 129, 147, 281 143
——— *v.* Woodman, 20 Eq. 721 ; 45 L. J. Ch. 57 ; 24 W. R. 47 . 568
Watters *v.* Smith, 2 B. & Ad. 889 ; 1 L. J. K. B. 31 330
Waugh *v.* Cope, 6 M. & W. 824 ; 10 L. J. Ex. 145 564
——— *v.* Morris, L. R. 8 Q. B. 202 ; 42 L. J. Q. B. 57 ; 28 L. T. 265 ; 21 W. R. 438 371
Way *v.* G. E. R. Co., 1 Q. B. D. 692 ; 45 L. J. Q. B. 874 ; 35 L. T. 253 210
—— *v.* Hearn, 13 C. B. N. S. 292 ; 32 L. J. C. P. 34 ; 6 L. T. 751 . 295
Weatherall *v.* Geering, 12 Ves. 504 ; 8 R. R. 369 . . . . 46, 48
Weaver *v.* Ward, Hob. 134 442
Webb, *In re*, 8 Taunt. 443 199
——— *v.* Austin, 8 Scott, N. R. 419 ; 7 M. & Gr. 701 ; 13 L. J. C. P. 203 . . . . . 92, 93
——— *v.* Beavan, 6 M. & Gr. 1055 ; 7 Scott, N. R. 936 . . . 135
——— *v.* Bell, Sid. 422, 440 ; 1 Ventr. 36 ; 2 Keb. 529, 595 ; Sir T. Raym. 218 425
——— *v.* G. W. R. Co., 26 W. R. 111 218
——— *v.* Herne Bay Commrs., L. R. 5 Q. B. 642 ; 39 L. J. Q. B. 221 ; 22 L. T. 745 ; 19 W. R. 241 389
——— *v.* Plummer, 2 B. & Ald. 746 537
——— *v.* Rhodes, 3 B. N. C. 732 ; 4 Scott, 497 ; 6 L. J. C. P. 212 . 139
——— *v.* Russell, 3 T. R. 393 ; 1 R. R. 735 . . . 60, 62, 74, 512
——— *v.* Salmon, 13 Q. B. 886, 894 ; 3 H. L. C. 510 ; 18 L. J. Q. B. 143 ; 19 Id. 34 ; 14 Jur. 33 339
Webber *v.* Maddocks, 3 Camp. 1 784
Webster *v.* De Tastet, 7 T. R. 157 ; 4 R. R. 402 480
Weeks *v.* Maillardet, 14 East, 568 784
Welby *v.* Drake, 1 C. & P. 557 338
Welch *v.* L. & N. W. R. Co., 34 W. R. 166 201
Weld *v.* Baxter, 11 Exch. 816 ; 1 H. & N. 568 ; 25 L. J. Ex. 214 ; 26 Id. 112 ; 3 Jur. N. S. 91 ; 5 W. R. 113 95
Weldon *v.* De Bathe, 54 L. J. Q. B. 113 ; 14 Q. B. D. 339 ; 53 L. T. 520 ; 33 W. R. 328 280
Wellock *v.* Constantine, 32 L. J. Ex. 285 ; 2 H. & C. 146 ; 9 Jur. N. S. 232 ; 7 L. T. 751 . . . . . 278, 279
Wells *v.* Abrahams, L. R. 7 Q. B. 554 ; 41 L. J. Q. B. 306 ; 26 L. T. 433 ; 20 W. R. 659 278
——— *v.* Horton, 4 Bing. 40 ; 12 Moore, 176 304
Welsh *v.* Rose, 6 Bing. 638 ; 4 M. & P. 484 434
Wenham *v.* Fowle, 3 Dowl. 43 334
Wenlock *v.* River Dee Co., 10 App. Cas. 354 ; 54 L. J. Q. B. 577 ; 53 L. T. 62 ; 49 J. P. 773 378

PAGE

Wenman *v.* Lyon, 64 L. T. 88 ; (1891) 1 Q. B. 634 ; 60 L. J. Q. B. 223 ; 39 W. R. 301 18
Wennall *v.* Adney, 3 B. & P. 247 ; 6 R. R. 780 143
Wentworth *v.* Bullen, 9 B. & C. 840 260
——— *v.* Outhwaite, 10 M. & W. 436 ; 12 L. J. Ex. 173 720, 721, 722, 727, 730
West *v.* Dobb, L. R. 5 Q. B. 460 ; 4 Id. 634 ; 9 B. & S. 755 ; 38 L. J. Q. B. 289 ; 39 Id. 190 ; 20 L. T. 737 ; 23 Id. 76 ; 17 W. R. 879 . . . . . 49, 65, 69
—— *v.* Fritche, 3 Exch. 216 ; 18 L. J. Ex. 50 516
—— *v.* Nibbs, 4 C. B. 172 ; 17 L. J. C. P. 150 . . . . . 130, 133
—— *v.* Skipp, 1 Ves. sen. 239, 456 19
—— *v.* Steward, 14 M. & W. 47 786
West Cumberland Co. *v.* Kenyon, 11 Ch. D. 782 ; 6 Id. 773 ; 46 L. J. Ch. 850 ; 48 Id. 793 ; 40 L. T. 703 ; 28 W. R. 23 823
West Norfolk Manure Co. *v.* Archdale, 16 Q. B. D. 754 ; 55 L. J. Q. B. 230 ; 54 L. T. 561 ; 34 W. R. 401 ; 50 J. P. 500 266
Westbury-upon-Severn Union, *Re*, 4 E. & B. 314 . . . 641, 663
Westbury *v.* Powell, Co. Lit. 56 a 245, 253
Westlake *v.* Adams, 5 C. B. N. S. 248 ; 27 L. J. C. P. 271 ; 4 Jur. N. S. 1021 375
Westmore *v.* Paine, (1891) 1 Q. B. 482 ; 60 L. J. M. C. 89 ; 64 L. T. 55 ; 39 W. R. 463 ; 55 J. P. 440 ; 17 Cox, C. C. 244 673
Weston *v.* Sneyd, 1 H. & N. 703 ; 26 L. J. Ex. 161 ; 5 W. R. 317 . 645
Westzinthus, *Re*, 5 B. & Ad. 817 ; 2 N. & M. 644 ; 3 L. J. K. B. 56 738, 739
Wey *v.* Yally, 6 Mod. 194 ; 2 Salk. 651 ; 3 Id. 381 ; Holt, 705 . . 588
Whaite *v.* L. & Y. R. Co., L. R. 9 Ex. 67 ; 43 L. J. Ex. 47 ; 30 L. T. 272 ; 22 W. R. 374 207
Whaley *v.* Laing, 2 H. & N. 476 ; 26 L. J. Ex. 327 ; 8 W. R. 439 . 345
Whalley *v.* L. & Y. R. Co., 13 Q. B. D. 131 ; 53 L. J. Q. B. 285 ; 50 L. T. 472 ; 32 W. R. 711 ; 48 J. P. 500 . . . . . 443, 823
Wharton *v.* Naylor, 12 Q. B. 673 ; 6 D. & L. 136 ; 12 Jur. 894 ; 17 L. J. Q. B. 278 432
Whatman *v.* Pearson, L. R. 3 C. P. 422 ; 37 L. J. C. P. 156 ; 18 L. T. 290 ; 16 W. R. 649 353
Wheatley *v.* Low, Cro. Jac. 668 181
Wheeler *v.* Branscombe, 5 Q. B. 373 ; 1 D. & M. 406 ; 13 L. J. Q. B. 83 ; 7 Jur. 1131 507
——— *v.* Montifiore, 2 Q. B. 133 ; 1 G. & D. 493 ; 11 L. J. Q. B. 34 ; 6 Jur. 299 513
Whistler *v.* Foster, 32 L. J. C. P. 161 ; 14 C. B. N. S. 248 ; 8 L. T. 317 ; 11 W. R. 648 472
Whitby *v.* Mitchell, 42 Ch. D. 494 ; 44 Id. 85 ; 59 L. J. Ch. 8, 485 ; 61 L. T. 353 ; 62 Id. 771 ; 38 W. R. 5, 337 418
Whitcomb *v.* Whiting, 2 Dougl. 652 561
White *v.* Carmarthen R. Co., 1 H. & M. 786 ; 33 L. J. Ch. 93 ; 9 L. T. 439 ; 12 W. R. 68 373
—— *v.* Feast, L. R. 7 Q. B. 353 ; 41 L. J. M. C. 81 ; 26 L. T. 611 ; 20 W. R. 382 667
—— *v.* G. W. R. Co., 2 C. B. N. S. 7 ; 26 L. J. C. P. 158 ; 5 W. R. 488 223
—— *v.* Hawkins, unreported 496, 500
—— *v.* Morris, 11 C. B. 1015 ; 21 L. J. C. P. 185 ; 16 Jur. 500 . 15
—— *v.* Sawyer, 1 Palm. 211 532
—— *v.* Spettigue, 13 M. & W. 603 ; 1 C. & K. 673 ; 14 L. J. Ex. 99 ; 9 Jur. 70 279
—— *v.* Stringer, 2 Lev. 105 29
—— *v.* Wiltshire, Palm. 52 ; 2 Rolle, 137 . . . . . 105, 108
Whitehead *v.* Anderson, 9 M. & W. 518 ; 11 L. J. Ex. 157...726, 729, 732, 733
——— *v.* Greetham, 2 Bing. 464 ; M'Clel. & Y. 205 ; 10 Moore, 183...182

PAGE

Whitehead *v.* Taylor, 10 A. & E. 210 ; 2 P. & D. 367 ; 9 L. J. Q. B. 65 ; 4 Jur. 247 350
Whitehouse *v.* Fellowes, 10 C. B. N. S. 765 ; 30 L. J. C. P. 305 ; 4 L. T. 177 ; 9 W. R. 557 446
Whiteley *v.* Adams, 15 C. B. N. S. 392 ; 33 L. J. C. P. 89 ; 10 Jur. N. S. 470 ; 9 L. T. 483 ; 12 W. R. 153 262
Whiting *v.* Burke, 6 Ch. 342 ; 10 Eq. 539 151
Whitlock's Case, 8 Co. Rep. 70 61
Whittaker *v.* Howe, 3 Beav. 383 . . . . . 404, 411
Whittle *v.* Frankland, 31 L. J. M. C. 81 ; 8 Jur. N. S. 382 ; 5 L. T. 639 647
Whitton *v.* Peacock, 3 Myl. & K. 325 ; 2 B. N. C. 411 ; 2 Scott, 630 ; 1 Hodges, 376 . . . . . 60, 91, 93
Wickham *v.* Wickham, 2 K. & J. 478 291
Wigg *v.* Shuttleworth, 13 East, 87 371
Wigglesworth *v.* Dallison, 1 Dougl. 201 528
Wilbraham *v.* Snow, 2 Wms. Saund. (ed. 1871), 87 113
Wild Ranger, The, 32 L. J. A. 49 ; 31 Id. 206 ; 9 Jur. N. S. 134 ; 7 L. T. 725 ; 11 W. R. 255 618
Wildbor *v.* Rainforth, 8 B. & C. 4 ; 2 M. & Ry. 185 133
Wildes *v.* Dudlow, 19 Eq. 198 ; 44 L. J. Ch. 341 ; 23 W. R. 435 . 290
Wildy *v.* Stephenson, C. & E. 3 . . . . . 545, 559
Wilkes *v.* Broadbent, 2 Str. 1224. 533
——— *v.* Perks, 5 M. & Gr. 376 ; 6 Scott, N. R. 42 ; 12 L. J. C. P. 145 ; 7 Jur. 68 342
Wilkins *v.* Hemsworth, 7 A. & E. 807 ; 3 N. & P. 55 ; 1 W. W. & H. 10 ; 7 L. J. M. C. 28 ; 2 Jur. 94, 301 640
——— *v.* Wright, 3 Tyr. 824 ; 4 Id. 121 ; 2 C. & M. 191 ; 3 L. J. M. C. 39 640
Wilkinson *v.* Byers, 1 A. & E. 106 ; 3 N. & M. 853 ; 3 L. J. K. B. 144...330, 331
——— *v.* Coverdale, 1 Esp. 75 183
——— *v.* Dutton, 3 B. & S. 821 ; 32 L. J. M. C. 152 ; 9 Jur. N. S. 1104 ; 8 L. T. 276 665
——— *v.* Evans, L. R. 1 C. P. 407 ; 1 H. & R. 552 ; 35 L. J. C. P. 224 ; 12 Jur. N. S. 600 ; 14 W. R. 963 . . 297, 300
——— *v.* Hall, 3 B. N. C. 508 ; 4 Scott, 301 ; 3 Hodges, 56 ; 6 L. J. C. P. 82 . . . . . 513, 514
——— *v.* Johnson, 3 B. & C. 428 ; 5 D. & R. 403 785
——— *v.* Stoney, 1 Jebb & S. 509 351
Willans *v.* Ayres, 3 App. Cas. 133 ; 47 L. J. P. C. 1 ; 37 L. T. 732...556, 559
William's Case, 5 Co. Rep. 72, b. 237, 253
Williams, *Ex p.*, 7 Ch. D. 138 ; 47 L. J. Bkcy. 26 ; 37 L. T. 764 ; 26 W. R. 274 521
———, *Re*, 21 L. J. M. C. 46 ; 2 L. M. & P. 580 ; 15 Jur. 1060 . 652
——— *v.* African S. S. Co., 1 H. & N. 300 ; 26 L. J. Ex. 69 ; 2 Jur. N. S. 693 219
——— *v.* Bayley, L. R. 1 H. L. 200 ; 4 Giff. 638 ; 35 L. J. Ch. 717 ; 11 Jur. N. S. 236 ; 12 Id. 875 ; 12 L. T. 110 ; 14 Id. 802 . . . . . 351, 365, 385, 386
——— *v.* Burrell, 1 C. B. 402 ; 14 L. J. C. P. 98 ; 9 Jur. 282 70, 96
——— *v.* Earle, L. R. 3 Q. B. 739 ; 37 L. J. Q. B. 231 ; 19 L. T. 238 ; 16 W. R. 1041 . . . . . 65, 69
——— *v.* Everett, 14 East, 582 ; 13 R. R. 315 140
——— *v.* Gesse, 3 B. N. C. 849 ; 5 Scott, 56 ; 7 C. & P. 777 . . 124
——— *v.* Groucott, 4 B. & S. 149 ; 32 L. J. Q. B. 237 ; 9 Jur. N. S. 1237 ; 11 W. R. 886 ; 8 L. T. 458 . . . 795, 816
——— *v.* Holmes, 8 Exch. 861 ; 22 L. J. Ex. 283 ; 1 W. R. 391 . 428
——— *v.* Lake, 29 L. J. Q. B. 1 ; 2 E. & E. 349 ; 6 Jur. N. S. 45 ; 1 L. T. 56 ; 8 W. R. 41 298
——— *v.* Leper, 3 Burr. 1886 ; 2 Wils. 302 . . . 291, 460, 461
——— *v.* Lewis, 6 H. L. C. 1013 ; 3 Drew. 668 ; 5 Jur. N. S. 323 ; 5 W. R. 17, 243 ; 7 Id. 349 419

PAGE

Williams *v.* Moor, 11 M. & W. 256 ; 2 Dowl. N. S. 993 ; 12 L. J. Ex. 253 ; 7 Jur. 817 143
——— *v.* Morris, 8 M. & W. 488 ; 11 L. J. Ex. 126 135
——— *v.* Mostyn, 4 M. & W. 145 ; 7 Dowl. 38 ; 7 L. J. Ex. 289 ; 2 Jur. 643 274
——— *v.* Smith, 22 Q. B. D. 134 ; 58 L. J. Q. B. 21 ; 59 L. T. 757 ; 37 W. R. 93 ; 52 J. P. 823 264
——— *v.* Wheeler, 8 C. B. N. S. 299 622
——— *v.* Wynne, 57 L. J. M. C. 30 ; 58 L. T. 283 ; 52 J. P. 343 . 656
Williamson *v.* Henley, 6 Bing. 299 ; 3 M. & P. 731 769
——————— *v.* Thomson, 16 Ves. 443 456
——————— *v.* Williamson, 9 Ch. 729 ; 17 Eq. 549 ; 43 L. J. Ch. 382, 738 ; 30 L. T. 154 ; 31 Id. 291 ; 22 W. R. 682 . 47
Willis, *Re*, 21 Q. B. D. 384 ; 57 L. J. Q. B. 634 ; 59 L. T. 749 ; 36 W. R. 639 524
——— *v.* De Castro, 4 C. B. N. S. 216 ; 27 L. J. C. P. 243 ; 6 W. R. 500 340
——— *v.* Maclachlan, 1 Ex. D. 376 ; 45 L. J. Q. B. 689 ; 35 L. T. 218 631
——— *v.* Newham, 3 Y. & J. 518 568
Willyams *v.* Bullmore, 33 L. J. Ch. 461 ; 11 Jur. N. S. 1115 ; 9 L. T. 216 ; 11 W. R. 506 368
Wilmhurst *v.* Bowker, 5 B. N. C. 541 ; 7 M. & Gr. 882 ; 8 Scott, N. R. 571 ; 8 L. J. C. P. 309 ; 3 Jur. 796 720
Wilson *v.* Brett, 11 M. & W. 113 ; 12 L. J. Ex. 264 . . . 185, 190
——— *v.* Coupland, 5 B. & Ald. 228 140
——— *v.* Cutting, 10 Bing. 436 ; 4 M. & Scott, 268 153
——— *v.* Dickson, 2 B. & Ald. 2 219
——— *v.* Ducket, 2 Mod. 61 429
——— *v.* Hart, 7 Taunt. 295 ; 1 Moore, 45 539
——— *v.* ——, 1 Ch. 463 ; 2 H. & M. 551 ; 35 L. J. Ch. 569 ; 11 Jur. N. S. 735 ; 12 Id. 460 ; 12 L. T. 798 ; 14 Id. 499 ; 13 W. R. 988 ; 14 Id. 748 87
——— *v.* Muskett, 3 B. & Ad. 743 366
——— *v.* Newberry, L. R. 7 Q. B. 31 ; 41 L. J. Q. B. 31 ; 25 L. T. 695 ; 20 W. R. 111 . . . . . 825, 829
——— *v.* Nightingale, 8 Q. B. 1034 ; 15 L. J. Q. B. 307 ; 10 Jur. 917 497
——— *v.* Queen's Club, (1891) 3 Ch. 522 ; 60 L. J. Ch. 698 ; 65 L. T. 42 ; 40 W. R. 172 . . . . . 64, 511
——— *v.* R. E. A. Co., 2 Camp. 623 ; 12 R. R. 760 480
——— *v.* Strugnell, 7 Q. B. D. 548 ; 50 L. J. M. C. 145 ; 45 L. T. 218 ; 45 J. P. 831 ; 14 Cox, C. C. 624 365
——— *v.* Tummon, 6 M. & Gr. 236 ; 6 Scott, N. R. 894 ; 1 D. & L. 513 ; 12 L. J. C. P. 307 349
——— *v.* Waddell, 2 App. Cas. 95 ; 35 L. T. 639 822
——— *v.* Wilson, 14 Sim. 405 ; 1 H. L. C. 538 ; 1 De G. & S. 152 ; 14 L. J. Ch. 204 ; 9 Jur. 148 ; 11 Id. 340 . . 366
——— *v.* ———, 1 Sim. N. S. 288 ; 20 L. J. Ch. 365 ; 15 Jur. 349 . 419
Wilton *v.* Atlantic R. Mail Co., 10 C. B. N. S. 453 ; 30 L. J. C. P. 369 ; 8 Jur. N. S. 231 ; 4 L. T. 706 ; 9 W. R. 748 . 220
——— *v.* Dunn, 17 Q. B. 294 ; 21 L. J. Q. B. 60 ; 15 Jur. 1104 ... 508, 526
Winch *v.* Keeley, 1 T. R. 619 771
Winchilsea's Policy Trust, *Re*, 39 Ch. D. 168 ; 58 L. J. Ch. 20 ; 59 L. T. 167 ; 37 W. R. 77 142
Windhill L. B. *v.* Vint, 45 Ch. D. 351 ; 59 L. J. Ch. 608 ; 62 L. T. 725 ; 63 Id. 366 ; 17 Cox, C. C. 41 ; 38 W. R. 738 364
Windsor's (Dean of) Case, 5 Co. Rep. 24 a 65
Windsor (Dean of) *v.* Gover, 2 Wms. Saund. 301 54
Wing *v.* Earle, Cro. Eliz. 267 552
——— *v.* Mill, 1 B. & Ald. 104 143
Wingate *v.* Waite, 6 M. & W. 739 ; 9 L. J. Ex. 319 ; 4 Jur. 860 . 649
Winn *v.* Mossman, L. R. 4 Ex. 292 ; 38 L. J. Ex. 200 ; 20 L. T. 672 ; 17 W. R. 924 655

PAGE
Winsmore *v.* Greenbank, Willes, 577 258
Winter *v.* Innes, 4 My. & C. 101 ; 2 Jur. 981 333
Winterbottom *v.* Derby, L. R. 2 Ex. 316 ; 36 L. J. Ex. 194 ; 16 L. T. 771 ; 16 W. R. 15 274
Wise *v.* G. W. R. Co., 1 H. & N. 63 ; 25 L. J. Ex. 258 ; 4 W. R. 551 213
Wiseman *v.* Vandeputt, 2 Vern. 203 . . . . 688, 705, 716, 720
Witherley *v.* Regent's Canal Co., 12 C. L. N. S. 2 ; 3 F. & F. 61 ; 6 L. T. 255. 276
Witt, *Re*, 2 Ch. D. 489 ; 45 L. J. Bkcy. 118 ; 34 L. T. 785 ; 24 W. R. 891 559
Wolfe *v.* Matthews, 21 Ch. D. 194 ; 51 L. J. Ch. 833 ; 47 L. T. 158 ; 30 W. R. 838 370
Wollaston *v.* Hakewill, 3 Scott N. R. 593 ; 3 M. & Gr. 297 ; 10 L. J. C. P. 303 . . . . . 47, 96
——— *v.* Tribe, 9 Eq. 44 ; 21 L. T. 449 ; 18 W. R. 83 29
Wolmerhausen *v.* Gullick, (1893) 2 Ch. 514 ; 62 L. J. Ch. 773 ; 68 L. T. 753. 152
Wolverhampton Bank, *Ex p.*, 14 Q. B. D. 32 ; 33 W. R. 642 ; 1 M. B. R. 261. . . . . 364, 386
——————— Banking Co. *v.* Marston, 7 H. & N. 148 ; 30 L. J. Ex. 402 ; 7 Jur. N. S. 1040 ; 4 L. T. 524 ; 9 W. R. 790 17
——————— Waterworks Co. *v.* Hawkesford, 28 L. J. C. P. 242 ; 6 C. B. N. S. 336 ; 5 Jur. N. S. 1104 ; 7 W. R. 464. . . . 285
——————————— *v.* Hawksford, 7 C. B. N. S. 795 ; 29 L. J. C. P. 121 ; 6 Jur. N. S. 632 ; 2 L. T. 354 ; 8 W. R. 446 . 381
Womersley *v.* Church, 17 L. T. 190 826
——— *v.* Dally, 26 L. J. Ex. 219. 538
Wood *v.* Benson, 2 Tyr. 97 ; 2 C. & J. 94 ; 1 Price, 169 ; 1 L. J. Ex. 18 372
——— *v.* Clarke, 1 Tyr. 314 ; 1 C. & J. 484 ; 1 Price, 26 . . . 429
——— *v.* Curling, 15 M. & W. 626 ; 16 Id. 628 ; 17 L. J. Ex. 301 ; 12 Jur. 1055 198
——— *v.* Dixie, 7 Q. B. 892 ; 9 Jur. 798 18
——— *v.* Leadbitter, 13 M. & W. 838 ; 14 L. J. Ex. 161 ; 9 Jur. 187 . 345
——— *v.* Roberts, 2 Stark. 417 335
——— *v.* Rowcliffe, 6 Hare, 183 743
——— *v.* Slack, L. R. 3 Q. B. 379 ; 37 L. J. Q. B. 130 ; 18 L. T. 510 ; 16 W. R. 859 784
Woodhouse *v.* Wood, 29 L. J. M. C. 149 ; 6 Jur. N. S. 421 ; 1 L. T. 59 671
Woodley *v.* Metr. District R. Co., 2 Ex. D. 384 ; 46 L. J. Ex. 521 ; 36 L. T. 419 275
Woodman *v.* Nottingham, 49 New Hampshire R. 387 ; Sedgwick, L. C. on Damages, 685 230
Woodward *v.* L. & N. W. R. Co., 3 Ex. D. 121 ; 47 L. J. Ex. 263 ; 38 L. T. 321 ; 26 W. R. 354 206
——————— *v.* Pell, L. R. 4 Q. B. 55 ; 38 L. J. Q. B. 30 ; 19 L. T. 557 ; 17 W. R. 117 113
Wookey *v.* Pole, 4 B. & Ald. 1 . . . . . 457, 468
Woollen *v.* Wright, 1 H. & C. 554 ; 31 L. J. Ex. 513 ; 7 L. T. 73 ; 10 W. R. 715 349
Woolley *v.* Idle, 4 Burr. 1951 393
Wootton *v.* Steffenoni, 12 M. & W. 129 ; 13 L. J. Ex. 72 62
Wordall *v.* Smith, 1 Camp. 332 12
Worrall *v.* Jacob, 3 Mer. 256 18
Worthington *v.* Grimsditch, 7 Q. B. 479 ; 15 L. J. Q. B. 52 ; 10 Jur. 26 . . . . . 566, 567
——————— *v.* Wigley, 3 B. N. C. 454 ; 3 Scott, 555 ; 5 Dowl. 504 ; 5 L. J. C. P. 325 ; 1 Jur. 183 323
Wortley *v.* Nottingham L. B., 21 L. T. 582 415

PAGE

Wright *v.* Burroughes, 3 C. B. 685 ; 4 D. & L. 226 ; 15 L. J. C. P. 277 ; 16 Id. 6 ; 10 Jur. 860 . . . . 50, 60, 134
——— *v.* Campbell, 4 Burr. 2041 ; 1 W. Bl. 627 . 678, 680, 683, 686, 687, 699, 705, 713, 715, 734
——— *v.* Dewes, 1 A. & E. 641 ; 3 N. & M. 790 ; 3 L. J. K. B. 181 . 432
——— *v.* Inshaw, 1 Dowl. N. S. 802 ; 6 Jur. 857 783
——— *v.* Mid. R. Co., L. R. 8 Ex. 137 ; 42 L. J. Ex. 89 ; 29 L. T. 436 ; 21 W. R. 460 224
Wyatt *v.* G. W. R. Co., 34 L. J. Q. B. 204 ; 6 B. & S. 709 ; 11 Jur. N. S. 825 ; 12 L. T. 568 ; 13 W. R. 837 276
——— *v.* Harrison, 3 B. & Ad. 871 ; 1 L. J. K. B. 237 . . . 270
Wyld *v.* Pickford, 8 M. & W. 443 ; 10 L. J. Ex. 382 . . 185, 202, 205, 206, 208, 222
Wylie *v.* Birch, 4 Q. B. 566 ; 3 G. & D. 629 ; 12 L. J. Q. B. 260 ; 7 Jur. 626 274
Wyndham *v.* Chetwynd, 1 W. Bl. 95 ; 1 Burr. 414 ; 1 Ld. Ken. 253 ; 2 Id. 121 315
Wynne *v.* Hughes, 21 W. R. 628 295

Y.

Yarmouth *v.* France, 19 Q. B. D. 647 ; 57 L. J. Q. B. 7 ; 36 W. R. 281 277
Yates, *Ex p.*, 2 De G. & J. 191 ; 27 L. J. Bkcy. 9 ; 4 Jur. N. S. 649 . 783
——— *v.* Delamayne, Bac. Abr., *Execution* (N.) 112, 113
——— *v.* Pym, 6 Taunt. 445 554
——— *v.* Thomson, 3 Cl. & F. 544 621
Yea *v.* Fouraker, 2 Burr. 1099 564
Yellowly *v.* Gower, 11 Exch. 274 ; 24 L. J. Ex. 289 63
York, N. & B. R. Co., *v.* Crisp, 14 C. B. 527 ; 2 C. L. R. 1357 ; 23 L. J. C. P. 125 ; 18 Jur. 606 ; 2 W. R. 428 200
——— *v.* Grindstone, 1 Salk. 388 124
Yorkshire Tire Co. *v.* Rotherham, 4 C. B. N. S. 362 ; 27 L. J. C. P. 235 672
Young *v.* Lambert, L. R. 3 P. C. 142 ; 22 L. T. 499 ; 18 W. R. 497 ; 6 Moore P. C. N. S. 406 195
——— *v.* Leamington, 8 App. Cas. 517 ; 8 Q. B. D. 579 ; 51 L. J. Q. B. 292 ; 52 Id. 713 ; 46 L. T. 555 ; 49 Id. 1 ; 30 W. R. 500 ; 31 Id. 925 ; 46 J. P. 516 ; 47 J. P. 660 . . . 379
——— *v.* Timmins, 1 Tyr. 226 ; 1 C. & J. 331 . . . 402, 405, 407
Yungmann *v.* Briessmann, 67 L. T. 642 ; 41 W. R. 148 ; 4 R. 119 . 192, 195, 196

Z.

Zouch *v.* Clay, 1 Vent. 185 ; 2 Lev. 35 ; 2 Keb. 872 783
Zunz *v.* S. E. R. Co., L. R. 4 Q. B. 539 ; 38 L. J. Q. B. 209 ; 20 L. T. 873 ; 17 W. R. 1096 . . . . . 208, 210, 216, 224
Zwinger *v.* Samuda, 7 Taunt. 265 ; 1 Moore, 12 ; Holt N. P. 395 . 455

ADDENDA.

P. 17, line 27,
Add, *Morris* v. *Morris*, (1895) A. C. 625.

„ 29, line 7,
A.-G. v. *Jacobs-Smith*, (1895) 2 Q. B. 341, C. A.

„ 40, line 14 from bottom,
Add, *Thomas* v. *Lulham*, (1895) 2 Q. B. 400.

„ 51, *ad finem*,
Add, *Howard* v. *Fanshawe*, (1895) 2 Ch. 581.

„ 106, line 5,
Insert, before "In *Penton* v. *Browne*," The maxim, that "a man's house is his castle," only extends to his dwelling-house.

106, line 14,
Add, But *Penton* v. *Browne* was followed in the C. A. in *Hodder* v. *Williams*, (1895) 2 Q. B. 663.

„ 125, line 12 from bottom,
Robins v. *Gray*, (1895) 2 Q. B. 501, C. A.

„ 161, line 5 from bottom,
Baynes v. *Lloyd*, (1895) 2 Q. B. 610, C. A.

„ 199, line 3,
Insert, See *Brabant* v. *King*, (1895) A. C. 632, 640.

„ 199, line 5 from bottom,
Hill v. *Scott*, (1895) 2 Q. B. 713, C. A.

„ 220, line 17,
Add, *Baerselman* v. *Bailey*, (1895) 2 Q. B. 301, where *Norman* v. *Binnington* was considered.

„ 273, line 16,
Bradford v. *Pickles*, (1895) A. C. 587, H. L.

„ 302, *ad finem*,
Add, *Lloyd* v. *Nowell*, (1895) 2 Ch. 744.

„ 379, line 15 from bottom,
Add, In *British Insulated Wire Co.* v. *Prescot U. D. C.*, (1895) 2 Q. B. 463, 538, it was held that the provision as to the insertion of a penalty clause is equally imperative.

P. 468, line 15,
Add, *A.-G.* v. *Sudeley*, (1895) 2 Q. B. 526.

„ 568, line 9 from bottom,
Tucker v. *Tucker*, (1894) 3 Ch. 429, C. A.

„ 652, line 15,
Add, A summons is unnecessary to give justices jurisdiction to make an order under the Industrial Schools Act, 1860, s. 14; *R.* v. *Jennings*, (1896) 1 Q. B. 64.

„ 746, line 16 from bottom,
Helby v. *Matthews*, (1895) A. C. 471, H. L.

„ 746, line 10 from bottom,
Payne v. *Wilson*, (1895) 2 Q. B. 537, C. A.

„ 786, line 13,
Add, See, as to alteration of a guarantee, *Ellesmere Co.* v. *Cooper*, (1896) 1 Q. B. 75.

CORRIGENDA.

P. 22, line 34, *for* Cro. Eliz. 56, *read* Cro. Eliz. 350.
„ 124, line 22, *for* Mersey Co., *read* Trent Co.
„ 213, line 30, *for* Partington, *read* Pardington.
„ 219, line 40, margin, *for* 56 & 57, *read* 57 & 58.
„ 280, line 18, *for* Parkinson, *read* Parkins.
„ 287, note (*b*), *for* Trott, 1 C. & P. 82, *read* Tratt, 2 C. & P. 82.
„ 323, line 30, *for* Helsham, *read* Helshaw.
„ 333, line 35, *for* 4 Cr. & M. 109, *read* 4 My. & C. 101.
„ 375, line 36, *for* Walker, *read* Warwick.
„ 388, line 24, *for* 1867, *read* 1876.
„ 434, lines 13, 14, *for* 51 Hen. 3, st. 3, *read* 51 Hen. 3, st. 4 (Rev. St., ed. 1888, vol. i., p. 75); and *delete* but now repealed.
„ 439, line 34, *for* Rosewell, *read* Roswell.
„ 439, line 34, *for* 12 Mod. 639, *read* 12 Mod. 635.
„ 457, line 16, *for* 3 B. & P. 649, *read* 1 B. & P. 649.
„ 472, line 38, margin, *for* 44 & 45, *read* 45 & 46.
„ 599, line 29, *for* c. 6, *read* c. 16, ss. 6, 7.
„ 669, line 10, *read* 1 Carrow's New Sess. Cas.
„ 783, line 8, *for* Clark, *read* Clerk.

TWYNE'S CASE.

MICH. 44 *ELIZ.—IN THE STAR CHAMBER.*

[REPORTED 3 COKE, 80.]

What transactions are fraudulent within St. 13 Eliz. c. 5, and 27 Eliz. c. 4.

IN an information by Coke, the Queen's Attorney-General, against Twyne of Hampshire, in the Star Chamber, for making and publishing of a fraudulent gift of goods, the case on the statute of 13 Eliz. c. 5, was such: Pierce was indebted to Twyne in 400*l.*, and was indebted also to C. in 200*l.*: C. brought an action of debt against Pierce, and pending the writ, Pierce, being possessed of goods and chattels of the value of 300*l.*, in secret made a general deed of gift of all his goods and chattels, real and personal whatsoever, to Twyne, in satisfaction of his debt; notwithstanding that Pierce continued in possession of the said goods, and some of them he sold; and he shore the sheep, and marked them with his own mark: and afterwards C. had judgment against Pierce, and had a *fieri facias* directed to the sheriff of Southampton, who by force of the said writ came to make execution of the said goods; but divers persons, by command of the said Twyne, did with force resist the said sheriff, claiming them to be the goods of the said Twyne by force of the said gift; and openly declared by the commandment of Twyne, that it was a good gift, and made on a good and lawful consideration. And whether this gift, on the whole matter, was fraudulent and of no effect by the said Act of (*a*) 13 Eliz. or not, was the question. And it was resolved by Sir Thomas Egerton, Lord Keeper of the Great Seal, and by the Chief Justice Popham and Anderson, and the whole court of

(*a*) 5 Co. 60 a, b. 6 Co. 18 b. 10 Co. 56 b. 3 Inst. 152. Co. Lit. 3 b, 76 a, 290 a, b. 13 El. c. 5. 2 Leon. 8, 9, 47, 223, 308, 309. 3 Leon. 57. Latch. 222. 2 Rol. Rep. 493. Palm. 415. Cr. El. 233, 234, 645, 810. Cro. Jac. 270, 271. Dy. 295, pl. 17, 351, pl. 23. 2 Bulst. 226. Rastal, Entries, 207 b. Lane, 47, 103. Hob. 72, 166. Moor, 638. Doct. pla. 200. Yelv. 196, 197. 1 Brownl. 111. Co. Ent. 162.

Star Chamber, that this gift was fraudulent, within the statute of 13 Eliz. And in this case divers points were resolved:

1. That this gift had the signs and marks of fraud, because the gift is general, without exception of his (*b*) apparel, or of anything of necessity; for it is commonly said, *quod* (*c*) *dolosus versatur in generalibus.*

2. The donor continued in possession, and used them as his own; and by reason thereof he traded and trafficked with others, and defrauded and deceived them.

3. It was made in secret, *et dona clandestina sunt semper suspiciosa.*

4. It was made pending the writ.

5. Here was a trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and trust is the cover of fraud.

6. The deed contains, that the gift was made honestly, truly, and *bonâ fide*; *et clausulæ inconsuet' semper inducunt suspicionem.*

Secondly, it was resolved, that notwithstanding here was a true debt due to Twyne, and a good consideration of the gift, yet it was not within the proviso of the said Act of 13 Eliz., by which it was provided, that the said Act shall not extend to any estate or interest in lands, &c., goods or chattels, made on a good consideration and *bonâ fide*; for, although it is on a true and good consideration, yet it is not *bonâ fide*, for no gift shall be deemed to be *bonâ fide* within the said proviso which is accompanied with any trust. As if a man be indebted to five several persons in the several sums of 20*l.*, and hath goods of the value of 20*l.*, and makes a gift of all his goods to one of them in satisfaction of his debt, but there is a trust between them, that the donee shall deal (*d*) favourably with him in regard of his poor estate, either to permit the donor, or some other for him, or for his benefit, to use or have possession of them, and is contented that he shall pay him his debt when he is able, this shall not be called *bonâ fide* within the said proviso; for the proviso saith on a good consideration, and *bonâ fide*; so a good consideration does not suffice, if it be not also *bonâ fide.* And therefore, reader, when any gift shall be to you in satisfac-

(*b*) Godb. 398. Rep. 157. Moor, 321.
(*c*) 2 Bulstr. 226. 2 Co. 34 a. 1 Roll. (*d*) Goldsb. 161.

tion of a debt, by one who is indebted to others also:—1. Let it be made in a public manner, and before the neighbours, and not in private, for secrecy is a mark of fraud. 2. Let the goods and chattels be appraised by good people to the very value, and take a gift in particular in satisfaction of your debt. 3. Immediately after the gift, take the possession of them: for continuance of the possession in the donor is the sign of trust. And know, reader, that the said words of the proviso, on a good consideration, and *bonâ fide*, do not extend to every gift made *bonâ fide*; and, therefore, there are two manner of gifts on a good consideration, *scil.*, consideration of nature or blood, and a valuable consideration. As to the first, in the case before put; if he who is indebted to five several persons, to each party in 20*l.*, in consideration of natural affection gives all his goods to his son, or cousin, in that case, forasmuch as others should lose their debts, &c., which are things of value, the intent of the Act was, that the consideration in such case should be valuable; for equity requires that such gift, which defeats others, should be made on as high and good consideration as the things which are thereby defeated are; and it is to be presumed that the father, if he had not been indebted to others, would not have dispossessed himself of all his goods, and subjected himself to his cradle; and therefore it shall be intended, that it was made to defeat his creditors; and if consideration of nature or blood should be a good consideration within this proviso, the statute would serve for little or nothing, and no creditor would be sure of his debt. And as to the gifts made *bonâ fide*, it is to be known, that every gift made *bonâ fide*, either is on a trust between the parties, or without any trust; every gift made on a trust is out of this proviso; for that which is betwixt the donor and donee called (*e*) a trust, *per nomen speciosum*, is in truth, as to all the creditors, a fraud, for they are thereby defeated and defrauded of their true and due debts. And every trust is either expressed or implied; an express trust is, when in the gift, or upon the gift, the trust by word or writing is expressed: a trust implied is, when a man makes a gift without any consideration, or on a consideration of nature or blood only; and therefore, if a man, before the statute of 27 H. 8, had bargained his land for

(*e*) 6 Co. 72 b.

a valuable consideration to one and his heirs, by which he was seised to the use of the bargainee: and afterwards the bargainor, without a consideration, enfeoffed others (*e*), who had no notice of the said bargain; in this case the law implies a trust and confidence, and they shall be seised to the use of the bargainee; so in the same case, if the feoffees, in consideration of nature or blood, and without a valuable consideration, enfeoffed their sons, or any of their blood, who had no notice of the first bargain, yet that shall not toll the use raised on a valuable consideration; for a feoffment made only on consideration of nature or blood, shall not toll an use raised on a valuable consideration, but shall toll an use raised (*f*) on consideration of nature, for both considerations are *in æquali jure*, and of one and the same nature.

And when a man, being greatly indebted to sundry persons, makes a gift to his son, or any of his blood, without consideration, but only of nature, the law intends a trust betwixt them, *scil.*, that the donee would in consideration of such gift being voluntarily and freely made to him, and also in consideration of nature, relieve his father, or cousin, and not see him want who had made such gift to him; *vide* 33 H. 6, 33 (*g*), by Prisot, if the father enfeoffs his son and heir apparent within age, *bonâ fide*, yet the lord shall have the wardship of him: so note, valuable consideration is a good consideration within this proviso; and a gift made *bonâ fide* is a gift made without any trust either expressed or implied: by which it appears that as a gift made on a good consideration, if it be not also *bonâ fide*, is not within the proviso; so a gift made *bonâ fide*, if it be not on a good consideration, is not within the proviso; but it ought to be on a good consideration, and also *bonâ fide*.

To one who marvelled what should be the reason that Acts and statutes are continually made at every parliament without intermission, and without end, a wise man made a good and short answer, both which are well composed in verse:—

> Quæritur, ut crescunt tot magna volumina legis?
> In promptu causa est, crescit in orbe dolus.

And because fraud and deceit abound in these days more than in former times, *it was resolved in this case by the whole*

(*e*) See Stat. 1 Rich. 3, cap. 1; Sanders on Uses, 5th Ed., p. 21; 2 Roll. 779.

(*f*) 2 Roll. 779.

(*g*) 33 H. 6, 16. 7 Co. 39 b.

court, that all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud. Note, reader, according to their opinions, divers resolutions have been made.

Between Pauncefoot and Blunt (*h*), in the Exchequer Chamber, Mich. 35 & 36 Eliz., the case was: Pauncefoot being indicted for recusancy, for not coming to divine service, and having an intent to flee beyond sea, and to defeat the Queen of all that might accrue to her for his recusancy or flight, made a gift of all his leases and goods of great value, coloured with feigned consideration; and afterwards he fled beyond sea, and afterwards was outlawed on the same indictment: and whether this gift should be void to defeat the Queen of her forfeiture, either by the common law, or by any statute, was the question. And some conceived that the common law which (*i*) abhors all fraud, would make void this gift as to the Queen; *vide* Mich. 12 & 13 Eliz.; Dyer (*j*) 295; 4 & 5 P. & M. 160. And the statute of (*k*) 50 E. 3, c. 6, was considered: but that extends only in relief of creditors, and extends only to such debtors as flee to sanctuaries, and other privileged places. But some conceived that the statute of (*l*) 3 H. 7, c. 4, extends to this case; for although the preamble speaks only of creditors, yet it is provided by the body of the act generally, that all gifts of goods and chattels made or to be made on trust to the use of the donor, shall be void and of no effect; but that is to be intended as to all strangers who are to have prejudice by such gift, but between the parties themselves it stands good. But it was resolved by all the barons, that the statute 13 Eliz. c. 5 (*m*), extends to it; for thereby it is enacted and declared, that all feoffments, gifts, grants, &c., "to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs," shall be void, &c. So that *this Act doth not extend only to*

(*h*) Lane, 44, 45.

(*i*) 3 Co. 78 a.

(*j*) 3 Co. 78 a, b. Dyer, 295, pl. 8, 9, 10, &c. Lane, 44.

(*k*) Co. Lit. 76 a.

(*l*) Cro. El. 291, 292. Lane, 45.

(*m*) Co. Lit. 3 b, 76 a, 290 a, b. 3 Inst. 152. 5 Co. 60 a, b. 6 Co. 18 b. 10 Co. 56 b. Co. Ent. 162 a. 1 Leon. 47, 308, 309. 2 Leon. 8, 9, 223. 3 Leon. 57. Latch. 222. 2 Roll. Rep. 493. Palm. 415. Cr. El. 233, 234, 645, 810. Cr. Jac. 270. 2 Bulst. 226. Hob. 72, 166. Yelv. 196, 197. 1 Brownl. 11. Dyer, 295, pl. 17, 351, pl. 23. Rastal, Fraudulent Deeds. 1 Rast. Ent. 207 b. Lane, 47, 103. Moor, 638. Doct. pl. 200.

creditors, but to all others who had cause of action, or suit, or any penalty, or forfeiture, &c.

And it was resolved, that this word forfeiture should not be intended only of a forfeiture of an obligation, recognizance, or such like (as it was objected by some, that it should, in respect that it comes after damage and penalty), but also to everything which shall by law be forfeit to the king or subject. And therefore, if a man, to prevent a forfeiture for felony, or by outlawry, makes a gift of all his goods, and afterwards is attainted or outlawed, these goods are (*n*) forfeited, notwithstanding this gift (*o*); the same law of recusants; and so the statute is expounded beneficially to suppress fraud. Note well this word (*p*) "declare" in the Act of 13 Eliz., by which the parliament expounded that this was the (*q*) common law before. And according to this resolution it was decreed, Hil. 36 Eliz., in the Exchequer Chamber.

Mich. 42 & 43 Eliz. in the Common Pleas, on evidence to a jury, between Standen (*r*) and Bullock, these points were resolved by the whole court on the statute of 27 Eliz. c. 4. Walmsley, J., said that Sir Christ. Wray, late C. J. of England, reported to him, that he and all his companions of the King's Bench were resolved, and so directed a jury on evidence before them; that where a man had conveyed his land to the use of himself for life, and afterwards to the use of divers others of his blood, with a future power of revocation, as after such feast, or after the death of such one; and afterwards, and before the power of revocation began, he, for valuable consideration, bargained and sold the land to another and his heirs; this bargain and sale is within the (*s*) remedy of the said statute. For although the statute saith, "the said first conveyance not by him revoked, according to the power by him reserved," which seems by the literal sense to be intended of a present power of revocation, for no revocation can be made by force of a future power until it comes *in esse*; yet it was held that the intent of the Act was, that such voluntary conveyance which was originally subject to a power of

(*n*) Co. Lit. 290 b.

(*o*) The 33 & 34 Vict. c. 23, abolished forfeitures for treason or felony, but did not affect the law of forfeiture consequent upon outlawry. Outlawry in civil proceedings was abolished by 42 & 43 Vict. c. 59, s. 3.

(*p*) Co. Lit. 76 a, 290 b.

(*q*) Hard. 397.

(*r*) Moor, 605, 615. Bridgm. 23. 5 Co. 60 b. Palm. 217. Lane, 22. 2 Jones, 95.

(*s*) 1 Sid. 133.

revocation, be it *in præsenti* or *in futuro*, should not stand against a purchaser *bonâ fide* for a valuable consideration; and if other construction should be made, the said Act would serve for little or no purpose, and it would be no difficult matter to evade it: so if A. had reserved to himself a power of revocation with the assent of B., and afterwards A. bargained and sold the land to another, this bargain and sale is good, and within the remedy of the said Act; for otherwise the good provision of the Act, by a small addition, and evil invention, would be defeated (*t*).

And on the same reason it was adjudged, 38 Eliz., in the Common Pleas, between Lee and his wife executrix of one Smith, plaintiff, and Mary (*u*) Colshil, executrix of Thomas Colshil, defendant in debt on an obligation of 1000 marks, Rot. 1707. The case was, Colshil, the testator, had the office of the Queen's customer, by letters patent, to him and his deputies; and by indenture between him and Smith, the testator of the plaintiff, and for 600*l.* paid, and 100*l. per ann.* to be paid during the life of Colshil, made a deputation of the said office to Smith; and Colshil covenanted with Smith, that if Colshil should die before him, that then his executors should repay him 300*l.* And divers covenants were in the said indenture concerning the said office, and the enjoying of it; and Colshil was bound to the said Smith in the said obligation to perform the covenants; and the breach was alleged in the non-payment of the 300*l.*, forasmuch as Smith survived Colshil; and although the said covenant to repay the 300*l.* was lawful, yet, forasmuch as the rest of the covenants were against the statute of (*x*) 5 E. 6, cap. 16, and if the addition of a lawful covenant should make the obligation of force as to that (*y*), the statute would serve for little or no purpose; for this cause it was adjudged, that the obligation was utterly void.

(*t*) But see 2 Show. 46, *post in notis*, p. 25.

(*u*) 2 And. 55, 107. Godb. 213. Cro. El. 529. Moor. 857. Ley, 2, 75, 79.

(*x*) Style, 29. Cro. El. 520. Cro. Jac. 269. Hob. 75. Co. Lit. 234 a. 12 Co. 78. 3 Inst. 148, 154. 3 Keb. 26, 659, 660, 717, 718. 1 Brownl. 70, 71. 2 And. 55, 107. 3 Bulst. 91. 3 Leon. 33. 1 Rol. Rep. 157, 236. Goldsb. 180.

(*y*) 2 And. 56, 57, 108. 1 Mod. Rep. 35, 36. Hob. 14. 11 Co. 27 b. 2 Roll. 28. Co. Lit. 234 a. 2 Jones, 90, 91. Cro. El. 529, 530. Cro. Car. 338. Godb. 212, 213. 1 Brownl. 64. Plowd. 68 b. Moor, 856, 857. Ley, 75, 79.

2nd. It was resolved that if a man hath power of revocation, and afterwards to the intent to defraud a purchaser, he levies a (*z*) fine, or makes a feoffment, or other conveyance to a stranger, by which he extinguishes his power, and afterwards bargains, and sells the lands to another for a valuable consideration, the bargainee shall enjoy the land, for as to him, the fine, feoffment, or other conveyances by which the condition was extinct, was void by the said Act; and so the first clause, by which all fraudulent and covinous conveyances are made void as to purchasers, extends to the last clause of the Act, *scil.*, when he who makes the bargain and sale had power of revocation. And it was said that the statute of Eliz. hath made voluntary estates made with power of revocation, as to purchasers, in equal degree with conveyances made by fraud and covin to defraud purchasers.

Between (*a*) Upton and Basset in trespass, Trin. 37 Eliz., in the Common Pleas, it was adjudged that if a man makes a lease for years by fraud and covin, and afterwards makes another lease *bonâ fide*, but without fine or rent, reserved, that the second lease should not avoid the first lease.

For, 1st. It was agreed, that by the common law an estate made by fraud should be avoided only by him who had a former right, title, interest, debt, or demand, as by 33 H. 6, a sale in open (*b*) market by covin shall not bar a right which is more ancient: nor a covinous gift shall not defeat execution in respect of a former debt, as it is agreed in 22 Ass. 72; but he who hath right, title, interest, debt, or demand more puisne, shall not avoid a gift or estate precedent by fraud by the common law.

2nd. *It was resolved that no purchaser should avoid a precedent conveyance made by fraud and covin, but he who is a* (*c*) *purchaser for money or other valuable consideration*; for although in the preamble it is said "for money or other good consideration," and likewise in the body of the Act "for money, or other good consideration," yet these words "good consideration" are to be

(*z*) 1 Co. 112 b, 174 a. Co. Lit. 237 a. Hob. 337, 338. Moor, 605. 2 Rol. Rep. 337, 496. Winch. 65.

(*a*) Co. Ent. 676 b, 19. Cro. El. 444, 445. Lane, 45.

(*b*) Plow. 46 b, 55 a. Fitz. Replic. 15. Br. Trespass. 26. Br. Collusion, 4. Br. Property, 6. 2 Inst. 713. 14 H. 8, 8 b. 33 H. 6, 5 a, b.

(*c*) Cro. El. 445.

intended only of valuable consideration; and that appears by the clause which concerns those who had power of revocation; for there it is said, "for money or other consideration paid or given," and this "paid" is to be referred to "money," and "given" is to be referred to "good consideration;" so the sense is "for money paid, or other good consideration given," which words exclude all considerations of nature or blood, or the like, and are to be intended only of valuable considerations which may be given; and therefore he who makes a purchase of land for a valuable consideration is only a purchaser within the statute; and this latter clause doth well expound these words "other good consideration," mentioned before in the preamble and body of the Act.

And so it was resolved, *Pasch.* 32 Eliz., in a case (*d*) referred out of the Chancery to the consideration of Wyndham and Periam, Justices: between John Needham, plaintiff, and Beaumont, Serjeant-at-law, defendant: where the case was, Hen. Babington seised in fee of the manor of Lit-Church, in the county of Derby, by indenture, 10 Feb. 8 Eliz., covenanted with the Lord Darcy, for the advancement of such heirs males, as well those he had begot, as those he should afterwards beget, on the body of Mary then his wife (sister to the said Lord Darcy), before the feast of St. John Baptist then next following, to levy a fine of the said manor to the use of the said Henry for his life, and afterwards to the use of the eldest issue male of the bodies of the said Henry and Mary begotten in tail, &c., and so to three issues of their bodies, &c., with the remainder to his right heirs. And afterwards, 8 *Maii, ann.* 8 Eliz., Henry Babington, by fraud and covin, to defeat the said covenant, made a lease of the said manor for a great number of years to Robert Heys: and afterwards levied the fine accordingly: and on conference had with the other Justices, it was resolved, that although the issue was a purchaser, yet he was not a purchaser in vulgar and common intendment: also consideration of blood, natural affection, is a good consideration, but not such a good consideration which is intended by the statute of 27 Eliz., for (*e*) a valuable consideration is only a good consideration within that Act. In

(*d*) 1 And. 233. *Needham and Beaumont's Case.*

(*e*) 2 Roll. Rep. 305, 306.

this case, Anderson, C.J., of the Common Pleas, said that a man who was of small understanding, and not able to (*f*) govern the lands which descended to him, and being given to riot and disorder, by mediation of his friends, openly conveyed his lands to them, on trust and confidence that he should take the profits for his maintenance, and that he should not have power to waste and consume the same; and afterwards, he being seduced by deceitful and covinous persons, for a small sum of money bargained and sold his land, being of a great value: this bargain, although it was for money, was holden to be (*g*) out of this statute, for this Act is made against all fraud and deceit, and doth not help any purchaser, who doth not come to the land for a good consideration lawfully and without fraud or deceit; and such conveyance made on trust is void as to him who purchases the land for a valuable consideration *bonâ fide*, without deceit or cunning.

And by the judgment of the whole court Twyne was convicted of fraud, and he and all the others of a riot.

(*f*) Cro. El. 445. (*g*) Cro. El. 445.

Stat. 13 Eliz. c. 5; feoffments, &c., made with intent to delay or defraud creditors void.

Statute 13 Eliz. c. 5 (made perpetual by 29 Eliz. c. 5), after reciting that feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions have been contrived of malice, fraud, covin, collusion, or guile, to delay, hinder, or defraud creditors, or others, of their just and lawful actions, suits, debts, accounts, damages, forfeitures, &c., declares and enacts that every feoffment, &c., of lands, tenements, hereditaments, goods or chattels, by writing or otherwise, and every bond, suit, judgment, or execution, made for any intent or purpose before declared and expressed, shall be as against that person, his heirs, successors, executors, administrators, or assigns, whose actions, &c., are or might be in anywise disturbed, hindered, delayed, or defrauded by such practices, *utterly void*. By s. 6, however, the Act is not to extend to any estate or interest in lands, &c., on good consideration and *bonâ fide*, lawfully conveyed to any person not having notice of such covin, &c.

Act not to affect *bonâ fide* purchasers for good consideration *without notice*.

This Act was not by any means the first attempt of the

legislature to foil covinous transactions, for by 3 H. 7, c. 4, "all deeds of gift of goods and chattels made or to be made of trust to the use of the person or persons that made the same deed of gift" were declared "void and of none effect." And by the prior Act of 50 Ed. 3, c. 6, after reciting "that divers persons do give their tenements and chattels to their friends by collusion to have the profits at their will and after do flee to the franchise of Westminster, of St. Martin-le-Grand of London, or other such privileged places, and there do live a great time with a high countenance of another man's goods, and profits of the said tenements and chattels, till the said creditors shall be bound to take a small parcel of their debt and release the remnant," it was ordained that "if it be found that such gifts be so made by collusion, the said creditors shall have execution of the said tenements and chattels as if no such gift had been made." These two Acts, as well as the 2 R. 2, c. 3, which contained provisions on the same subject, were repealed by the Stat. Law Rev. Act, 1863, with, amongst other qualifications, this somewhat enigmatical one, that the repeal is not to affect any "principle or rule," &c., "derived by, in, or from" the repealed enactments.

Previous statutes.

When it is attempted to invalidate a transfer of goods by showing it to fall within 13 Eliz. c. 5, a question arises proper for the consideration of a jury, who are to say whether the transaction was *bonâ fide*, or a contrivance to defraud creditors. Where an absolute bill of sale of chattels is executed by a debtor to his creditor, purporting to convey the property to the vendee immediately, yet the vendor is after its execution suffered to remain in possession, a very strong presumption of fraud arises; for, as Lord Coke remarks in the principal case, continuance in possession by the donor is a sign of a trust for his benefit. Accordingly, in *Edwards* v. *Harben*, 2 T. R. 587, where a creditor took an absolute bill of sale of the goods of his debtor, but agreed to leave them in his possession for a limited time, and in the meantime the debtor died, whereupon the creditor took and sold the goods, he was held liable to be sued as *executor de son tort* for the debts of the deceased; see *Shears* v. *Rogers*, 3 B. & Ad. 363. Indeed, in *Edwards* v. *Harben*, the court went so far as to say, "This has been argued as a case in which the want of possession is only *evidence* of fraud, and that it was not such a circumstance, *per se*, as makes the transaction fraudulent in point of law. That is the point

Question for jury, under 13 Eliz., was the transaction *bonâ fide*?

Presumption of fraud, from debtor remaining in possession after absolute bill of sale.

Former rule that absolute conveyance without delivery of possession is in law fraudulent.

we have considered, and we are all of opinion that if there be *nothing but the absolute conveyance without the possession*, that, in point of law, is fraudulent;" see *Bamford* v. *Baron*, 2 T. R. 594, n.; *Reed* v. *Blades*, 5 Taunt. 212; *Paget* v. *Perchard*, 1 Esp. 205; *Martin* v. *Podger*, 2 W. Bl. 702. Nay, Lord Ellenborough thought that if the vendor remained in possession of the goods after the sale, the case was not bettered by the vendee's remaining in possession along with him; and, therefore, in *Wordall* v. *Smith*, 1 Camp. 333, where an action was brought against a sheriff for a false return to a writ of *fi. fa.*, sued out by the plaintiff against M., and returned by the sheriff *nulla bona*, and upon the trial it appeared that M. had, before the issuing of the *fi. fa.*, assigned all his effects to a creditor, whose servant was immediately put into the house, and remained there conjointly with M., Lord Ellenborough directed a verdict for the plaintiff, saying:—"To defeat the execution there must have been a *bonâ fide* substantial change of possession. It is a mere mockery to put another person in to take possession jointly with the former owner of the goods. A concurrent possession with the assignor is colourable; there must be an exclusive possession under the assignment, or it is fraudulent and void, as against creditors."

Qualified by later decisions.

However, though in *Edwards* v. *Harben* it was laid down in the express terms above stated that an absolute sale without delivery of possession was, in point of law, fraudulent, the tendency of the courts has since been to qualify that doctrine, and leave the whole circumstances of each case to a jury, bidding them decide whether the presumption of fraud deducible from the absence of a transmutation of possession shall prevail. And, indeed, it ought to be remarked, that even in *Edwards* v. *Harben*, the words of Buller, J., were, "If there be *nothing* but an absolute conveyance, without the possession, that in point of law is fraudulent;" by which his lordship may have intended that where there was *nothing*, *i.e.*, no facts whatever appearing in the case, except the absolute conveyance and the non-delivery, that then the inference of fraud would be so strong, that a jury ought not to resist it. But it is very different in cases where, although the conveyance is absolute, and the possession has not passed, still there are surrounding circumstances which show that a fraud may not have been intended; in such cases it cannot properly be said, that there is "*nothing but an absolute conveyance without the*

possession." Therefore in *Latimer* v. *Batson*, 4 B. & C. 652, where the sheriff seized the Duke of Marlborough's goods and sold them to the judgment creditor, who sold them to the plaintiff, who put a man in possession, but allowed them to remain in the duke's mansion and be used by him as before, it was held that it was properly left to the jury to say whether the sale was a *bonâ fide* sale for money paid by the plaintiff; and that, if so, they should find a verdict for him. Here the goods had been seized by the sheriff, who is a public officer, and his seizure a public act, so that the transaction was accompanied with some notoriety, and as the secrecy of the transfer is a badge of fraud (see the principal case, and *Mace* v. *Cammel*, Lofft. 782), so is its notoriety always a strong circumstance to rebut the presumption thereof; see also *Leonard* v. *Baker*, 1 M. & S. 251; *Watkins* v. *Birch*, 4 Taunt. 823; *Jezeph* v. *Ingram*, 8 *Id.* 838; *Kidd* v. *Rawlinson*, 2 B. & P. 59; *Cole* v. *Davies*, 1 Ld. Raym. 724; *Macdona* v. *Swiney*, 8 Ir. C. L. R. 73. For a case of a sale by a man to his wife, see *Ramsay* v. *Margrett* (1894) 2 Q. B. 18.

Notoriety of transfer may negative presumption of fraud.

It may, therefore, be safely laid down, that, under almost any circumstances, the question *fraud or no fraud*, is one for the consideration of the jury; see the judgments in *Martindale* v. *Booth*, 3 B. & Ad. 498, where several cases establishing this point are cited; and *Carr* v. *Burdiss*, 5 Tyr. 316, per Parke, B.; *Dewey* v. *Bayntun*, 6 East, 257; *Reed* v. *Blades*, 5 Taunt. 212; *Lindon* v. *Sharp*, 6 Man. & Gr. 898, per Tindal, C. J.; *Pennell* v. *Dawson*, 18 C. B. 355; *Darvill* v. *Terry*, 6 H. & N. 807. In *Biddulph* v. *Goold*, 11 W. R. 882, an exaggeration in a bill of sale of the amount of the consideration given was held not to invalidate it, though the misstatement was intentional; the jury finding that it was made innocently, though the making it was unbusinesslike. So, in Chancery there are no rules establishing particular circumstances to be indelible badges of fraud; but the question of *bona fides* is there also one of fact; *Hale* v. *Saloon Omnibus Co.*, 4 Drew. 492.

Fraud now a question for jury,

and is a question of fact in Chancery.

The above observations apply to cases where the conveyance is *absolute*, and there is no transmutation of possession, but where the conveyance is not absolute to take effect immediately, as for instance, where it is by way of mortgage, and the mortgagee is not to take possession till a default in payment of the mortgage money, there, as the nature of the transaction does not call for any transmutation of possession, the absence of such transmutation seems to

Where transaction is a mortgage, absence of change of possession no evidence of fraud.

be no evidence of fraud. "We consulted," said Buller, J., in *Edwards* v. *Harben*, "with all the judges, who are unanimously of opinion, that unless possession *accompanies and follows the deed*, it is fraudulent and void; I lay stress on the words *accompanies and follows*, because I shall mention some cases where, though possession was not delivered at the time, the conveyance was held not to be fraudulent." And then his lordship proceeded to point out the distinction between "deeds, or bills of sale, which are to take place *immediately*, and those which are to take place *at some future time*: for, in the latter case, the possession continuing in the vendor till that future time, or till that condition is performed, is consistent with the deed, and such possession comes within the rule as *accompanying and following* the deed;" see B. N. P. 258; and *Cadogan* v. *Kennett*, Cowp. 436; *Minshull* v. *Lloyd*, 2 M. & W. 450. This doctrine was affirmed and acted upon in *Martindale* v. *Booth*, 3 B. & Ad. 505, and in *Reed* v. *Wilmot*, 7 Bing. 577. See also per Tindal, C.J., *Reeves* v. *Capper*, 5 B. N. C. 140. Cases may arise of attempts to take advantage of this doctrine for the purposes of fraud, by introducing terms consistent with the continuing possession of the vendor into deeds really intended not to operate as a *bonâ fide* transfer of property, but to enure for the vendee's protection. In such cases, however, the collusion, as soon as discovered, would be held to invalidate the deed as much as if the conveyance purported upon the face of it to be absolute, for the presence or absence of fraud depends on the motives of the party making the conveyance; see *Nunn* v. *Wilsmore*, 8 T. R. 521, per Le Blanc, J.; *Riches* v. *Evans*, 9 C. & P. 640.

Nor where possession of vendor is consistent with deed.

In cases of secret transfer of goods not impeachable on the ground of fraud, or want of consideration, the 13 Eliz. c. 5, left the creditor liable to incur a loss by trusting to the false appearance of ownership which the debtor's continuance in possession presented. In the event of his bankruptcy this defect in the law was remedied by later statutes, which vested in his assignees, all goods which by consent and permission of the true owner were in the debtor's possession, order, or disposition at the time of his bankruptcy and of which he was then the reputed owner. A provision to this effect is contained in s. 44, sub-s. (iii), of the Bankruptcy Act, 1883. As to the doctrine of reputed ownership in Bankruptcy, see the notes to *Horn* v. *Baker*, vol. ii., *post*.

Transfers not void under 13 Eliz. merely because secret.

But they may be void under the Bankruptcy law.

In general the secrecy of the transfer was not absolutely

fatal to its validity until the Bills of Sale Act, 1854. Now, by the Bills of Sale Acts, 1878 and 1882, all bills of sale of personal chattels, as therein defined, if given "by way of security for the payment of money," are void in all cases unless made in the prescribed form and duly registered; and, if not given by way of security for the payment of money, they are void, as against the trustee in bankruptcy, or execution creditor, of the grantor, as to all goods in the grantor's possession or apparent possession. The limits of this note do not permit a consideration of the decisions upon these Acts, which are fully dealt with in the text books upon this specific subject.

or under the Bills of Sale Acts.

There are some cases, that for instance of the sale of a ship at sea, in which an actual delivery being impossible, no presumption of fraud can possibly arise from the substitution of one merely symbolical; *Atkinson* v. *Maling*, 2 T. R. 472. In the case of British ships, notoriety of transfer is to a certain extent secured by the Merchant Shipping Act, 1894, which requires that when a registered ship, or any share in her, is disposed of to persons qualified to own British ships, the transfer must be made by bill of sale, which must contain a description of the ship, and must be registered according to the provisions of that Act (ss. 24—26). See *Stapleton* v. *Haymen*, 2 H. & C. 918. This does not apply to a wreck or hulk which has lost the character of a ship; *European Mail Co.* v. *P. & O. Co.*, 14 W. R. 843.

Where actual delivery impossible, fraud not presumed.

Ships.

57 & 58 Vict. c. 60.

It will be observed that the 13 Eliz. only declares the fraudulent conveyance to be void, "as against that person, his heirs, &c., who are, or might be in anywise disturbed, hindered, delayed, or defrauded." Such a conveyance is good as against the party executing it, *Robinson* v. *M'Donnel*, 2 B. & Ald. 134; and also as against any other person privy and consenting to it, *Steel* v. *Brown*, 1 Taunt. 381; *Ollivet* v. *King*, 25 L. J. Ch. 427; and as against strangers other than creditors or *bonâ fide* purchasers for valuable consideration, *Bessey* v. *Windham*, 6 Q. B. 166 (see, as to the question of evidence raised in this case, *White* v. *Morris*, 11 C. B. 1015). A person claiming under a voluntary *post-obit* bond is a creditor who may impeach under 13 Eliz. a subsequent voluntary settlement, *Adames* v. *Hallett*, 6 Eq. 469. If before the conveyance is avoided the transferee assigns the goods to a *bonâ fide* purchaser for value, the transfer is valid, *Morewood* v. *S. Yorkshire R. Co.*, 3 H. & N. 798; and in the case of fraudulent settlements, purchasers for value or

Conveyances within 13 Eliz. good against maker,

and privies,

and strangers not creditors or purchasers for value.

mortgagees, whether legal or equitable, of any interest created by the settlement are protected, provided that they took before the settlement had been avoided and without notice that it was fraudulent, *Halifax Bank* v. *Gledhill*, (1891) 1 Ch. 31. A sham transfer for the purpose of defrauding creditors has been held not to pass the property in the goods even as between the debtor and his confederate, *Bowes* v. *Foster*, 2 H. & N. 779. In *Manning* v. *Gill*, 13 Eq. 485, a voluntary settlement made by a lunatic in prison on a charge of felony was, after his acquittal, held void as between himself and the donee. Under what circumstances the maker of a voluntary settlement may himself avoid it, see *Phillips* v. *Mullings*, 7 Ch. 244; *Hall* v. *Hall*, 8 Id. 430; *Dutton* v. *Thompson*, 23 Ch. D. 278.

Sometimes not binding upon maker.

In the principal case, Pierce, the grantor, was indebted to the grantee, Twyne, which debt would have been a sufficient consideration to support a *bonâ fide* transfer of the goods, and the ground on which the court proceeded was not that there was no sufficient consideration to sustain a grant by Pierce to Twyne, but that the secrecy, the non-delivery, the *clausulæ inconsuetæ*, &c., raised a presumption that the whole transaction was collusive and a juggle, and though purporting to be a sale, was, in reality, the creation of a trust for the benefit of Pierce; to use their own words, "it was resolved that, notwithstanding here was a true debt due to Twyne, and a good consideration of the gift, yet it was not within the proviso of the said Act of 13 Eliz., by which it was provided that the said Act shall not extend to any estate or interest in lands, &c., goods or chattels, made on good consideration and *bonâ fide*; for although it is on a true and good consideration, yet it is not *bonâ fide*, for no gift shall be deemed to be *bonâ fide*, within the said proviso, which is accompanied with any trust." In other words, although a debtor has a right to prefer one creditor to another, and by making a transfer of his property to one favoured claimant to defeat the other, provided he do so in an open manner, and without any further object than his act upon the face of it imports; still the law will not allow a creditor to make use of his demand to shield his debtor, and, while he leaves him *in statu quo* by forbearing to enforce the assignment, to defeat the other creditors by insisting upon it. Thus, (to illustrate this position by Lord Coke's words in the principal case,) "if a man be indebted to five several persons in the several sums of 20*l*., and hath

Ground of decision in principal case.

Want of *bona fides*.

goods of the value of 20*l.*, and makes a gift of all his goods to one of them in satisfaction of his debt, *but there is a trust between them* that the donee shall deal favourably with him in regard of his poor estate, either to permit the donor or some other person for him, or for his benefit, to use or have possession of them, and is contented that he shall pay him his debt when he is able; this shall not be called *bonâ fide* within the said proviso, for the proviso saith on a good consideration *and bonâ fide*, so a good consideration doth not suffice if it be not also *bonâ fide*."

Good consideration not sufficient.

There is, however, no doubt but that a debtor, provided that the transaction is not invalidated as a fraudulent preference under the bankruptcy law (see now the Bankruptcy Act, 1883, s. 48), may openly prefer a particular creditor to the rest; and may transfer property to him or to a trustee in trust for him for the *bonâ fide* purpose of discharging his debt, even after the other creditors have brought actions, or recovered judgments; and such transfers are not void, under the 13 Eliz., as against the preferred creditors; *Holbird* v. *Anderson*, 5 T. R. 235; *Estwick* v. *Caillaud*, Id. 420; *Ex p. Elliott*, 2 Ch. D. 104; *Alton* v. *Harrison*, 4 Ch. 622. In the last case Giffard, L.J., held that it was immaterial that the transfer was of the whole of the debtor's property, saying "if the deed is *bonâ fide*, *i.e.*, if it is not a mere cloak for retaining a benefit to the grantor, it is a good deed under the 13 Eliz." See also *Ex p. Games*, 12 Ch. D. 314, 324.

Common law right of debtor to prefer particular creditors.

Upon the same footing stands a transfer to a trustee for the benefit of all the creditors, so soon as any one creditor has assented to it; *Harland* v. *Binks*, 15 Q. B. 713; or if the trustee is a creditor, as soon as he has had notice of it; *Siggers* v. *Evans*, 5 E. & B. 367; see also *Wolverhampton Bank* v. *Marston*, 7 H. & N. 148; *Evans* v. *Jones*, 3 H. & C. 423; *Johns* v. *James*, 8 Ch. D. 744; *Boldero* v. *L. & Westminster Discount Co.*, 5 Ex. D. 47; *Godfrey* v. *Poole*, 13 App. Cas. 497, 502. The transfer must, however, be made for the *bonâ fide* purpose of discharging the creditors' claims; and it will be void if its real intent is to delay, hinder, or defeat creditors; see *Owen* v. *Body*, 5 A. & E. 28 (explained in *Hickman* v. *Cox*, 8 C. B. 817, 3 C. B. N. S. 523, 9 Id. 47); *Spencer* v. *Slater*, 4 Q. B. D. 13; *Ex p. Chaplin*, 26 Ch. D. 319. The mere fact, however, that the trustee is empowered to carry on the debtor's business for the purpose of winding it up does not render it

Trusts for creditors.

void; *Janes* v. *Whitbread*, 11 C. B. 406; *Coates* v. *Williams*, 7 Exch. 205.

Sale for good consideration to defeat expected execution valid.

It was broadly laid down in *Wood* v. *Dixie*, 7 Q. B. 892, that a *bonâ fide* sale of property for good consideration is not, either at common law or under the statute, void merely because it is made with intent to defeat an *expected* execution; and this was accepted as good law in *Hale* v. *Saloon Omnibus Co.*, 4 Drew. 492, and *Darvill* v. *Terry*, 6 H. & N. 807; see also *Golden* v. *Gillam*, 20 Ch. D. 389, 396. *Bott* v. *Smith*, 21 Beav. 511, and *Stokoe* v. *Cowan*, 29 Id. 637, seem to be cases where the sale was not a *bonâ fide* sale for good consideration. Where the writ has been actually delivered to the sheriff, see s. 26 of Sale of Goods Act, 1893, which repeals 29 C. 2, c. 3, s. 16, and 19 & 20 Vict. c. 97, s. 1.

Assignment before conviction for felony.

Before forfeiture for felony was abolished by the Forfeiture Act, 1870, an assignment of all his effects in trust for his family by a man about to be tried for felony, was held to be within the 13 Eliz., and void against the crown; *Shaw* v. *Bran*, 1 Stark. 319; *Jones* v. *Ashurst*, Skinn. 357; *Morewood* v. *Wilkes*, 6 C. & P. 145; *Pauncefoot's Case*, *ante*, p. 5; *Saunders* v. *Wharton*, 32 L. J. Ch. 224; see also *R.* v. *Bridger*, 1 M. & W. 145; *Manning* v. *Gill*, 13 Eq. 485; but an assignment before conviction was valid, if made for good consideration and *bonâ fide*; *Chowne* v. *Baylis*, 31 Beav. 351.

Separation deed.

A deed of separation which recited an agreement to separate in consequence of disputes, and by which the husband granted an annuity to trustees for his wife's benefit, was held voluntary and void against creditors, in *Clough* v. *Lambert*, 10 Sim. 174. But *bonâ fide* separation deeds have been held not to be void under the 13 Eliz. when founded on valuable consideration; *e.g.*, when the trustees covenanted to indemnify the husband against the wife's debts, *Stephens* v. *Olive*, 2 Bro. Ch. C. 90; or when the wife gave up her right to a divorce, *Nunn* v. *Wilsmore*, 8 T. R. 521, 529; see also *Fitzer* v. *Fitzer*, 2 Atk. 511; *Worrall* v. *Jacob*, 3 Mer. 256; *Cowx* v. *Foster*, 1 J. & H. 30.

Marriage settlements.

A marriage settlement is void under the 13 Eliz. where the intention of the parties is to defraud or delay creditors, and the marriage is merely part of a scheme in which husband and wife are both implicated to protect the property from their claims; *Columbine* v. *Penhall*, 1 Sm. & Giff. 228; *Bulmer* v. *Hunter*, 8 Eq. 46; *Re Pennington*, 59 L. T. 774; see *Kevan* v. *Crawford*, 6 Ch. D. 29; *Wenman* v.

Lyon, 64 L. T. 88; *Parnell* v. *Stedman*, C. & E. 153; and though the marriage be *bonâ fide* and the settlor solvent at the date of the settlement, yet it seems that a general covenant in an ante-nuptial settlement made by a trader to settle all after-acquired property upon his wife and children may be void as against his creditors under the Act; *Ex p. Bolland*, 17 Eq. 115. A deed of dissolution of partnership made at a time when the partners were insolvent, has been held void against creditors as being *malâ fide*; *Ex p. Mayou*, 4 De G. J. & S. 664, 668; and where an insolvent trader sold the stock in trade of his business partly in consideration of an annuity to his wife, if she survived him, she was, on his death, declared to be a trustee of the annuity for the creditors, the gift of the annuity being held to be void as against them; *French* v. *French*, 6 De G. M. & G. 95; see *Neale* v. *Day*, 28 L. J. Ch. 45; *Cornish* v. *Clark*, 14 Eq. 184. As to the favour accorded in Chancery to family arrangements, see *Penhall* v. *Elwin*, 1 Sm. & Giff. 258; *Golden* v. *Gillam*, 20 Ch. D. 389, and p. 30, *infra*.

Dissolutions of partnership.

A judgment and execution "contrived of malice" are within the same mischief and same rule as a gift or assignment. An early case on this subject is *West* v. *Skipp*, 1 Ves. sen. 244, where it is laid down by Lord Hardwicke, that if a creditor seize the goods of his debtor and suffer them to remain long in his hands, this is evidence of fraud; see *Lovick* v. *Crowder*, 8 B. & C. 132; *Imray* v. *Magnay*, 11 M. & W. 267; *Hunt* v. *Hooper*, 12 *Id.* 664.

Judgments and executions contrived of malice.

It has been said by Lord Mansfield, that "the principles of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by stat. 13 Eliz. c. 5;" 2 Cowp. 434.

The question, whether a conveyance be fraudulent under this statute, is different from the question, whether it be fraudulent under the bankruptcy law. Any transfer which is fraudulent under the 13 Eliz. is also fraudulent and an act of bankruptcy under the bankruptcy law, and void as against the trustee in bankruptcy; *Doe* v. *Ball*, 11 M. & W. 531; *Billiter* v. *Young*, 6 E. & B. 1, 17; see the Bankruptcy Act, 1883, s. 4 (1) (*b*). A discussion, however, of the effect of the Bankruptcy Act seems to be beyond the scope of this note.

Transfers fraudulent under 13 Eliz. are acts of bankruptcy.

It has been laid down that a voluntary settlement or conveyance is not void against creditors under 13 Eliz. unless the maker was indebted at or about the time of making it;

Voluntary conveyances, when void under 13 Eliz.

Holcraft's Case, Dyer, 294 (*b*); *Stephens* v. *Olive*, 2 Bro. C. C. 90; *Lush* v. *Wilkinson*, 5 Ves. 384; where Lord Alvanley said that to invalidate a post-nuptial settlement, under 13 Eliz., the settlor must be in insolvent circumstances at the time; see also *Shears* v. *Rogers*, 3 B. & Ad. 362; *Battersbee* v. *Farrington*, 1 Swanst. 106; *Russell* v. *Hammond*, 1 Atk. 15; *Middlecome* v. *Marlow*, 2 Atk. 519; *Townshend* v. *Windham*, 2 Ves. sen. 1. In later cases, however, the above doctrine has not been applied; *Townsend* v. *Westacott*, 2 Beav. 340, 4 Id. 58; approved in *Skarf* v. *Soulby*, 1 Mac. & G. 364; *French* v. *French*, 6 De G. M. & G. 95; *Tarback* v. *Marbury*, 2 Vern. 510; *Hungerford* v. *Earle*, Id. 261; *Jenkyn* v. *Vaughan*, 3 Drew. 419; *Barling* v. *Bishopp*, 29 Beav. 417; *Ware* v. *Gardner*, 7 Eq. 317. These cases show that it is not essential that there should be existing debts, or insolvency, at the time of the conveyance or settlement. In *Thompson* v. *Webster*, 4 Drew. 628, 632, Kindersley, V.-C., said: "It is not necessary, in order to set aside a voluntary deed, that the settlor should be in a state of insolvency. The principle now established is this: the language of the Act being that any conveyance of property is void against creditors if made with *intent* to defeat, hinder, or delay creditors, the Court is to decide in each particular case whether, on all the circumstances, it can come to the conclusion that the intention of the settlor in making the settlement was to defeat, hinder, or delay his creditors;" and this statement of the law was accepted as correct by the Judicial Committee in *Godfrey* v. *Poole*, 13 App. Cas. 497.

Rule laid down by Kindersley, V.-C.

Subsequent creditors.

The voluntary settlement may be impeached by subsequent creditors as well as by creditors existing at the time it was made. "If a man makes it with a view to his being indebted at a future time, it is equally fraudulent and ought to be set aside;" *Stileman* v. *Ashdown*, 2 Atk. 477, per Lord Hardwicke. In *Holmes* v. *Penney*, 3 K. & J. 99, Wood, V.-C., said: "where, in order to evade the statute, a person being considerably indebted makes a voluntary settlement, which would be void if impeached by those who were then his creditors, and afterwards pays them off, and a new set of creditors stand in their places, ... such a settlement would be void against the subsequent creditors, because it would be a fraud on the statute." In *Mackay* v. *Douglas*, 14 Eq. 106, where a man about to embark in a hazardous trade made a voluntary settlement of the bulk of his property, Malins, V.-C., set the settlement aside, holding that it was

sufficient to avoid a voluntary settlement that the settlor at the time of the settlement contemplated a state of things which *might* result in insolvency, although he was then solvent and continued so for some time afterwards. This case was approved and followed in the C. A. in *Ex p. Russell*, 19 Ch. D. 588. In *Ex p. Stephens*, 3 Ch. D. 807, a solvent man who was not then a trader made a voluntary settlement upon himself for life, determinable upon his bankruptcy, with further trusts for his wife and children. Thirteen years afterwards he embarked in trade and became bankrupt, and the settlement was set aside as fraudulent on its face.

Lord Westbury's dicta in *Spirett* v. *Willows*.

In *Spirett* v. *Willows*, 3 De G. J. & S. 293, a man made a voluntary settlement of property on his wife, reserving other property sufficient to pay his existing debts; but immediately afterwards, instead of paying them, he realized everything that he had and denuded himself of it all. Lord Westbury, in setting aside the settlement at the suit of a creditor whose debt existed at the time of the settlement, said: "If the debt of the creditor, by whom the voluntary settlement is impeached, existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement. But if a voluntary settlement or deed of gift be impeached by subsequent creditors, whose debts had not been contracted at the date of the settlement, then it is necessary to show either that the settlor made the settlement with express intent to 'delay, hinder, or defraud creditors,' or that after the settlement the settlor had no sufficient means or reasonable expectations of being able to pay his then existing debts; that is to say, was reduced to a state of insolvency, in which case the law infers that the settlement was made with intent to 'delay, hinder, or defraud creditors,' and is therefore fraudulent and void. It is obvious that the fact of a voluntary settlor retaining money enough to pay the debts which he owes at the time of making the settlement, but not actually paying them, cannot give a different character to the settlement, or take it out of the statute. It still remains a voluntary alienation or deed of gift, whereby, in the event, the remedies of creditors, whose debts existed at the time, are 'delayed, hindered, or defrauded.'" The above dicta were considered and commented on in *Freeman* v. *Pope*, 9 Eq. 206, 5 Ch. 538, where a voluntary settlement was held void at the instance of a subsequent creditor.

Inference of intent to defeat creditors.

In *Freeman* v. *Pope*, *supra*, and other cases it was laid down that it is not "necessary to prove any *actual* intention to delay creditors, where the facts are such as to show that the necessary consequence of what was done was to delay them:" and that in such cases the intent must be inferred. This doctrine that the intent *must* be inferred was criticized in *Ex p. Mercer*, 17 Q. B. D. 290, where however the court carefully abstained from deciding that a voluntary settlement can never be void without an actual intention to defeat creditors. In that case it was held that the defeat or delay of creditors was not a necessary consequence of the settlement, and that there was no intent to defeat or delay them, and the settlement was therefore upheld.

Rule derivable from cases.

The true test derivable from the above cases appears to be, not whether there be any debt in existence which was due prior to the settlement and which in the result has remained unpaid, though the settlor continued solvent after making the settlement, but whether from all the circumstances the Court can infer that the settlement was made with the intent, actual or constructive, of delaying or defeating existing or subsequent creditors.

Bankruptcy Act, 1883, s. 47.

Voluntary settlements made by persons who become bankrupt are dealt with by s. 47 of the Bankruptcy Act, 1883. This Act makes every voluntary settlement made within two years of the settlor's bankruptcy void as against his trustee in bankruptcy; and also every voluntary settlement made within ten years of his bankruptcy, unless the parties claiming under it prove that he was solvent without the aid of the settled property, and that his interest in the property passed immediately to the trustee of the settlement.

Where debt incurred by ancestor.

It has been held to make no difference in the application of the 13 Eliz. that the debt was contracted, not by the party making the conveyance but by his ancestor from whom he derived the estate; *Apharry* v. *Bodingham*, Cro. Eliz. 56; *Gooch's Case*, 5 Rep. 60; see *Richardson* v. *Horton*, 7 Beav. 112; and as a fraudulent conveyance by the heir is void, so is one by an executor or administrator of the property of the deceased, and he is chargeable with what he so conveys as assets; *Doe* v. *Fallows*, 2 C. & J. 481; *Re Troughton*, 71 L. T. 427. And property fraudulently conveyed by the deceased himself is, in contemplation of law, assets for payment of his debts in the hands of his executors; *Shears* v. *Rogers*, 3 B. & Ad. 363. By s. 3 of 13 Eliz., parties to the fraudulent conveyance, bond, &c., forfeit a year's value of

Conveyances by heirs and executors.

the lands or tenements conveyed, the whole value of the chattels, and the amount of any covenous bond, half to the crown, and half to the parties aggrieved. The assignees of an insolvent are *parties grieved* within this section; *Butcher* v. *Harrison*, 4 B. & Ad. 129; the fraudulent conveyance being void as against them; *Doe* v. *Ball*, 11 M. & W. 531. Penalties. Parties grieved.

As a general rule, in the case of ordinary creditors, where the debtor is not dead or bankrupt, the 13 Eliz. operates only upon property capable of being taken in execution; see *Sims* v. *Thomas*, 12 A. & E. 536. Thus, before 1 & 2 Vict. c. 110, it is found laid down that copyholds are not, generally speaking, within 13 Eliz., on account of their not being subject to debts; *Mathews* v. *Feaver*, 1 Cox, Ch. Ca. 278, and the same is stated to be the law, since that statute, in 1 Scriven on Copyholds, by Stalman, 146. It seems, however, that the law is otherwise, since s. 11 of that statute has subjected copyholds, like other lands, to execution by elegit. With regard to choses in action, it was laid down by Lord Cottenham, in *Norcutt* v. *Dodd*, Cr. & Ph. 100, that a voluntary assignment of a chose in action is not fraudulent as against creditors, within the 13 Eliz., during the lifetime of the assignor, since it could not be reached by an execution; but that, after his death, it might be treated as fraudulent in a proceeding against the executor, because the chose in action would have been assets in his hands available towards payment of the creditors. Pursuing this doctrine, it has been decided that a voluntary assignment of such choses in action as are seizable in execution by the provisions of 1 Vict. c. 110, are now subject to the operation of 13 Eliz. c. 5; *Barrack* v. *M'Cullock*, 3 K. & J. 110; *Stokoe* v. *Cowan*, 29 Beav. 637; and this view was, apparently, assumed to be correct in *Freeman* v. *Pope*, 9 Eq. 206, 5 Ch. 538, where *Stokoe* v. *Cowan* was cited, and in *Taylor* v. *Coenen*, 1 Ch. D. 636. Rule that statute affects only property capable of being taken in execution. Copyholds. Choses in action.

The effect of 13 Eliz. c. 5 upon the sheriff's duty was explained by the Court of Exch. in *Imray* v. *Magnay*, 11 M. & W. 267; from which decision it follows that the sheriff is bound (at all events if he have notice of the fraud) to seize and sell, notwithstanding a fraudulent assignment or judgment and execution, and that if he do not, an action lies against him. That case was followed by *Christopherson* v. *Burton*, 3 Exch. 160, and recognised in *Shattock* v. *Carden*, 6 Exch. 727. In *Remmett* v. *Lawrence*, 15 Q. B. Duty of sheriff.

1010, however, Lord Campbell expressed a wish to have the case of *Imray* v. *Magnay* reconsidered.

Creditors' rights, under the 13 Eliz., are legal rights, and their enforcement will not be barred by the equitable doctrine of laches; *Re Maddever*, 27 Ch. D. 523.

27 Eliz. c. 4. Fraudulent conveyance void as against purchasers.

The statute 27 Eliz. c. 4, being *in pari materiâ* with the 13 Eliz. c. 5, is referred to in the text, in illustration of the doctrine there laid down, respecting the construction of the latter statute. The 27 Eliz. (rendered perpetual by 30 Eliz. c. 18) was enacted for the protection of *purchasers*, as 13 Eliz. was for that of *creditors*. It enacts, s. 2, that every conveyance, grant, charge, lease, estate, incumbrance, and limitation of use of, in, or out of any *lands*, *tenements*, *or other hereditaments* whatsoever, made for the intent and purpose to defraud and deceive such person as shall purchase the same, or any rent, profit, or commodity, in or out of the same, shall be deemed and taken, only against that person and his heirs, successors, executors, administrators, and assigns, and against every one lawfully claiming under them, who shall so purchase the same for money or other good consideration, to be *wholly void*, frustrate, and of none effect.

Under this Act it was held that not merely is a conveyance executed *with express intention to defraud* subsequent purchasers for value void as against them (see *Burrel's Case*, 6 Rep. 72; *Gooch's Case*, 5 Rep. 60; and *Standen* v. *Bullock*, cited *ante*, p. 6); but a *voluntary* conveyance is so likewise, even though the subsequent purchaser have notice of it; *Goodright* v. *Moses*, 2 W. Bl. 1019; *Evelyn* v. *Templar*, 2 Bro. Ch. C. 148; *Buckle* v. *Mitchell*, 18 Ves. 100; *Doe* v. *Manning*, 9 East, 59; *Cormick* v. *Trapaud*, 6 Dowl. 60; for the very execution of a subsequent conveyance was considered to sufficiently evince the fraudulent intent of the former one. Now, however, it is provided by the Voluntary Conveyances Act, 1893, that a voluntary conveyance of lands, whenever made, if made *bonâ fide* and without any fraudulent intent, shall not "be deemed fraudulent or covinous within the meaning of 27 Eliz. c. 4 by reason of any subsequent purchase for value," or be defeated by a conveyance made upon any such purchase (s. 2). This Act does not affect a purchase for value from the voluntary grantor made before the passing of the Act, 29th June, 1893 (s. 3).

Voluntary conveyance.

Voluntary Conveyances Act, 1893, 56 & 57 Vict. c. 21.

The 27 Eliz. makes a conveyance executed with intent to

defraud void only as against a purchaser for value. Such a conveyance is still good as against the grantor, who therefore cannot as against a purchaser without notice compel specific performance of a subsequent contract to purchase for value; *Smith* v. *Garland*, 2 Mer. 123; see *Butterfield* v. *Heath*, 15 Beav. 408; or resist an action by a purchaser who has refused the title to recover his deposit, *Clarke* v. *Willott*, L. R. 7 Ex. 313. The purchaser, moreover, can compel specific performance of the contract; *Buckle* v. *Mitchell*, 18 Ves. 100; *Rosher* v. *Williams*, 20 Eq. 210.

27 Eliz. c. 4.

Conveyance good against grantor.

S. 5 of the 27 Eliz. enacts, that if any person shall make any conveyance of lands, with a clause of revocation, at his will and pleasure, of such conveyance, and, after such conveyance, shall bargain, sell, grant, demise, convey, or charge the lands to any person for money or other good consideration, the first conveyance not being revoked, such first conveyance, as against such bargainee, vendee, lessee, his heirs, successors, executors, administrators, and assigns, shall be void and of none effect; see the observations on this section in the principal case. A power to mortgage to any extent is a power of revocation within the meaning of this section; *Tarback* v. *Marbury*, 2 Vern. 511; but a power to charge with a particular sum is, if no fraud be found, not so; *Jenkins* v. *Kemish*, 1 Lev. 152. A power to lease for any number of years, with or without rent, is also a power of revocation within this section; for both that and the mortgage power enable the party exercising them in substance to defeat the estate; *Lavender* v. *Blackstone*, 2 Lev. 146. But a power to be exercised with the consent of third persons is not within this clause, unless, as in the case put in the text, they be under the control of the settlor; *Butler* v. *Waterhouse*, 2 Show. 46.

S. 5.

Conveyance with power of revocation.

Power to mortgage.

Power to lease.

Power subject to consent of others.

A legal mortgagee is a *purchaser* within the 27 Eliz.; *Chapman* v. *Emery*, Cowp. 279; *Dolphin* v. *Aylward*, L. R. 4 H. L. 486. So, in equity, is an equitable mortgagee by deposit; see *Lister* v. *Turner*, 5 Hare, 281; *Buckle* v. *Mitchell*, *supra*; and *Rosher* v. *Williams*, *supra*; although the mere deposit does not make him a purchaser *at law*; *Kerrison* v. *Dorrien*, 9 Bing. 76. And so is a lessee at a rack rent; *Goodright* v. *Moses*, 2 W. Bl. 1019; or a person who releases a contested right in consideration of the conveyance to him; *Hill* v. *Exeter*, 2 Taunt. 69; or the purchaser under a settlement made in consideration of an intended marriage; *Douglasse* v. *Waad*, 1 Cha. Ca. 99; but

Who are purchasers.

27 Eliz. c. 4.

not under a post-nuptial settlement, unless made in pursuance of articles entered into before marriage; *Martin* v. *Seamore*, 1 Cha. Ca. 170; for one voluntary conveyance cannot defeat another; *Clavering* v. *Clavering*, 2 Vern. 473; and *semble* that the articles ought to be binding ones, *Doe* v. *Rowe*, 4 B. N. C. 737. A lessee without fine or rent is not a purchaser within the statute; *Upton* v. *Bassett*, Cro. Eliz. 444; cited in *Twyne's Case*; nor is a judgment creditor, *Beavan* v. *Oxford*, 6 De G. M. & G. 507; see *Benham* v. *Keane*, 31 L. J. Ch. 129.

Will is a voluntary conveyance.

A will is looked on as a voluntary conveyance; *Villers* v. *Beaumont*, 1 Vern. 100; *Brudenell* v. *Boughton*, 2 Atk. 625; see 3 Swanst. 411, 414, *in notis*.

Assignment of leaseholds not.

An assignment of leaseholds to which a responsibility is attached is not; *Price* v. *Jenkins*, 5 Ch. D. 619; *Ex p. Doble*, 26 W. R. 407; *Harris* v. *Tubb*, 42 Ch. D. 79; but see *Lee* v. *Mathews*, 6 L. R. Ir. 530; *Shurmur* v. *Sedgwick*, 24 Ch. D. 597. The principle of *Price* v. *Jenkins* has no application to cases arising under 13 Eliz. c. 5; *Ridler* v. *Ridler*, 22 Ch. D. 74. There may be cases in which, on account of the inadequacy of the price, a question may arise, whether a subsequent conveyance, though *some* value pass, be not *in effect* voluntary, and a mere trick for the purpose of invalidating a former one; *Doe* v. *James*, 16 East, 212; see *Persse* v. *Persse*, 7 Cl. & F. 279, and *Owen* v. *Owen*, 3 H. & C. 88.

Conveyance for inadequate value.

Only purchasers from grantor himself protected.

It was decided by *Doe* v. *Rusham*, 17 Q. B. 723, and *Lewis* v. *Rees*, 3 K. & J. 132, in accordance with *Parker* v. *Carter*, 4 Hare, 409, and not following the decision of the Irish Court of Exch. in *Moffett* v. *Whittaker*, Long. & T. 141, that a *bonâ fide* purchaser for value from the heir-at-law or devisee of the maker of a voluntary conveyance cannot impeach it under the statute. And the rule laid down in *Doe* v. *Rusham* equally excludes from the benefit of the statute a purchaser for value from a person claiming under a second voluntary conveyance or from any other person than the maker of the voluntary conveyance himself; *Godfrey* v. *Poole*, 13 App. Cas. 497, 504. For a like reason, in *Doe* v. *Lewis*, 11 C. B. 1035, where a woman before her marriage had executed a voluntary conveyance of leaseholds, it was held that, upon her subsequent marriage without any settlement, the leaseholds did not vest in her husband as a purchaser for value under 27 Eliz.; for, though marriage is a valuable consideration, yet the husband taking merely by operation of law was not a purchaser within the statute.

In *Doe* v. *Rusham*, *Doe* v. *Lewis*, and *Lewis* v. *Rees*, it was laid down that the resolution in *Burrel's Case*, 6 Rep. 72, that "if a father makes a lease by fraud and covin of his land to defraud others to whom he shall demise or sell it (and all fraudulent leases shall be so intended), and before the father sells or demises he dies, and the son, knowing or not knowing of the lease, sells the land on good consideration, the vendee shall avoid the lease by the act 27 Eliz.," is to be understood as applying only to a case of actual fraud; and the case of *Warburton* v. *Loveland*, 6 Bligh N. S. 30, was explained as having turned upon the construction of the Registry Acts.

Rule in *Burrel's Case* explained.

In 27 Eliz. there is a proviso, s. 4, similar to that in 13 Eliz. s. 6, in favour of *bonâ fide purchasers* for good consideration. Such are considered persons taking under instruments made *bonâ fide* and for a valuable consideration; *Roe* v. *Mitton*, 2 Wils. 356; or under ante-nuptial settlements; *Kirk* v. *Clark*, Pr. Cha. 275; or post-nuptial settlements made in consideration of ante-nuptial articles; or of an additional portion; *Dundas* v. *Dutens*, 2 Cox, 235; *Jones* v. *Marsh*, Forester, 63; *Browne* v. *Jones*, 1 Atk. 188; *Spurgeon* v. *Collier*, 1 Eden, 55; or in consideration of the wife's joining to destroy an ante-nuptial settlement; *Scott* v. *Bell*, 2 Lev. 70; or of the husband giving up his interest in his wife's estate, *Hewison* v. *Negus*, 16 Beav. 594; *Teesdale* v. *Braithwaite*, 5 Ch. D. 630; *Shurmur* v. *Sedgwick*, 24 Ch. D. 597; see *Schreiber* v. *Dinkel*, 54 L. T. 911; or of the wife giving up her equity to a settlement; *Re Home*, 54 L. T. 301. As to the invalidity of a post-nuptial settlement of the wife's estate without such consideration, and of such a settlement when made in pursuance of a merely parol ante-nuptial agreement, see *Butterfield* v. *Heath*, 15 Beav. 408, and *Warden* v. *Jones*, 2 De G. & J. 76. *Butterfield* v. *Heath* was, however, questioned and distinguished by Jessel, M.R., in *Re Foster*, 6 Ch. D. 87, where the authorities are collected and reviewed; see also *Trowell* v. *Shenton*, 8 Ch. D. 318; and *Re Conlan's Estates*, 29 L. R. Ir. 199. Persons who, between the voluntary settlement and the purchase, have acquired as purchasers under the voluntary settlement any legal or even equitable right, are purchasers within s. 4, *Prodgers* v. *Langham*, 1 Sid. 133. *East India Co.* v. *Clavel*, Pr. Ch. 377, seems opposed to *Prodgers* v. *Langham*, but the latter case was not referred to in the former, and it was approved of by Lord Eldon, *George* v.

Bonâ fide purchasers.

Milbanke, 9 Ves. 193, and by Lord Kenyon, *Parr* v. *Eliason*, 1 East, 95, where it is called "a very leading authority." See *East India Co.* v. *Clavel*, explained in *Payne* v. *Mortimer*, 28 L. J. Ch. 716; and also *Smartle* v. *Williams*, 3 Lev. 387; *Kirk* v. *Clark*, Pr. Cha. 275; *Brown* v. *Carter*, 5 Ves. 862; *George* v. *Milbanke*, 9 Ves. 190; *Meggison* v. *Foster*, 2 Y. & C. C. C. 336; and *Halifax Bank* v. *Gledhill*, (1891) 1 Ch. 31, 37.

How far consideration of marriage will extend.

There have been some cases in which the question has been how far the consideration of marriage will extend, and whether limitations in favour of remote objects may not be void as against subsequent purchasers; see *Jenkins* v. *Kemishe*, Hard. 395; *White* v. *Stringer*, 2 Lev. 105; *Osgood* v. *Strode*, 3 P. Wms. 245; *Ball* v. *Burnford*, Pr. in Cha. 113; *Reeves* v. *Reeves*, 9 Mod. 132; *Hart* v. *Middlehurst*, 3 Atk. 371. The issue of the marriage are always within the consideration. A limitation to the issue of the settlor by a second marriage was certified by the K. B. not to be voluntary; *Clayton* v. *Wilton*, 3 Madd. 302; and, in *Newstead* v. *Searles*, 1 Atk. 265, a settlement made by a widow, upon her re-marriage, on the children of her former marriage, was upheld by Lord Hardwicke against a subsequent mortgagee. In *Clarke* v. *Wright*, 5 H. & N. 401, 6 Id. 849, and *Gale* v. *Gale*, 6 Ch. D. 144, these two cases were treated as binding authorities by the Exch. Cham., and by Fry, J., and a provision in the marriage settlement of a woman's property for her illegitimate child, and a covenant by a widow, upon her second marriage, to convey property for the benefit of her children by her first marriage, were held not to be voluntary. In *Price* v. *Jenkins*, 4 Ch. D. 483, Hall, V.-C., held that a son of the intended husband by a former marriage was a volunteer; and the same was decided by Kay, J., in *Re Cameron*, 37 Ch. D. 32. Lord Selborne, in the Scotch case, *Mackie* v. *Herbertson*, 9 App. Cas. 303, commented upon the earlier cases and explained the decision in *Newstead* v. *Searles*; and in *De Mestre* v. *West*, (1891) A. C. 264, Lord Selborne, in delivering the judgment of the Privy Council, expressly dissented from the decision in *Clarke* v. *Wright*, and said that *Clayton* v. *Wilton* and *Newstead* v. *Searles* were decided upon the principle, adopted in *Mackie* v. *Herbertson*, that "where the limitations which were not within the marriage consideration were covered by those which were, so that those which were within the marriage consideration could not take effect in the form and manner provided by the instrument without also giving effect to the

Issue of former or subsequent marriage.

others," the former limitations could not be defeated. In *A.-G.* v. *Jacobs-Smith*, (1895) 1 Q. B. 472, Wright and Collins, JJ., treated *Newstead* v. *Searles* as still an authority, that when a widow, upon her remarriage, makes a settlement on children of her former marriage, such children are not volunteers, but their decision was reversed in the C. A., W. N., 1895, p. 85.

Collaterals.

Limitations in favour of collaterals are, as a general rule, voluntary; *Stackpoole* v. *Stackpoole*, 4 Dru. & War. 320; *Cotterell* v. *Homer*, 13 Sim. 506; *Smith* v. *Cherrill*, 4 Eq. 390; *Wollaston* v. *Tribe*, 9 Eq. 44. In *Heape* v. *Tonge*, 9 Hare, 104, Turner, V.-C., laid it down, that limitations in favour of collaterals are to be supported, if there be any party to the settlement who purchases on their behalf: and he referred to the example put by Lord Eldon in *Pulvertoft* v. *Pulvertoft*, 18 Ves. 92, where he said, "In the case for instance of a father, tenant for life, with remainder to his son in tail, they may agree upon the marriage of the son to settle not only on his issue, but upon the brothers and uncles of that son; and the question would be, whether they, though not within the consideration of the marriage, are not within the contract between the father and the son, both having a right to insist upon a provident provision for uncles, brothers, sisters, and other relations, and to say to each other, I will not agree unless you will so settle."

Limitations, even though void as against subsequent purchasers, may be binding as against the settlor and his heirs; see *Davenport* v. *Bishopp*, 2 Y. & C. 451; *per* Kay, J., *Re Cameron*, *supra*; unless the settlement is otherwise invalid; see *Wollaston* v. *Tribe*, 9 Eq. 44.

Purchaser from fraudulent grantee.

The title of a purchaser for valuable consideration, from a person who has obtained a conveyance by fraud, of which he, however, has no notice, falls within the above proviso, and cannot be impeached; *Doe* v. *Martyr*, 1 B. & P. N. R. 332.

Actual consideration may be proved, to rebut fraud.

The existence of a valuable consideration, though it should differ from the consideration specified in the instrument, may be proved, in order to rebut fraud and establish a right to the benefit of the proviso; thus, where a deed purported to be in consideration of love and affection, evidence was allowed that the grantor was under a bond to support the objects of it; *Gale* v. *Williamson*, 8 M. & W. 405; see *Pott* v. *Todhunter*, 2 Coll. C. C. 76.

Adequacy of consideration.

The adequacy of the consideration is an important element in forming a conclusion as to the *bona fides* of the

transaction; see *Doe* v. *James*, 16 East, 212. In no case, however, can inadequacy of consideration alone be said, as a proposition of law, conclusively to establish *mala fides*. The relation between the parties, and other circumstances, may explain away its *primâ facie* effect. For instance, a conveyance in a deed, by way of family arrangement, part of the inducement to execute which is obviously natural love and affection, may be sustained by any valuable consideration not very inadequate; *Persse* v. *Persse*, 7 Cl. & F. 279: see *Pott* v. *Todhunter*, 2 Coll. C. C. 76; *Parker* v. *Carter*, 4 Hare, 409; *Bayspoole* v. *Collins*, 6 Ch. 228; *Townend* v. *Toker*, 1 Id. 446; *Heape* v. *Tonge*, 9 Hare, 90, where an amicable settlement of a supposed claim under a lost will was upheld. The joinder of a necessary party in a conveyance is not always a sufficient consideration. It has been held not to be so where a limitation was made, not for his benefit or at his desire, nor in pursuance of any contract of his; *Doe* v. *Rolfe*, 8 A. & E. 650.

Stat. 27 Eliz. more beneficial than stat. 13 Eliz.

The 27 Eliz. was, perhaps, a more beneficial enactment than the 13 Eliz., for it has been laid down, that at common law no fraud was remedied which should defeat an after purchase, but only that which was committed to defraud a former interest; Cro. Eliz. 445, and *ante*, p. 8; yet there is a *dictum* of Lord Mansfield's to the contrary, in *Cadogan* v. *Kennett*, Cowp. 434. The words of the act, it will be observed, are very large and comprehensive. They include every "conveyance, grant, charge, lease, estate, and limitation of use." Therefore, it was held that the uses declared on a recovery might be void as against a subsequent purchaser, though the recovery itself remained valid and destroyed an estate tail for his benefit, *Doe* v. *Rolfe*, 8 A. & E. 650; *Tarleton* v. *Liddell*, 17 Q. B. 390. Copyholds are within this act, *Doe* v. *Bottriell*, 5 B. & Ad. 131; *Currie* v. *Nind*, 1 Myl. & Cr. 17; *Doe* v. *Rolfe*, 8 A. & E. 650. So are equitable interests, *Barton* v. *Vanheythuysen*, 11 Hare, 126. But not personal property, *Jones* v. *Croucher*, 1 Sim. & S. 315, and Sugd. V. & P., 14th ed., 719; see *Halifax Bank* v. *Gledhill*, (1891) 1 Ch. 31, 39.

Copyholds are within act.

And equitable interests.

Personalty not,

nor gifts to charities.

There are also cases to which, from their nature, as importing the absence of valuable consideration, the 27 Eliz. c. 4, does not, it seems, extend; for instance, a voluntary endowment of a charity is not defeated by a subsequent conveyance for valuable consideration; *Newcastle* v. *A.-G.*, 12 Cl. & F. 402; *Ramsay* v. *Gilchrist*, (1892) A. C. 412.

DUMPOR'S CASE.

HIL. 45 *ELIZ.—IN THE KING'S BENCH.*

[REPORTED 4 COKE, 119.]

When a condition not to alien without licence is determined by the first licence granted.—Apportionment of conditions (*a*).

IN trespass between Dumpor and Symms, upon the general issue the jurors gave a special verdict to this effect: the President and Scholars of the College of Corpus Christi, in Oxford, made a lease for years, in anno 10 Eliz., of the land now in question, to one Bolde, *proviso that the lessee or his assigns should not alien the premises to any person or persons, without the special licence of the lessors. And afterwards the lessors by their deed*, anno 13 Eliz., *licensed the lessee to alien*, or demise the land, or any part of it, to any person or persons *quibuscunque*. And afterwards, anno 15 Eliz., the lessee assigned the term to one Tubbe, who by his last will devised it to his son, and by the same will made his son executor, and died. The son entered generally, and the testator was not indebted to any person, and afterwards the son died intestate, and the ordinary committed administration to one who assigned the term to the defendant. The President and Scholars, by warrant of attorney, entered for the condition broken, and made a lease to the plaintiff for 21 years, who entered upon the defendant, who re-entered, upon which re-entry this action of trespass was brought; and that upon the lease made to Bolde, the yearly rent of 33*s*. 4*d*. was reserved, and upon the lease to the plaintiff, the yearly rent of 22*s*. was only reserved. And the jurors prayed upon all this matter the advice and discretion of the Court, and upon this verdict judgment was given against the plaintiff. And in this case divers points were debated and resolved; 1st. *That the*

(*a*) The rule laid down in this case was abolished by 22 & 23 Vict. c. 35, so far as relates to conditions contained in leases. See *post in notâ*.

alienation by licence to Tubbe, had (*b*) *determined the condition*, so that no alienation which he might afterwards make could break the proviso, or give cause of entry to the lessors, for the lessors could not dispense with an alienation for one time, and that the same estate should remain subject to the proviso after. And although the proviso be, that the lessee or his assigns shall not alien, yet when the lessors license the lessee to alien, they shall never defeat, by force of the said proviso, the term which is absolutely aliened by their licence, inasmuch as the assignee has the same term which was assigned by their assent: so if the lessors dispense with one alienation, they thereby dispense with all alienations after; for inasmuch as by force of the lessor's licence, and of the lessee's assignment, the estate and interest of Tubbe was absolute, it is not possible that his assignee who has his estate and interest shall be subject to the first condition: and as the dispensation of one alienation is the dispensation of all others, so it is as to the persons, for if the lessor dispense with one, all the others are at liberty. And therefore it was adjudged, Trin. 28 Eliz., Rot. 256, *in Com' Banco inter* Leeds (*c*) and Compton, that where the Lord Stafford made a lease to three, upon condition that they or any of them should not alien without the assent of the lessor, and afterwards one alienated by his assent, and afterwards the other two without licence, and it was adjudged that in this case the condition being determined as to one person (by the licence of the lessor) was determined in all. And (*d*) Popham, Chief Justice, denied the case in 16 Eliz., Dyer (*e*), 334: that if a man leases land upon condition that he shall not alien the land, or any part of it, without the assent of the lessor, and afterwards he aliens part with the assent of the lessor, that he cannot alien the residue without the assent of the lessor: and conceived, that is not law, for he said the condition could not be divided or (*f*) appointed by the act of the parties; and in the same case, as to parcel which was aliened by the assent of the lessor, the condition is

(*b*) 1 Roll. Rep. 70, 390. 1 Roll. 422, 471. 2 Bulst. 291. Cro. Jac. 398. 3 Co., 64, Pennant's case. 3 Ed. 6, Dyer, 66 a.

(*c*) 1 Roll. 472. Cro. El. 816. Godb. 93. Noy, 32. 4 Leon. 58. 2 Bulstr. 291.

(*d*) Styles, 317.

(*e*) Dy. 334, pl. 32. Cro. El. 816. Styles, 334. Moor, 205.

(*f*) Co. Lit. 215 a.

determined; for although the lessee aliens any part of the residue, the lessor shall not enter into the part aliened by licence, and, therefore, the condition being determined in part, is determined in all. And therefore, the Chief Justice said, he thought the said case was falsely printed, for he held clearly that it was not law. *Nota*, reader, *Paschæ* 14 Eliz. Rot. 1015, *in Com' Banco*, that where the lease was made by deed indented for 21 years of three (*g*) manors, A., B., C., rendering rent, for A. 6*l*., for B. 5*l*., for C. 10*l*., to be paid in a place out of the land, with a condition of re-entry into all the three manors, for default of payment of the said rents, or any of them, and afterwards the lessor, by deed indented and enrolled, bargained and sold the reversion of one house and forty acres of land, parcel of the manor of A., to one of his heirs, and afterwards, by another deed indented and enrolled, bargained and sold all the residue to another and his heirs; and if the second bargainee should enter for the condition broken or not, was the question: and it was adjudged, that he should not enter for the (*h*) condition broken, because *the condition, being entire, could not be apportioned by the act of the parties*, but by the severance of part of the reversion it is destroyed in all. *But it was agreed, that a condition may be* (*i*) *apportioned in two cases*, 1. *By act in law*. 2. *By act and wrong of the lessee*. By act in law, as if a man, seised of two acres, the one in fee, and the other in (*k*) borough English, has issue two sons, and leases both acres for life or years, rendering rent with condition; the lessor dies; in this case by this descent, which is an act in law, the reversion, rent, and condition are divided. 2. By act and wrong of the lessee, as if the lessee makes a feoffment of part, or commits waste (*l*) in part, and the lessor enters for the forfeiture, or recovers the place wasted, there, the rent and condition shall be apportioned, for none shall take advantage of his own wrong, and the lessor shall not be prejudiced by the wrong of the lessee: and the Lord Dyer, then Chief Justice of the

(*g*) Dyer, 308, 309, pl. 75. 5 Co. 55 b. Moor, 97, 98. By 22 & 23 Vict. c. 35, s. 3, where the reversion on a lease is severed and the rent is legally apportioned, the assignee of each part of the reversion is entitled in respect of the apportioned rent to the benefit of the condition. And see 44 & 45 Vict. c. 41, s. 12, as to apportionment in the case of leases made after that Act.

(*h*) Co. Lit. 215 a. Cro. Jac. 390. 5 Co. 55 b.

(*i*) 3 Bulstr. 154. Co. Lit. 215 a.

(*k*) 1 Rol. Rep. 331. Co. Lit. 215 a. See *Doe* v. *Lewis*, 5 A. & E. 277.

(*l*) 1 Rol. Rep. 331. Moor, 203.

Common Pleas, in the same case, said, that *he who enters for a condition broken, ought to be* in *of the same estate which he had at the time of the condition created*, and *that* he cannot have, when he has departed with the reversion of part: and with that reason agrees Litt. 80 b. And *vide* 4 & 5 Ph. & Mar., Dyer (*m*), 152, where a proviso in an indenture of lease was that the lessee, his executors or assigns, should not alien to any person without licence of the lessor, but only to one of the sons of the lessee; the lessee died; his executors assigned it over to one of his sons; it is held by Stamford and Catlyn, that the son might alien to whom he pleased, without licence (*n*), for the condition, as to the son, was determined: which agrees with the resolution of the principal point in the case at bar. 2. It was resolved, that the statutes of 13 Eliz. cap. 10, and 18 Eliz. cap. 11, concerning leases made by Deans and Chapters, Colleges, and other ecclesiastical persons, are (*o*) general laws whereof the court ought to take knowledge, although they are not found by the jurors: and so it was resolved between Claypole and Carter in a writ of error in the King's Bench.

(*m*) Dy. 152, pl. 7. Co. Lit. 215 a. Cro. Eliz. 757, 816.

(*n*) *Quære*, see *Lloyd* v. *Crispe*, 5 Taunt. 249, *post in notâ*, p. 36.

(*o*) 2 Roll. 465. Yelv. 106. Doct. pl. 337, 338. Noy, 124. 2 Brownl. 208. Cro. El. 816. Moor, 593. 1 Leon. 306, 307.

The decision followed in later cases until 22 & 23 Vict. c. 35, 23 & 24 Vict. c. 38.

This decision was acted on for a long time, although more than once disapproved of. In *Doe* v. *Bliss*, 4 Taunt. 735, Mansfield, C. J., said: "The profession have always wondered at *Dumpor's Case*, but it has been law so many centuries, that we cannot now reverse it." In *Brummell* v. *Macpherson*, 14 Ves. 173, Lord Eldon said: "Though *Dumpor's Case* always struck me as extraordinary, it is the law of the land." Accordingly it was affirmed by many subsequent decisions, and was even carried further, for it was held that whether the licence to assign was general, as in the principal case, or particular as "to one particular person subject to the performance of the covenants in the original lease," still the condition was gone, and the assignee might assign without licence; *Brummell* v. *Macpherson*, 14 Ves. 173. At length, however, the legislature interfered, and this rule has, by the operation of 22 & 23

Vict. c. 35, and 23 & 24 Vict. c. 38, ceased to be law, so far as relates to conditions in leases, and to licences and waivers of such conditions occurring since those Acts.

Law of Property Amendment Act, 1859.

Effect of licence under lease restricted.

S. 1.

Under 22 & 23 Vict. c. 35, s. 1, a licence given to a lessee or his assigns to do an act which, without such licence, would create a forfeiture, or give a right to re-enter, under a condition or power reserved in a lease, whether granted before or after the Act, unless otherwise expressed, extends only to the permission actually given, or the specific breach of a proviso or covenant made or to be made, or to the act specifically authorized; and, unless otherwise expressed, does not prevent proceedings for any subsequent breach; and all rights under covenants, and powers of forfeiture and re-entry, remain effectual in respect of any subsequent breach of covenant or condition not specifically authorized by the licence.

S. 2.

By s. 2, where, in any such lease, there is a right of re-entry on assigning, or sub-letting, or doing any specified act, without licence, a licence to one of several co-lessees to assign or sub-let his share or interest or to do any such act, or a licence to assign, or sub-let, or do any such act, in respect of only part of the property, does not destroy the right of re-entry, on breach by any other co-lessee, or by the lessee of the rest of the property, over and in respect of the shares, interests, or remaining property, not the subject of such licence.

Law of Property Amendment Act, 1860.

Effect of waiver restricted.

That Act did not interfere with the effect of *Dumpor's Case* upon questions of waiver. By s. 6, however, of 23 & 24 Vict. c. 38, any actual waiver by the lessor of the benefit of any covenant or condition in a lease, in any one particular instance, extends only to the breach to which it specially relates, and is not a general waiver of the benefit of such covenant or condition, unless an intention to that effect appears.

Though these enactments have destroyed the authority of *Dumpor's Case* itself, this note, which deals chiefly with the doctrine of waiver of forfeiture, a doctrine still of practical importance, is retained in the present edition.

Mode of licensing required at common law.

At common law the licence, in order to put an end to the condition, must have been such a licence as the condition contemplated, for where the condition was not to assign *without licence in writing*, a *parol* licence was no dispensation; *Roe* v. *Harrison*, 2 T. R. 425; *Macher* v. *Foundling Hospital*, 1 V. & B. 191; *Richardson* v. *Evans*, 3 Madd. 218; though it is said that if such parol licence were used as

a snare, equity would relieve, *Richardson* v. *Evans*, *supra*. It seems, too, that if the condition was not in general restraint of assignment, but permitted the lessee to assign in one particular way, *e.g.* by will, an assignee to whom the lease had been assigned in the permitted way could not assign in any other; "The ground of *Dumpor's Case* was this: the proviso was that the lessee or his assigns should not alien the premises to any person or persons without the special licence of the lessors; the lease was therefore to be void if any assignment was made. And there the court was of opinion that if the condition was once dispensed with, it was wholly dispensed with, because the provision for making void must exist entire, or not exist at all. But here is an exception out of the original restriction to alienate, so that in the alienation by will made by the lessees there was nothing to licence;" *Lloyd* v. *Crispe*, 5 Taunt. 249, 253, *per* Gibbs, J. Also, by defeasance properly framed to revive the condition, a licence to assign might virtually be limited to the particular assignment; see 3 Jarman's Conv. by Sweet, 685; but it was intimated by Gibbs, C. J., that there would have been great difficulty in giving that effect to any merely restrictive words in the licence; *Mason* v. *Corder*, 7 Taunt. 9, 11 note.

Waiver of forfeiture by acceptance of rent or other act.

Although there has been a breach of covenant or condition which operates as a forfeiture of the term, still the lessor may, by acceptance of rent or other acts, waive his right to take advantage of it. Acceptance of rent or other act does not operate as a waiver unless the lessor has, at the time, knowledge of the forfeiture. It may, however, appear from other circumstances that the rent was accepted with an intention of continuing the tenancy notwithstanding *any* forfeiture that might have occurred. In *Goodright* v. *Davids*, 2 Cowp. 803, the lease contained a covenant not to underlet without licence, and a power of re-entry in case of breach of the covenants; the lessee underlet various parts of the premises, but the lessor knew of it, and received rent afterwards. "The case," said Lord Mansfield, "is extremely clear. To construe this acceptance of rent, due since the condition broken, a waiver of the forfeiture, is to construe it according to the intention of the parties. Upon the breach of the condition the landlord had a right to enter. He had full notice of the breach, but does not take advantage of it, but accepts rent subsequently accrued. That shows he meant that the lease should continue. Forfeitures

are not favoured in law; and when a forfeiture is once waived, the court will not assist it;" see *Roe* v. *Harrison*, 2 T. R. 425; *Doe* v. *Birch*, 1 M. & W. 402; *Croft* v. *Lumley*, 5 E. & B. 648, 6 H. L. C. 672; *Walrond* v. *Hawkins*, L. R. 10 C. P. 342. Other acts of the lessor, besides acceptance of rent, which show an intention on his part to treat the lease as continuing, may operate as a waiver of a forfeiture. Any unequivocal act done by a lessor, after forfeiture incurred, by which he acknowledges that the tenancy existed after the forfeiture was incurred, will operate as such waiver. For instance: an assignment of a leasehold interest, expressed to be subject to underleases in respect of which a forfeiture had been incurred; *Hunt* v. *Bishop*, 8 Exch. 675; *Hunt* v. *Remnant*, 9 *Id.* 635: a receipt for rent due before the forfeiture, but given afterwards, describing the tenant as tenant at the date of the receipt; *Green's Case*, 1 Cro. Eliz. 3, cited in 1 M. & W. 406: a declaration in an action for damages for breach of covenant that the breach occurred during the term; *Pellatt* v. *Boosey*, 31 L. J. C. P. 281: negotiations, or an agreement, for a new lease on the expiration of the old lease of which a forfeiture had been incurred; *Ward* v. *Day*, 4 B. & S. 337, 5 *Id.* 359; *Doe* v. *Curwood*, 1 H. & W. 140: giving a special notice to repair under a special covenant, is a waiver of any forfeiture for breaches up to the expiration of the notice; *Doe* v. *Meux*, 4 B. & C. 606; *Doe* v. *Lewis*, 5 A. & E. 277: but a general notice is not; *Goatley* v. *Paine*, 2 Camp. 520; *Few* v. *Perkins*, L. R. 2 Ex. 92: advising a person to purchase the term from the tenant after a forfeiture incurred is a waiver; *Doe* v. *Eykins*, 1 C. & P. 154: and, perhaps, a notice to quit is a waiver of any forfeiture incurred before its expiration; *Gregory* v. *Wilson*, 9 Hare, 683, 688: the pleadings in an action, claiming possession, and asking for an injunction to restrain breaches generally, and alleging continued willingness to grant a lease in pursuance of the agreement alleged to have been determined by forfeiture, were held to be a waiver; *Evans* v. *Davis*, 10 Ch. D. 747; though in *Toleman* v. *Portbury*, L. R. 6 Q. B. 245, 7 *Id.* 344, it was held that particulars of breaches given in an action of ejectment could not amount to a waiver; see also *Victoria, A.-G. of*, v. *Ettershank*, L. R. 6 P. C. 354.

Waiver by other acts besides acceptance of rent.

It is conceived that the mere receipt of subsequent rent does not, of its own proper force, operate as a waiver of a

Receipt of rent is evidence of

election to continue lease.

forfeiture. It is only evidence of the election of the lessor to retain the reversion and its incidents, instead of taking possession of the land; see *Croft* v. *Lumley*, 6 H. L. C. 705, 713, *per* Bramwell, B., and Crompton, J.; and, as an election once made and expressed cannot be retracted, the receipt of subsequent rent, as such, without more, binds the landlord by proving an election—*quod semel placuit in electionibus amplius displicere non potest*, Co. Litt. 146 a; see *Ward* v. *Day*, 4 B. & S. 337. The amount of the rent reserved by a lease may be received under circumstances showing it to be *paid and accepted* merely as compensation for the use of the land and not with the intention of setting up the lease, in which case the receipt of the money does not amount to a waiver of the forfeiture; see *Doe* v. *Batten*, 1 Cowp. 243. So also the rent due under the lease may be paid and received upon the express terms that the receipt is not to operate as a waiver of any previous forfeiture.

Election cannot be retracted.

Inference of election may be rebutted.

Receipt of rent under protest.

"Where money is paid and received as rent under a lease, a mere protest that it is accepted conditionally and without prejudice to the right to insist upon a prior forfeiture cannot countervail the fact of such receipt," and prevent such receipt of rent operating as a waiver of the forfeiture; *Davenport* v. *The Queen*, 3 App. Cas. 115; see also *Strong* v. *Stringer*, 61 L. T. 470. If the lessor receives money which is tendered to him as rent, it seems that that is a receipt of rent by him which will operate as a waiver, although, both before and after the tender and upon taking the money, he unequivocally expresses his intention to accept the money, not as rent, but only as compensation for the use of the land. This was decided in *Croft* v. *Lumley*, in the Queen's Bench, 5 E. & B. 648. The court in coming to that decision acted upon the rule that, when money is paid, it must be applied according to the expressed will of the payer, and not of the receiver—*solvitur in modo solventis*; and they applied to the landlord's conduct the rule *non quod dictum sed quod factum est in jure inspicitur*, saying, "whatever words he might utter when he took up the money and carried it away, in point of law he received it as rent." The judgment in that case was affirmed in the Exch. Cham. and in the H. L. (5 E. & B. 682; 6 H. L. C. 672), but only on the ground that there had been no forfeiture. In the H. L. the question of waiver was submitted, with others, to the judges, and eight out of nine were of opinion that, if there had been a forfeiture, it had been

Croft v. *Lumley*.

Solvitur in modo solventis.

waived by the receipt of the money which had been offered as rent, and as rent only. Of the two peers who decided the case Lord Cranworth gave no opinion upon the question of waiver, but Lord Wensleydale said that he thought that it was a question of fact, and not of law, whether the transaction amounted to a payment and receipt of rent, and that he was led to suppose that it did not, as the money was not demanded back when the lessor declared that he would only take it as compensation. His lordship appeared to be of opinion that the rule *solvitur in modo solventis* is only applicable to the case of a payment in respect of one of two debts. If, therefore, money is tendered as *rent*, but the lessor is unwilling to receive it as *rent*, his only safe course appears to be to refuse it; *Croft* v. *Lumley*, 5 E. & B. 648. The proper question to be left to the jury in such cases appears to be whether the lessor received rent *eo nomine* as rent due under the lease; see *Doe* v. *Pritchard*, 5 B. & Ad. 765, 776; and *Davenport* v. *The Queen*, *supra*. If the lessor received rent as rent due under the lease, that waives any forfeiture incurred before the rent became due.

Question is whether rent was received *as rent.*

If the lessor has received subsequent rent *as rent*, that operates as a waiver of any forfeiture incurred up to the time such rent became due; *Pellatt* v. *Boosey*, 31 L. J. C. P. 281; *Price* v. *Worwood*, 4 H. & N. 512; *Davenport* v. *The Queen*, 3 App. Cas. 115. So also does suing for rent accrued due since forfeiture incurred; *Roe* v. *Minshall*, B. N. P. 96 c; *Dendy* v. *Nicholl*, 4 C. B. N. S. 376; or making an unqualified demand for such rent; *Doe* v. *Birch*, 1 M. & W. 408, where Parke, B., said: "I think an absolute unqualified demand of the rent by a person having sufficient authority would have amounted to a waiver of the forfeiture;" *Blyth* v. *Dennett*, 13 C. B. 178; *Dendy* v. *Nicholl*, *supra*; *Strong* v. *Stringer*, 61 L. T. 470; but acceptance of rent after it becomes due does not waive a forfeiture incurred by non-payment of that rent when it became due; *Green's Case*, 1 Cro. Eliz. 3.

What forfeitures waived by acceptance of rent.

Although acceptance of rent falling due after a forfeiture incurred operates as a waiver, yet acceptance after forfeiture of rent accrued due before the forfeiture will not do so; *Green's Case*, *supra*; *Marsh* v. *Curteys*, 2 Cro. Eliz. 528; *Price* v. *Worwood*, *supra*; *Cronin* v. *Rogers*, 1 C. & E. 348: for there is no inconsistency in accepting rent accrued due before the supposed determination of the estate; *Ward* v. *Day*, 4 B. & S. 337, 352, *per* Crompton, J.

Acceptance of rent due before forfeiture is no waiver.

Waiver by distress for rent.

A distress for rent operates as a waiver of any forfeiture incurred up to the time it is made, for it acknowledges a tenancy subsisting at the time of the distress; *Browning* v. *Beston*, 1 Plowd. 130, 133; *Doe* v. *Johnson*, 1 Stark. 411; *Ward* v. *Day*, 4 B. & S. 337; *Doe* v. *Williams*, 7 C. & P. 322; *Doe* v. *Peck*, 1 B. & Ad. 428; *Cotesworth* v. *Spokes*, 10 C. B. N. S. 103; *Grimwood* v. *Moss*, L. R. 7 C. P. 360, 363. The 8 Anne, c. 14, which extends the right to distrain for six months after the determination of the lease, cannot, it is conceived, affect the question of waiver; it has been said that this statute does not apply at all when the determination of the lease is for forfeiture; *Doe* v. *Williams*, *supra*; *Grimwood* v. *Moss*, *supra*; and, even if the statute does apply to such a case, it does not apply until after determination of the lease and, as will be seen hereafter, when the lessor has by some unequivocal act expressed his election to treat the lease as determined, no subsequent act will operate as a waiver. A distress is only a waiver of any forfeiture incurred up to the time it is made, and the continuing in possession under the distress does not waive any forfeiture incurred after the distress was first made; *Doe* v. *Johnson*, 1 Stark. 411. If the tenant does not submit to the distress, but replevies, the distress is not a waiver; *Blyth* v. *Dennett*, 13 C. B. 168, 180, *per* Jervis, C. J. Where proceedings in ejectment for non-payment of rent are taken under s. 210 of the C. L. P. Act, 1852, when it is necessary to prove that there was no sufficient distress to countervail the arrears due, an insufficient distress for rent due before breach of condition, is not a waiver, for it is made in order to complete the plaintiff's title given him by statute; *Brewer* v. *Eaton*, 3 Doug. 230; *Cotesworth* v. *Spokes*, 10 C. B. N. S. 103; if, however, such distress reduce the arrears to less than one half year's rent, the lessor cannot succeed under the statute; *Cotesworth* v. *Spokes*, *supra*.

The lessor does not waive his right to recover rent due before the forfeiture by enforcing the forfeiture, although the words of the condition be that the lessor shall have the premises again "*as if the indenture of lease had never been made*." The proper construction of such a condition is, that *from the time of re-entry* the lessor shall have the land again, as if the indenture had never been made; *Hartshorne* v. *Watson*, 4 B. N. C. 178.

Distinction as to waiver where lease

In Lord Coke's time there was a distinction drawn between cases where on breach of the condition the lease is to

be *void* and cases where it is only to be *voidable* on the lessor's re-entry. In the latter case acceptance of rent has always operated as a waiver of the lessor's right to re-enter, but in the former case it was held that, as the lease became void immediately upon the breach of the condition, no subsequent acceptance of rent could set it up again. "Where the estate or lease is *ipso facto* void by the condition or limitation, no acceptance of the rent after can make it to have a continuance; otherwise it is of a lease or estate voidable by entry;" Co. Litt. 215 a.

to be *void*, and where *voidable* only on lessor's re-entry.

This distinction was never applied to leases for lives; for if a lease for lives contained an express condition that it should be *void* upon breach of covenant by the lessee, still it was, in contemplation of law, only *voidable* by re-entry; and the reason was that an estate which began by livery could be determined only by entry; *Browning* v. *Beston*, Plowd. 133; *Doe* v. *Pritchard*, 5 B. & Ad. 765. But the force of this reason was lost when estates for life might, under 7 & 8 Vict. c. 76 and 8 & 9 Vict. c. 106, commence without livery. With regard to leases for years the distinction was clearly recognised in *Browning* v. *Beston*, *supra*; *Pennant's Case*, 3 Rep. 64; *Finch* v. *Throgmorton*, Cro. Eliz. 221; *Mulcarry* v. *Eyres*, Cro. Car. 511; *Doe* v. *Butcher*, Dougl. 51.

Distinction only applied to leases for years.

The distinction has ceased, however, to be of practical importance owing to the construction which in modern times has been placed, whenever possible, upon forfeiture clauses. "In a long series of decisions the Courts have construed clauses of forfeiture in leases declaring in terms, however clear and strong, that they shall be void on breach of conditions by the lessees, to mean that they are voidable only at the option of the lessors;" *Davenport* v. *The Queen*, 3 App. Cas. 115, 128.

Quære how far this distinction now of importance.

Thus in *Doe* v. *Bancks*, 4 B. & Ald. 401, it was provided that, on breach of a condition, the lease should be "deemed void to all intents and purposes;" and the tenant contended that upon breach the lease was determined, and that a subsequent payment and acceptance of rent created a new tenancy from year to year; but the court held that the true construction of the proviso was that the lease was only voidable at the option of the lessor. In *Rede* v. *Farr*, 6 M. & S. 121, the same construction was placed upon a proviso that the lease should "cease, determine, and be utterly void to all intents and purposes." The principle upon which those cases were

Construction of forfeiture clauses.

decided was that a tenant could not take advantage of his own wrong to say that the lease was at an end. The same rule of construction was applied to a contract for the purchase of land; *Malins* v. *Freeman*, 4 B. N. C. 395; and to composition deeds, *Hughes* v. *Palmer*, 19 C. B. N. S. 393; *Hyde* v. *Watts*, 12 M. & W. 254.

In *Roberts* v. *Davey*, 4 B. & Ad. 664, the question arose as to the construction to be put upon such a clause where third persons are concerned. In an action for trespass to land the defendant pleaded a licence from a previous owner in fee; replication that the licence was, on breach of a certain condition, "to cease, determine, and become utterly void and of no effect," and that the condition had been broken and the licence thereupon become void; demurrer, and judgment for the defendant on the ground that, according to *Doe* v. *Bancks*, the licence ought to be construed as determinable only *at the option* of one who had not signified such option.

There are also cases and *dicta* which show that, even as against the lessor, the word "void" will be construed to mean "voidable at his option," so that the breach of the condition can be waived. In *Arnsby* v. *Woodward*, 6 B. & C. 519, where, in addition to the words rendering the lease void, it was stated that "it should be lawful for the lessor to re-enter and expel the tenant," the court held that the additional words showed that it was the intention of the parties that the lease should only be voidable by re-entry, and consequently that the lessor had by subsequent receipt of rent waived the forfeiture; but Lord Tenterden said that if the clause had been in the very same words as in *Doe* v. *Bancks*, he "should have still thought that a receipt of rent by the landlord would be an admission that the lease was subsisting at the time when the rent became due, and that he could not afterwards insist upon a forfeiture previously committed. To hold the contrary would be productive of great injustice, for the effect would be this; it would enable a landlord at any period to eject a tenant after he had given him reason to suppose the forfeiture was waived, and after the latter had upon that supposition expended his money in improving the premises." In *Doe* v. *Birch*, 1 M. & W. 403, a clause that, on breach of certain stipulations, "it should be lawful for the lessor to retake possession of the premises, *and that the agreement should be null and void*," was construed in the same way, so as to admit the question

of waiver; see also *Bowser* v. *Colby*, 1 Hare, 109, and *Dakin* v. *Cope*, 2 Russ. 170.

In *Davenport* v. *The Queen*, 3 App. Cas. 115, a lease was granted by the Crown subject to the provisoes contained in a Colonial Act; one of which provisoes was that on a breach of a certain condition "the right and interest" of the tenant "should cease and determine." It was held by the Judicial Committee that this proviso, when read into the lease, was to be construed as rendering the lease upon breach of the condition only voidable, so that the forfeiture could be waived by subsequent acceptance of rent. The rule that such provisoes are to be construed as making the lease only voidable, even as regards the landlord, seems to be involved in the decision in *Roberts* v. *Davey*, 4 B. & Ad. 664; see also *Victoria, A.-G. of,* v. *Ettershank*, L. R. 6 P. C. 354.

In *Rede* v. *Farr*, 6 M. & S. 121, above referred to, Lord Ellenborough said:—"The court have looked into the cases and authorities cited, and are of opinion that the proviso does not vacate the lease entirely, *although it does as against the lessee;*" this seems to say that the lessor could insist that the lease became absolutely void upon breach.

Rule deducible from cases.

It may be deduced from the above cases that the distinction between leases which are void, and which are only voidable upon breach of condition, has no practical effect, for the courts will in almost every possible case construe the proviso for forfeiture as making the lease for all purposes only voidable. It must, however, be observed that the Judicial Committee, in *Davenport* v. *The Queen*, *supra*, limited their judgment by saying: "There is no doubt that the scope and purpose of an enactment or contract may be so opposed to this rule of construction that it ought not to prevail; but the intention to exclude it should be clearly established."

What is sufficient entry.

Any act done by the lessor, which, if done by a person having no right to re-enter, would be trespass, is an entry by the lessor and the determination of the term upon a forfeiture; *Doe* v. *Wood*, 2 B. & Ald. 724; *Turner* v. *Doe*, 9 M. & W. 646; so is any actual entry upon the premises by the lessor claiming them as his own; *Doe* v. *Williams*, 5 B. & Ad. 789; or a letting of the premises to a new tenant; *Doe* v. *Pritchard*, 5 B. & Ad. 765; *Baylis* v. *Le Gros*, 4 C. B. N. S. 537; and now the bringing of an action to re-

cover possession "is equivalent to an entry for the forfeiture," and determines the term; *Grimwood* v. *Moss*, L. R. 7 C. P. 360; see *Evans* v. *Davis*, 10 Ch. D. 747, 763. In *Ex p. Hart Dyke*, 22 Ch. D. 410, the C. A. declined to express any opinion whether an action to recover possession for a forfeiture determined the lease as from the commencement of the action.

No waiver after election expressed.

If the lessor has by some unequivocal act, such as entry, or bringing an action of ejectment, expressed his election to treat the lease as determined, no subsequent receipt of rent can operate as a waiver so as to revive the lease; *Jones* v. *Carter*, 15 M. & W. 718; *Evans* v. *Wyatt*, 43 L. T. 176; nor can a distress or any other act; *Grimwood* v. *Moss*, L. R. 7 C. P. 360. In *Dendy* v. *Nicholl*, 4 C. B. N. S. 376, Willes, J., is misreported to have said that the above doctrine is exploded, and the same learned judge, in *Grimwood* v. *Moss*, *supra*, said that he was "not prepared to be the first to shake or fritter away the authority of *Jones* v. *Carter*." A receipt of rent after an unequivocal act of election may, however, be evidence of a new agreement upon the old terms; *Doe* v. *Batten*, 1 Cowp. 243; *Evans* v. *Wyatt*, *supra*; see *Keith* v. *National Telephone Co.*, (1894) 2 Ch. 147.

Receipt of rent evidence of new tenancy.

Distinction between waiver of forfeiture for underletting and for assignment, now of small importance.

There was some distinction, in respect of *waiver*, between a condition against underletting and one against assignment; for in the former case, if the lessee underlet and the lessor accepted subsequently accruing rent, so as to waive the forfeiture, still, if the lessee, after the expiration of that term, made another underlease, the lessor might re-enter; *Doe* v. *Bliss*, 4 Taunt. 735; but if the lessor were, by acceptance of rent, to waive the forfeiture incurred by the lessee's assignment, there would have been (before the statutes referred to above, p. 35) an end of the condition altogether, exactly as there would have been if he had licensed it; *Lloyd* v. *Crispe*, 5 Taunt. 249; 1 Wms. Saund. 6th ed. p. 288; *Doe* v. *Pritchard*, 5 B. & Ad. 781, *per* Patteson, J. And it has been thought that, even if the lessor were expressly to license the lessee to underlet, still the lessee might incur a forfeiture by making a fresh underlease after the expiration of that licensed; for that the licence would in that case only operate as a suspension of the condition, and a condition might be *suspended*, though it could not (before the above statutes) be *apportioned*; 1 Wms. Saund. *supra*.

Recurring or

It need hardly be added that receipt of rent or other act

is no waiver of a forfeiture for a breach of condition which is a continuing breach. continuing forfeiture.

The receipt of rent, or other act, only waives all breaches committed up to the time of waiver and, therefore, is no waiver of a forfeiture for a breach of covenant which continues afterwards; *Doe* v. *Woodbridge*, 9 B. & C. 376; *Doe* v. *Jones*, 5 Exch. 498. Breaches of covenants to repair; *Doe* v. *Jones*, *supra*; *Doe* v. *Durnford*, 2 C. & J. 667; *Bennett* v. *Herring*, 3 C. B. N. S. 370: to insure; *Doe* v. *Gladwin*, 6 Q. B. 953; *Doe* v. *Peck*, 1 B. & Ad. 428; *Price* v. *Worwood*, 4 H. & N. 512: or not to use the premises in a particular way; *Doe* v. *Woodbridge*, 9 B. & C. 376: are of a continuing nature; but not breaches of covenants to put into repair or to repair within a specified time after notice; *Coward* v. *Gregory*, L. R. 2 C. P. 153, 170; or of a condition against insolvency, after discharge; *Doe* v. *Rees*, 4 B. N. C. 384; see also *Miles* v. *Tobin*, 17 L. T. 432.

A breach of covenant not to assign is not a continuing breach, but the covenant is broken anew by each assignment; a breach of a covenant not to sub-let is not continuing so long as the underlease cannot be determined, but each subletting is a new breach; *Goodright* v. *Davids*, 2 Cowp. 803; *Doe* v. *Bliss*, 4 Taunt. 735; *Walrond* v. *Hawkins*, L. R. 10 C. P. 342; *Griffin* v. *Tomkins*, 42 L. T. 359; see also *Lawrie* v. *Lees*, 14 Ch. D. 249, 262. In *Shepherd* v. *Berger*, (1891) 1 Q. B. 597, where there was a proviso for re-entry, "if and whenever" rent was in arrear and there was no sufficient distress, it was held that the lessor had a right of re-entry at any time when those two conditions co-existed. Where, however, a breach of covenant not to do a particular act without licence has continued for twenty years, and rent has been received throughout that period by the lessor, with full knowledge of the facts, a licence may be presumed; *Gibson* v. *Doeg*, 2 H. & N. 615; and see *Miles* v. *Tobin*, 17 L. T. 432.

An underlease is not a breach of a condition "not to assign, transfer, set over, or otherwise do and put away the indenture of demise or the premises thereby demised, or any part thereof;" *Crusoe* v. *Bugby*, 3 Wils. 234; but is a breach of a condition not to "set, let, or assign over the demised premises, or any part thereof;" *Roe* v. *Harrison*, 2 T. R. 425; and of a condition not to "assign or otherwise part with the demised premises or any part thereof;" *Doe* v. *Worsley*, 1 Camp. 20. An assignment is a breach of What amounts to a breach of condition not to assign, &c.

a covenant not to "let, set, or demise for all or any part of the term;" *Greenaway* v. *Adams*, 12 Ves. 395. Where two partners were joint lessees an assignment by one to the other upon dissolution of partnership was held to be clearly a breach of a covenant not to assign; *Varley* v. *Coppard*, L. R. 7 C. P. 505; but where on dissolution of partnership one of two partners, being joint lessees, gave up exclusive possession to the other, this was held not to be a breach of a covenant not to "part with the possession of the premises or any part thereof to any person or persons;" *Bristol* v. *Westcott*, 12 Ch. D. 461, where Jessel, M.R., comments upon the former case. To give exclusive possession of any part of the premises to another is a breach of a covenant not to "part with the possession of the demised premises or any part thereof;" *Roe* v. *Sales*, 1 M. & S. 297; *Greenslade* v. *Tapscott*, 1 C. M. & R. 59; though Lord Ellenborough held that letting lodgings was not a breach of a condition not to "let, assign, transfer, set over, or part with the premises or any part thereof without special licence in writing;" *Doe* v. *Laming*, 4 Camp. 73. A deposit of a lease by way of equitable mortgage is not a breach of a covenant not "to let, set, assign, transfer, set over, or otherwise part with the premises or the lease;" *Doe* v. *Hogg*, 4 D. & R. 226; *Ex p. Drake*, 1 M. D. & De G. 539. A parol letting for a yearly tenancy is a breach of a covenant not "to underlease;" *Timms* v. *Baker*, 49 L. T. 106. An underlease for the whole term is an "assignment;" *Beardman* v. *Wilson*, L. R. 4 C. P. 57. A deed of assignment in trust for creditors, under s. 194 of the Bankruptcy Act, 1869, was held to be a breach of covenant not to "assign," and to cause a forfeiture; *Holland* v. *Cole*, 1 H. & C. 67; but an assignment, subsequently avoided in bankruptcy, as an act of bankruptcy, was held not to cause a forfeiture; *Doe* v. *Powell*, 5 B. & C. 308; the lessor may, however, in such a case, by the insertion of express words for that purpose, provided they be clear and distinct, make even such an assignment a forfeiture; *Roe* v. *Galliers*, 2 T. R. 133; *Davis* v. *Eyton*, 7 Bing. 154.

Assignment by operation of law, as bankruptcy.

An assignment by operation of law is no breach of a condition not to assign, unless such an event is brought about by the fraudulent procurement of the lessee himself; *Doe* v. *Carter*, 8 T. R. 57, 300; see *Doe* v. *Hawke*, 2 East, 481. Therefore if the lessee become bankrupt; *Doe* v. *Bevan*, 3 M. & S. 353; *Weatherall* v. *Geering*, 12 Ves. 504; *Doe* v.

Smith, 5 Taunt. 795: or if the lease be taken in execution; *Doe* v. *Carter*, *supra*; *Croft* v. *Lumley*, 5 E. & B. 648, 688, 6 H. L. C. 672: or if the land be taken under statutory powers; *Slipper* v. *Tottenham R. Co.*, 4 Eq. 112; *Baily* v. *De Crespigny*, L. R. 4 Q. B. 180: there is no breach of a condition not to alienate; see also *Doe* v. *Rugeley*, 6 Q. B. 107. There is frequently an express condition that the term shall be forfeited on the bankruptcy of the lessee, or the taking in execution of the term; *Davis* v. *Eyton*, 7 Bing. 154; *Roe* v. *Galliers*, 2 T. R. 133; *Ex p. Gould*, 13 Q. B. D. 454; and a condition that the lessee shall occupy personally may have the same effect; *Doe* v. *Clarke*, 8 East, 185. Where there was a proviso for re-entry if "the lessee, his executors, administrators, or assigns should become bankrupt," and the lessee had assigned with the consent of the lessor as provided by the lease, it was held that the subsequent bankruptcy of the lessee did not cause a forfeiture; *Smith* v. *Gronow*, (1891) 2 Q. B. 394.

Marriage. Devise.

Marriage did not operate as a forfeiture; *Anon.*, Moor, 21. Whether a devise be a breach of the condition not to assign, has been disputed; *Fox* v. *Swann*, Styles, 483; *Dumper* v. *Syms*, Cro. Eliz. 815; *Berry* v. *Taunton*, *Id.* 331; *Doe* v. *Bevan*, 3 M. & S. 353, 361, *per* Bayley, J.; *Crusoe* v. *Bugby*, 3 Wils. 234; *Doe* v. *Evans*, 9 A. & E. 719, 724, *arguendo*.

Who are bound where the covenant names assigns.

It has been thought that if executors and administrators be not expressly named in the condition, an assignment by them would not create a forfeiture; *Anon.*, Moor, 21; *Seers* v. *Hind*, 1 Ves. jun. 295; but see *per* James, L.J., in *Williamson* v. *Williamson*, L. R. 9 Ch. 732, where he said "the words, lessee or lessees, imply executors, administrators, or assigns." The mention of *assigns* includes administrators, for they are *assigns* in law; *More's Case*, Cro. Eliz. 26; *Thornhil* v. *King*, *Id.* 757; see *Cox* v. *Browne*, Cha. Rep. 170; so are executors; *Wollaston* v. *Hakewill*, 3 Scott, N. R. 593; *Sleap* v. *Newman*, 12 C. B. N. S. 116; even *de son tort*, *Paull* v. *Simpson*, 9 Q. B. 365.

How far covenant for assigns binding on assignees and trustees under the Bankruptcy Acts.

In *Doe* v. *Bevan*, 3 M. & S. 353, it was held that the assignees of a bankrupt might assign, although *assigns* were named in the condition, but in that case the assignees were ordered by the Court of Chancery to sell the lease, and the decision was before *Copeland* v. *Stephens*, 1 B. & Ald. 593, which established that the general assignment of a bankrupt's personal estate under the commission did not vest a term of

years in the assignees until their acceptance of it. The Bankruptcy Acts, 1849 and 1861, gave the assignees an election to accept or decline leases. Now under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 20, 54, 168, it seems that, immediately upon a debtor being adjudged bankrupt the term vests in his trustee, subject to a right of disclaimer exercisable under s. 55; see *Re Johnson*, 70 L. T. 381.

General decisions as to covenants not to assign.

A *general* condition not to assign, inserted in a lease to a man "*and his assigns*," was considered in *Stuckeley* v. *Butler*, Hob. 170, to be void for repugnancy, though it was admitted that a condition against assignment to a particular person would, even in such case, be good; but the former part of the above doctrine has been denied; *Dennis* v. *Loving*, Hard. 427; and in *Weatherall* v. *Geering*, 12 Ves. 504, 511, Grant, M.R., said, that assigns would in such a case be taken to mean such assigns as the lessee might lawfully have, viz. by licence, and that there was no repugnancy. It is laid down (see Sheppard's Touchstone, by Preston, 131; Co. Litt. 223 a) that in an assignment of the entire interest in a term already created, a condition generally, and not partially and upon due restraints, against assignment is void.

Improper withholding of licence to assign.

Where there was a covenant not to assign without licence, such licence not to be withheld "unreasonably or vexatiously," Stuart, V.-C., held that it was unreasonable and vexatious to withhold the licence for the purpose of obtaining a surrender of the lease; *Lehmann* v. *McArthur*, 3 Eq. 746; but the C. A. expressed doubts upon that point; 3 Ch. 496; see also *Treloar* v. *Bigge*, L. R. 9 Ex. 151, where consent was not to be "arbitrarily withheld;" *Hyde* v. *Warden*, 3 Ex. D. 72, where consent was not to be withheld in the case of a "respectable and responsible person;" *Sheppard* v. *Hong Kong Bank*, 20 W. R. 459, where consent was not to be withheld "without some reasonable objection;" and *Harrison* v. *Barrow*, 63 L. T. 834, where consent was not to be "unreasonably refused, or refused to a respectable and responsible person."

Assignment without consent.

If in such cases the consent of the lessor is improperly withheld, an assignment without consent does not cause a forfeiture; *Treloar* v. *Bigge*, *supra*; *Hyde* v. *Warden*, *supra*; *Scar* v. *House Soc.*, 16 Ch. D. 387; *Burford* v. *Unwin*, 1 C. & E. 494. If, however, the lessee assigns without asking for consent, although, if asked for, consent could not be

properly withheld, a forfeiture is incurred; *Barrow* v. *Isaacs*, (1891) 1 Q. B. 417; *Lepla* v. *Rogers*, (1893) 1 Q. B. 31. It seems that a covenant not to assign without a licence is not a proper and usual covenant which a lessor is entitled to have under an agreement for a lease, apart from express stipulation; *Church* v. *Brown*, 15 Ves. 258; *Hodgkinson* v. *Crowe*, 10 Ch. 622; *Hampshire* v. *Wickens*, 7 Ch. D. 555; *Re Anderton*, 45 Ch. D. 476; *Re Lander*, (1892) 3 Ch. 41. On a mere agreement not to underlet a condition of re-entry on breach is not implied; *Crawley* v. *Price*, L. R. 10 Q. B. 302.

Negative covenants. Perform."

A proviso for re-entry may be reserved upon breach of *negative* as well as of *positive* covenants. In some cases it has been said that the word "perform," used in a proviso for re-entry, is not applicable to breaches of *negative* covenants, but that some such word as "observe" or "keep" must be used for that purpose; *West* v. *Dobb*, L. R. 5 Q. B. 460; *Wadham* v. *Postmaster-General*, L. R. 6 Q. B. 644, 648; *Hyde* v. *Warden*, 3 Ex. D. 72, 82; *Evans* v. *Davis*, 10 Ch. D. 747: but in *Barrow* v. *Isaacs*, (1891) 1 Q. B. 417, 419, 424, the C. A. thought that there was no good ground for this distinction.

Apportionment of conditions, 22 & 23 Vict. c. 35, s. 3. 44 & 45 Vict. c. 41, s. 12.

By 22 & 23 Vict. c. 35, s. 3, where the reversion on a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion is entitled in respect of the apportioned rent to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation; and by the Conveyancing Act, 1881, s. 12, it is provided, with respect to leases made after the commencement of that Act, "that notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition, contained in the lease, shall be apportioned, and shall remain annexed to the several parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease." The

assignee of part of the reversion in the entire of the land may take advantage of a condition; *Wright* v. *Burroughes*, 3 C. B. 685; *Taite* v. *Gosling*, 11 Ch. D. 273: see as to the indivisibility of a condition precedent, *Neale* v. *Ratcliff*, 15 Q. B. 916.

Notice of assignment.

Except in the case of forfeiture for non-payment of rent (see 4 Ann. c. 16, s. 10), the assignee of the reversion can enforce a forfeiture without giving the tenant notice of the assignment; *Scaltock* v. *Harston*, 1 C. P. D. 106.

Conveyancing Act, 1881, 44 & 45 Vict. c. 41.

Notice before forfeiture.

By the Conveyancing Act, 1881, s. 14, a right of re-entry or forfeiture is not enforceable, by entry or otherwise, unless and until the lessor has served the lessee with a notice specifying the breach complained of, and requiring the lessee to remedy the same, if it can be remedied, and to make compensation, and the lessee has failed to comply with such notice within a reasonable time. This provision, however, does not extend to forfeitures for non-payment of rent, or for assigning, underletting, parting with the possession of, or disposing of the premises, or on bankruptcy of the lessee, or the taking in execution of his interest (s. 14, sub-s. 6). By s. 2, sub-s. 2, of the Conveyancing Act, 1892, the provisions of s. 14 of the above Act are now made to apply, to some extent, to forfeitures on bankruptcy or taking in execution; those provisions are made to apply during one year from the date of the bankruptcy or taking in execution, and to continue to apply if the lessee's interest is sold during that year. Leases of agricultural or pastoral land, of public-houses, of furnished houses, or of any property in respect of which the personal qualifications of the tenant are important, are, however, excepted from the operation of the Act of 1892 (s. 2, sub-s. 3).

Exceptions.

Conveyancing Act, 1892, 55 & 56 Vict. c. 13.

The provisions of s. 14 of the Act of 1881 apply to all leases made before or after the Act, and take effect notwithstanding any stipulation to the contrary. It was decided that s. 14 did not apply to an agreement for a lease; *Swain* v. *Ayres*, 21 Q. B. D. 289; but now, by s. 5 of the Act of 1892, s. 14 is made applicable to an agreement for a lease "where the lessee has become entitled to have his lease granted."

Agreement for a lease.

The notice to be given under s. 14 need not demand compensation; *Lock* v. *Pearce*, (1893) 2 Ch. 271. The lessor can, in the notice, claim only such compensation as might have been recovered by him in an action for breach of covenant; *Skinners Co.* v. *Knight*, (1891) 2 Q. B. 542.

Relief in equity.

A court of equity would not relieve a lessee, merely on the ground that it could give compensation, upon breach of any covenant in a lease except the covenant to pay rent; but it would relieve in case of breach occasioned by fraud, accident, surprise, or mistake; *Hill* v. *Barclay*, 18 Ves. 63; *Barrow* v. *Isaacs*, (1891) 1 Q. B. 417. In the last case the lessee's solicitor omitted to look at the lease, and forgot that there was a covenant not to assign without consent, and it was held that the lessee was not entitled to equitable relief from forfeiture for assigning without consent. There is no case in which equitable relief from a forfeiture for breach of covenant not to assign has been granted; but it has been refused; *Wafer* v. *Mocato*, 9 Mod. 112; see *Reynolds* v. *Pitt*, 19 Ves. 134, 141; *Davies* v. *Moreton*, 2 Ch. Ca. 127; *Lovat* v. *Ranelagh*, 3 V. & B. 24, 31.

Relief under Conveyancing Act, 1881.

In cases which are within the provisions of s. 14 of the Conveyancing Act, 1881 (see *ante*), where a lessor is proceeding, by action or otherwise, to enforce a forfeiture, the lessee may apply for relief in the lessor's action, if any, or in an action brought by himself. The court may on such application grant or refuse relief, and may grant it on such terms as it thinks fit; see *Quilter* v. *Mapleson*, 9 Q. B. D. 672; *North London Co.* v. *Jacques*, 49 L. T. 659; *Mitchison* v. *Thomson*, 1 C. & E. 72; *Bridge* v. *Quicke*, 67 L. T. 54. This application cannot be made after the lessor has actually re-entered; *Quilter* v. *Mapleson*, 9 Q. B. D. 672; *Rogers* v. *Rice*, (1892) 2 Ch. 170.

The underlessee of a lessee cannot obtain relief against the original lessor, under s. 14, but can obtain relief only when his own lessor is proceeding against him; *Burt* v. *Gray*, (1891) 2 Q. B. 98; *Cresswell* v. *Davidson*, 56 L. T. 811; *Nind* v. *Nineteenth Century Soc.*, (1894) 2 Q. B. 226. An underlessee can, however, obtain a vesting order, under s. 4 of the Conveyancing Act, 1892, by applying to the court while the lessor is proceeding to enforce a forfeiture; see *Cholmeley School* v. *Sewell*, (1894) 2 Q. B. 906.

In cases not within s. 14, relief may sometimes be obtained under the equitable jurisdiction of the courts; see *Barrow* v. *Isaacs*, (1891) 1 Q. B. 417; and, in cases of non-payment of rent, under s. 212 of the C. L. P. Act, 1852, and s. 1 of the C. L. P. Act, 1860; see *Hare* v. *Elms*, (1893) 1 Q. B. 604.

SPENCER'S CASE.

PASCH. 25 ELIZ.—IN THE KING'S BENCH.

[REPORTED 5 COKE, 16.]

Covenants—What covenants run with the land.

SPENCER and his wife brought an action of (*a*) covenant against Clark, assignee to J. assignee to S., and the case was such: Spencer and his wife by deed indented demised a house and certain land (in the right of his wife) to S. for a term of 21 years, by which indenture S. covenanted for him, his executors and administrators, with the plaintiffs, that he, his executors, administrators, or assigns, would build a brick wall upon part of the land demised, &c. S. assigned over his term to J., and J. to the defendant; and for not building of the brick wall the plaintiff brought the action of covenant against the defendant as assignee: and after many arguments at the bar, the case was excellently argued and debated by the justices at the bench: and in this case these points were unanimously resolved by Sir Christopher Wray, Chief Justice, Sir Thomas Gawdy, and the whole court; and many differences taken and agreed concerning express covenants, and covenants in law, and which of them would run with the land, and which of them are collateral, and do not go with the land, and where the assignee shall be bound without naming him, and where not; and where he shall not be bound, although he be expressly named, and where not.

1. When the covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *quodammodo* annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee (*b*), although

(*a*) 2 Bulstr. 281, 282. Comberb. 64. Carth. 178. Skinner, 211, 297. 3 Wilson, 27. Cro. Jac. 439. Moor, 159.

(*b*) Moor, 27, 399. Cro. El. 457, 552, 553. 1 Roll. 521, 522. 1 Sand. 239. Cr. Jac. 125. Cr. Car. 222, 523. 1 Jones, 245. 1 Siderf. 157. 1 Anders. 82. 1 Show. 284. 4 Mod. 80. 3 Lev. 326. Salk. 185, 317.

he be not bound by express words; but when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being; as if the lessee covenants to repair the houses demised to him during the term, that is parcel of the contract, and extends to the support of the thing demised, and therefore is *quodammodo* annexed appurtenant to houses, and shall bind the assignee although he be not bound expressly by the covenant: but in the case at bar the covenant concerns a thing which was not *in esse* at the time of the demise made (*c*), but to be newly built after, and therefore shall bind the covenantor, his executors or administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being.

2. It was resolved that in this case, if the lessee had covenanted for him *and his* (*d*) *assigns*, that they would make a new wall upon some part of the thing demised, that forasmuch as it is to be done upon the land demised, that it should bind the assignee: for although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore shall bind the assignee *by express words*. So on the other side, if a warranty be made to one, his heirs and assigns, by express words, the assignee shall take benefit of it, and shall have a (*e*) *Warrantia Chartæ*; F. N. B. 135; & 9 E. 2, *Garr' de Charters*, 30; 36 E. 3, *Garr*, 1; 4 H. 8, Dyer, 1. But although the covenant be for him and his assigns, yet if the thing to be done be *merely collateral to the land*, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged. As if the lessee covenants for him and his assigns to build a house upon the land of the lessor which is no parcel of the demise, or to pay any collateral sum to the lessor, or to a stranger, it shall not bind the assignee, because it is merely collateral, and in no manner touches or concerns the thing that was demised, or that is assigned over; and therefore in such case the assignee of the thing demised cannot be charged with it, no more than any other stranger.

(*c*) Cr. El. 457. Cr. Jac. 439. Dyer, 14, pl. 69. 1 Anders. 82. Moor, 159. 1 Roll. Rep. 360. Moor, 159, 392.

(*d*) Cr. Car. 25, 188. 1 Jones, 223.

(*e*) F. N. B. 135.

3. It was resolved, if a man leases (*f*) sheep or other stock of cattle, or any other personal goods for any time, and the lessee covenants for him and his assigns at the end of the time to deliver the like cattle or goods as good as the things letten were, or such price for them; and the lessee assigns the sheep over; this covenant shall not bind the assignee, for it is but a personal contract, and wants such (*g*) privity as is between the lessor and lessee and his assigns of the land in respect of the reversion. But in the case of a lease of personal goods there is not any privity, nor any reversion (*h*), but merely a thing in action in the personalty, which cannot bind any but the covenantor (*i*), his executors or administrators, who represent him. The same law, if a man demise a house and land for years, with a stock or sum of money, rendering rent (*k*), and the lessee covenants for him, his executors, administrators, and assigns, to deliver the stock or sum of money at the end of the term, yet the assignee shall not be charged with this covenant; for although the rent reserved was increased in respect of the stock or sum, yet the rent did not issue out of the stock or sum (*l*), but out of the land only; and therefore as to the stock or sum the covenant is personal, and shall bind the covenantor, his executors and administrators, and not his assignee. And it is not certain that the stock or sum will come to the assignee's hands, for it may be wasted, or otherwise consumed or destroyed by the lessee, and therefore the law cannot determine, at the time of the lease made, that such covenant shall bind the assignee.

4. It was resolved, that if a man makes a feoffment by this word (*m*) *dedi*, which implies a warranty, the assignee of the feoffee shall not vouch; but if a man makes a lease for years by this word *concessi* (*n*) or *demisi*, which implies a covenant, if the assignee of the lessee be evicted, he shall have a writ of

(*f*) 2 Jones, 152. 1 Leon. 43. Swinb. 224.

(*g*) Cr. Car. 188.

(*h*) 1 Leon. 43.

(*i*) Swinb. 324.

(*k*) See *Dean of Windsor* v. *Gower*, 2 Wms. Saund. 301; *Gardiner* v. *Williamson*, 2 B. & Ad. 336; *Lord Mountjoy's Case*, 5 Co. 4; *Jewel's Case*, *ib.* 3.

(*l*) Kelw. 153 b. 1 And. 4. Dyer, 56, pl. 15, 16, 212, pl. 37, 38. 21 E. 4, 29 a. 3 Bulst. 291. 9 E. 4, 1 b.

(*m*) 2 Inst. 275. 4 Co. 81 a. 1 Co. 2 b. Co. Lit. 384 a. Yelv. 139. Perk. Sect. 124.

(*n*) 4 Co. 81 a. Yelv. 139. Co. Lit. 384 a. Perk. Sect. 124. Dall. 101. Cr. Jac. 73. 2 Inst. 276. F. N. B. 134 h. Hob. 12. 1 Vent. 44. Rol. 521. (See 8 & 9 Vict. c. 106, s. 4.)

covenant: for the lessee and his assignee hath the yearly profits of the land, which shall grow by his labour and industry, for an annual rent; and therefore it is reasonable, when he hath applied his labour, and employed his cost upon the land, and be evicted (whereby he loses all), that he shall take such benefit of the demise and grant as the first lessee might, and the lessor hath no other prejudice than what his especial contract with the first lessee hath bound him to.

5. Tenant by the courtesy, or any other who comes *in* in the *post*, shall not vouch (which is in lieu of an action). But if (*o*) a ward be granted by deed to a woman who takes husband, and the woman dies, the husband shall vouch by force of this word *grant*, although he comes to it by act in law. So if a man demises or grants land to a woman for years, and the lessor covenants with the lessee to repair the houses during the term, the woman marries and dies, the husband shall have an action of covenant as well on the covenant in law on these words (demise or grant) as on the express covenant. The same law is of tenant by statute-merchant or statute-staple or *elegit* of a term, and he to whom a lease for years is sold by force of any execution shall have an action of covenant in such case as a thing annexed to the land, although they come to the term by act in law; as if a man grants to lessee for years, that he shall have so many (*p*) estovers as will serve to repair his house, or as he shall burn in his house, or the like, during the term, it is as appurtenant to the land, and shall go with it as a thing appurtenant, into whose hands soever it shall come.

6. If lessee for years covenants to repair the houses during the term (*q*), it shall bind all others as a thing which is appurtenant, and goeth with the land, in whose hands soever the term shall come, as well those who come to it by act in law, as by the act of the party, for all is one having regard to the lessor. And if the law should not be such, great prejudice might accrue to him; and reason requires that they who shall take benefit of such covenant when the lessor makes it with the lessee, should, on the other side, be bound by the like covenant when the lessee makes it with the lessor.

(*o*) 2 Roll. 743. See *post*, p. 57.
(*p*) 5 Co. 24 b. F. N. B. 181 n.
(*q*) 5 Co. 16 a, b. 5 Co. 24 b. Cr. Jac. 240, 309, 439. 1 Jones, 223. Cr. El. 373. 1 Sid. 157. 2 Vern. 275. 1 B. & B. 238.

7. It was resolved that the assignee (*r*) of the assignee should have an action of covenant. So of the executors of the assignee of the assignee; so of the assignee of the executors or administrators of every assignee, for all are comprised within this word (*assignees*), for the same right which was in the testator, or intestate, shall go to his executors or administrators (*s*); as if a man makes a warranty to one, his heirs and assigns, the assignee (*t*) of the assignee shall vouch, and so shall the heirs of the assignee; the same law of the assignee of the heirs of the feoffee, and of every assignee. So every one of them shall have a writ of *Warrantia Chartæ*. *Vide* 14 E. 3, Garr. 33; 38 E. 3, 21; 36 E. 3, Garr. 1; 13 E. 1, Garr. 93; 19 E. 2, Garr. 85, &c. For the same right, which was in the ancestor, shall descend to the heir in such case without express words of the heirs of the assignees.

Observe, reader, your old books, for they are the fountains out of which these resolutions issue; but perhaps by these differences the fountains themselves will be made more clear and profitable to those who will make use of them. For example (*u*), in 42 E. 3, 3, the case is: grandfather, father, and two sons: The grandfather was seised of the manor of D., whereof a chapel was parcel: a prior, with the assent of his convent, by deed covenanted for him and his successors, with the grandfather and his heirs, that he and his convent would sing all the week in his chapel, parcel of the said manor, for the lords of the said manor and his servants, &c.: the grandfather did enfeoff one of the manor in fee, who gave it to the younger son and his wife in tail; and it was adjudged that the tenants in tail as (*x*) terre-tenants (for the elder brother was heir), should have an action of covenant against the prior, for the covenant is to do a thing which is annexed to the chapel, which is within the manor, and so annexed to the manor, as it is there said. And Finchden related that he had seen it adjudged, that two (*y*) coparceners made partition of land, and one did covenant with the other to acquit him of suit, which was due, and that coparcener to whom

(*r*) 1 Roll. 521. 1 Roll. Rep. 81, 82. 2 Bulst. 281. Owen, 151, 152.

(*s*) See *Sharp* v. *Newman*, 12 C. B. N. S. 116.

(*t*) Cr. El. 534. Co. Lit. 384 b.

(*u*) Co. Lit. 384 a. 1 Roll. 520, 521. Br. Covenant, 5. Statham Covenant, 3.

(*x*) Co. Lit. 385 a. 8 Co. 145 a.

(*y*) 1 Roll. 521. Co. Lit. 384 b, 385 a. 42 E. 3, 3 b. Br. Covenant, 5. 1 Roll. Rep. 81.

the covenant was made did alien, and the suit was arrear; and the feoffee brought a writ of covenant against the coparcener to acquit him of the suit; and the writ was maintainable notwithstanding he was a stranger to the covenant, because the acquittal fell upon the land; but if such covenant were made to say divine service in the (*z*) chapel of another, there the assignee shall not have an action of covenant, for the covenant in such case cannot be annexed to the chapel, because the chapel doth not belong to the covenantee, as it is adjudged in (*a*) 2 H. 4, 6 b. But there it is agreed that if the covenant had been with the lord of the manor of D. and his heirs, lords of the manor of D., and inhabitants therein, the covenant shall be annexed to the manor, and there the terretenant shall have the action of covenant without privity of blood. *Vide* 29 E. 3, 48, and 30 E. 3, 14, *Simpkin* (*b*) *Simeon's Case*, where the case was, that Lady Bardolf, by deed granted a ward to a woman who married Simpkin Simeon, against whom the Queen brought a writ of right of ward, and they vouched the Lady Bardolf, and afterwards the wife died, by which the chattel (*c*) real survived to the husband (and resolved that the writ should not abate), the vouchee appeared, and said, what have you to bind me to warranty? The husband showed how that the lady granted to his wife, before marriage, the said ward; the vouchee demanded judgment for two causes.

1. Because no word of warranty was in the deed: as to that it was adjudged that this word (*d*) (*grant*) in this case of grant of a ward (being a chattel real) did import in itself a warranty.

2. Because the husband was not assignee to the wife, nor privy. As to *that* it was adjudged that he should vouch, for this warranty implied in this word (*grant*), is in case of a chattel real so annexed to the land, that the husband who comes to it by act in law, and not as assignee, should take benefit of it. But it was resolved by Wray, Chief Justice, and the whole court, that this word (*concessi* or *demisi*), in case of (*e*) freehold or inherit-

(*z*) 1 Roll. 521.

(*a*) Co. Lit. 385 a. Fitz. Covenant, 13. Br. Covenant, 17. F. N. B. 181 a.

(*b*) Co. Lit. 384 a. 2 Roll. 743, 744. 3 Bulst. 165. Hob. 47. 1 Roll. Rep. 81. Cr. El. 436.

(*c*) 1 Roll. 345. Co. Lit. 351 a.

(*d*) Co. Lit. 384 a, 101 b.

(*e*) Co. Lit. 384 a.

ance, doth not import any warranty; 11 H. 6, 45, *acc'*; *vide* 6 H. 4; 12 H. 4, 5; 1 H. 5, 2; 25 H. 8, Covenant Br. 32; 28 H. 8, Dyer, 28; 48 E. 3, 22; F. N. B. 145 C., 146, & 181; 9 Eliz., Dyer, 257; 26 H. 8, 3; 5 H. 7, 18; 32 H. 6, 32; 22 H. 6, 51; 18 H. 3, Covenant, 30; Old N. B., Covenant; 46 H. 3, 4; 38 E. 3, 24. See the statute of (*f*) 32 H. 8, c. 34; which act was resolved to extend to covenants which touch or concern the thing demised and not to collateral covenants.

(*f*) 32 H. 8, c. 34. Moor, 159. Cr. Jac. 523. 2 Bulst. 281, 282, 283. 1 Sand. 238, 239. Cr. Car. 25, 222. 1 Anders. 82. 2 Jones, 152. Owen, 152. 1 Style, 316, 317. Co. Lit. 215 a.

This is the leading case referred to upon every question whether a particular covenant does or does not run with particular lands, or a particular reversion.

When a covenant is said to run with the land.

When with reversion.

A covenant is said to run with land, when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that land. A covenant is said to run with the reversion, when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that reversion.

Questions upon this branch of the law generally arise between the lessor of lands or his assignee, and the lessee thereof or his assignee; and we will, therefore, briefly consider the subject with reference to persons holding those characters before enquiring into it with reference to persons not occupying those relations to each other.

Covenants between Lessor and Lessee.

Semble at common law covenants did not run with reversion.

An opinion has sometimes been intimated that there were, even at common law, some covenants which ran with the reversion. The authorities, however, seem to preponderate in favour of the doctrine of Serjeant Williams, who, in *Thursby* v. *Plant*, 1 Wms. Saund. 300, n. 10, says that "the better opinion seems to be, that the assignee of the reversion could not bring an action of covenant at common law." And the cases will be best reconciled, and the whole subject rendered far more intelligible, if we adopt the view taken by the learned and eminent personages who have

since edited that work (vol. 1, 240 a., note (*o*)), viz., "that *at common law covenants ran with the land, but not with the reversion.* Therefore, the assignee of the lessee was held to be liable in covenant and to be entitled to bring covenant, but the assignee of the lessor was not;" see *Butler* v. *Archer*, 12 Ir. C. L. R. 104, 127, *per* Lefroy, C.J.

32 H. 8, c. 34, s. 1. Assignees of reversion to have like remedies against lessees and their assigns as lessors had.

Such being the state of the common law, the statute 32 H. 8, c. 34, after reciting, among other things, that by the common law no stranger to any covenant could take advantage thereof, but only such as were parties or privies thereto, enacted that all persons and bodies politic, their heirs, successors, and assigns, having any gift or grant of the king of any lands or other hereditaments, or of any reversion in the same, which belonged to any of the dissolved monasteries, or by any other means came to the king's hands, since the 4th Feb., 1535, or which at any time before the passing of this Act belonged to any other person and after came to the king's hands, and all other persons being grantees or assignees to or by the king or any other person, and their heirs, executors, successors, and assigns, shall have like advantages against the lessees, their executors, administrators, and assigns, by entry, for non-payment of the rent or for doing waste or other forfeiture, and by action only, for not performing other conditions, covenants, or agreements, expressed in the indentures of leases and grants, against the said lessees and grantees, their executors, administrators, and assignees, as the lessors and grantors, their heirs, or successors, might have had.

S. 2. Lessees and their assigns to have the like remedies against assignees of reversion as lessees had against their lessors.

S. 2 enacted that all lessees and grantees of lands, or other hereditaments, for terms of years, life or lives, their executors, administrators, or assigns, shall have like action and remedy against all persons and bodies politic, their heirs, successors, and assigns, having any gift or grant, of the king or any other person, of the reversion of the lands and hereditaments so letten, or any parcel thereof, for any condition or covenant expressed in the indentures of their leases, as the same lessees might have had against the lessors and grantors, their heirs and successors.

44 & 45 Vict. c. 41.

The Conveyancing Act, 1881, ss. 10, 11, also contains some important provisions on this subject, the effect of which will be considered below.

Leases not under seal not within 32 H. 8, c. 34.

Leases not under seal are not within the meaning of 32 H. 8, c. 34, *Brydges* v. *Lewis*, 3 Q. B. 603; *Standen* v. *Chrismas*, 10 Id. 135; *Elliot* v. *Johnson*, L. R. 2 Q. B. 120;

and the remedy upon the stipulations contained in them is by action in the name of the original stipulator; *Bickford* v. *Parson*, 5 C. B. 920. In the case, however, of parol tenancies, when there has been an acceptance of rent or other act affirming the tenancy, a jury may infer that the parties consented to continue, after the assignment, upon the terms of the original letting, and "a conventional law is thus made equivalent to that of H. 8 in the case of leases under seal;" *Cornish* v. *Stubbs*, L. R. 5 C. P. 334, per Willes, J.; *Smith* v. *Eggington*, 9 Id. 145; cf. *Mansel* v. *Norton*, 22 Ch. D. 769.

Statute extends only to covenants which touch the thing demised.

Although the words of this Act are very general, and, taken literally, would comprehend every covenant expressed in the lease, yet it is settled, as we are informed in the principal case (p. 58), that *it extends only to covenants which touch and concern the thing demised, and not to collateral covenants*; see *Webb* v. *Russell*, 3 T. R. 402; 1 Inst. 215 b.; Shepp. Touch. 176.

Assignee of part of the reversion is an assignee within statute.

It is also settled that an assignee of part of the reversion, *e.g.* for years, is an assignee within the meaning of the Act; 1 Inst. 215 a; *Kidwelly* v. *Brand*, Plowd. 72; *Baxter* v. *Hemmings*, 2 Bulstr. 281, per Coke, C.J., citing *Leonard's Case*; *Wright* v. *Burroughes*, 4 D. & L. 226; 3 C. B. 685;

And of reversion in part of the land.

and so also is the assignee of the reversion in part of the land, as far as covenants are concerned; *Twynam* v. *Pickard*, 2 B. & Ald. 105; *Simpson* v. *Clayton*, 4 B. N. C. 758, 780; though, prior to 22 & 23 Vict. c. 35, s. 3, and the Conveyancing Act, 1881, he was not so for the purpose of availing himself of conditions, for they could not be apportioned by the act of the party; see *Dumpor's Case*, and the notes thereto, *ante*, p. 49. The original reversioner, after he has assigned the reversion in part of the land, may maintain covenant; *Swansea* v. *Thomas*, 10 Q. B. D. 48.

Assignee of term in part of the land.

The assignee of the term in part of the land is within the Act; *Palmer* v. *Edwards*, Doug. 121; *Twynam* v. *Pickard*, 2 B. & Ald. 105; 2 Wms. Saund. 181 d.; so is the assignee of the reversion into which a share of the term has merged; *Baddeley* v. *Vigurs*, 4 E. & B. 71; and the assignee of some of the joint tenants of a term where the covenant is joint and several; *Norval* v. *Pascoe*, 34 L. J. Ch. 82. A

Grantee of reversion in copyholds.

grantee of the reversion in copyhold lands is also an assignee within the meaning of the Act; *Glover* v. *Cope*, 3 Lev. 326; *Whitton* v. *Peacock*, 3 Myl. & K. 325. In *Isherwood* v. *Oldknow*, 3 M. & S. 382, where lands were devised to A.

for life, remainder to B. for life, with power to A. to make leases, and A. made a lease to C. and died during the term demised, it was held that B. should sue upon the covenants; "the question," said Le Blanc, J., "is—*Is the plaintiff an assignee?* He is the person next in remainder to the person granting the lease; true, he is not assignee of the lessor: he is assignee of the devisor. But I take it to be clear that the lease must be considered as emanating from the person who creates the power, and that it derives its force and authority from him. . . . The argument is, that he cannot have this action because he must be assignee of the person of the lessor or grantor. But he is the assignee of the person who, in the eye of the law, is the lessor: because the person empowering the tenant for life to grant the lease is, in the eye of the law, the lessor. The doctrine of Lord Coke in *Whitlock's Case*, 8 Rep. 70, entitles the court to say upon principle that this plaintiff was the assignee of him who, in contemplation of law, was the lessor, and that as such he is entitled to this action;" see also *Greenaway* v. *Hart*, 14 C. B. 340, and *Rogers* v. *Humphreys*, 4 A. & E. 299.

Devisee in remainder.

It seems, that a tenant from year to year, who demises by indenture for a term of years, however long, has, by reason of the possibility of his estate continuing longer than the demised term, a reversion with which the benefit of the covenants in the indenture may pass to an assignee during the existence of the tenancy from year to year; *Oxley* v. *James*, 13 M. & W. 209.

Reversion of tenant from year to year.

Both the benefit and burden of covenants, therefore, after 32 H. 8, c. 34, ran with the reversion from assignee to assignee, in the same manner as they ran, at common law, from assignee to assignee of the land. In order, however, that the covenants might continue available for the benefit of the reversioner, it was held to be absolutely necessary that he should continue to be seised or possessed of the same reversion to which the covenants were incident; for, if it happened to be merged by his becoming the owner of some other reversion in the same land, the covenants were altogether gone. Thus, in *Threr* v. *Barton*, Moore, 94, a person made a lease for 100 years; the lessee made an underlease for 20 years, rendering rent, with a clause of re-entry; afterwards, the original lessor granted the reversion in fee, and the grantee purchased the reversion of the term. It was held the grantee should not have either the rent or

Covenants now run with reversion as with land.

Effect of merger of reversion.

the power of re-entry, for the reversion of the term to which they were incident was extinguished in the reversion in fee; see also *Webb* v. *Russell*, 3 T. R. 402; *Wootton* v. *Steffenoni*, 12 M. & W. 132, where Parke, B., put the question—If tenants in common demise their undivided interests, and there is a joint covenant with both, will that run with the reversion? The answer to which was, that it would, but with the entire reversion only; *Thompson* v. *Hakewill*, 19 C. B. N. S. 713.

Tenants in common.

When lease renewed.

One of the consequences of the above doctrine was, that when lands were leased with a stipulation for renewal, and the lessee accepted a new lease, his remedies for rent and on the covenants contained in any underlease he might have made were completely gone, since the reversion was destroyed to which they were incident. To obviate these evils, 4 G. 2, c. 28, s. 6, enacted, that in case any lease shall be surrendered in order to be renewed, the new lease shall be as valid, to all intents, as if the underlease had been likewise surrendered before the taking of the new lease; and that the remedies of the lessees against their under-tenants shall remain unaltered, and the chief landlord shall have the same remedy by distress and entry for the rents and *duties* reserved in the new lease, so far as the same exceed not the rents and *duties* reserved in the former lease, as he would have had in case such former lease had been still continued. See on the construction of this latter provision, *Doe* v. *Marchetti*, 1 B. & Ad. 715; and *Ecclesiastical Commissioners* v. *Treemer*, (1893) 1 Ch. 166, 174.

Stat. 4 Geo. 2, c. 28, s. 6.

Rents and duties.

Merger does not extinguish covenants, when.

Real Property Act, 1845, s. 9.

The loss of the reversion by *merger* has now, in certain cases, ceased to operate as an extinguishment of the rent and covenants, by virtue of 8 & 9 Vict. c. 106, s. 9, which enacted that when the reversion expectant on a lease of any tenements or hereditaments, of any tenure, shall be surrendered or merged, "the estate, which shall for the time being confer, as against the tenant under the same lease, the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease." And the Judicature Act, 1873, by s. 25, sub-s. 4, provides that there shall not be "any merger, by operation of law only, of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity." As to when a lease will

Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 4.

be regarded in equity as still subsisting, notwithstanding a legal merger, see *Brandon* v. *Brandon*, 31 L. J. Ch. 47.

Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 10.

The Conveyancing Act, 1881, provides that rent, and the benefit of all covenants by the lessee "having reference to the subject matter" of the lease, and of all conditions, shall run with the reversionary estate, notwithstanding severance, in favour of the person for the time being entitled to the income of the whole, or part, of the land leased (s. 10); and that the obligation of all covenants by the lessor "with reference to the subject matter" of the lease shall run with the reversionary estate, or the several parts thereof, notwithstanding any severance, in favour of the person in whom the term is for the time being vested, and against the person for the time being entitled to the reversionary estate, if and so far as the lessor has power to bind such estate and the person for the time being entitled thereto (s. 11). It also provides that every condition contained in a lease shall be apportioned upon severance, in any manner, of the reversionary estate, or upon avoidance or cesser of the term as to part of the land, and shall operate as if the land comprised in each severed part, or as to which the term remains subsisting, had been alone comprised in the lease (s. 12). These sections apply only to leases made after 31st Dec., 1881.

Benefit of covenants and conditions to run with reversion.

S. 11.

Obligation of lessor's covenants to run with reversion.

S. 12.

Apportionment of conditions.

Effect of the Act.

These sections do not seem to alter the previous law so far as the running of covenants with the reversion is concerned. S. 10 apparently enables the beneficial owner for the time being of the whole or part of the land leased to sue upon the covenants, and enforce the conditions, whether he be the owner of the legal reversion or not, and whether or not there be any reversion by estoppel. If so, it enables the donee of a power of leasing, having himself no legal estate, to sue upon the covenants in a lease made under the power, and referring thereto, provided he be the person entitled to the income, which he could not, apart from estoppel, have done under the former law; see *Yellowly* v. *Gower*, 11 Ex. 274, 291.

The concluding words of s. 11, imposing the obligation of the covenant on the person from time to time entitled to the reversionary estate, if and as far as the lessor has power to bind him, seem to be merely a restatement of the law as previously settled; see *Isherwood* v. *Oldknow*, 3 M. & S. 382; *Greenaway* v. *Hart*, 14 C. B. 340; and *Yellowly* v. *Gower*, *supra*.

By virtue of ss. 10 and 11, when a mortgagor in possession has granted a lease under the provisions of s. 18 of the Act, the mortgagee upon giving notice of his intention to take possession becomes the reversioner, and is entitled to the benefit of the covenants and conditions in the lease, and is subject to the obligation of the covenants entered into by the mortgagor; *Municipal Society* v. *Smith*, 22 Q. B. D. 70; *Wilson* v. *Queen's Club*, (1891) 3 Ch. 522.

Apportionment of conditions.

The above provisions as to apportionment of conditions have made a considerable alteration in the law. As we have already seen, the assignee of a part of the reversion in the whole of the land could take advantage both of covenants and conditions, but an assignee of the reversion in part of the lands, though an assignee as to covenants, was not so as to conditions. The law on this point was modified by 22 & 23 Vict. c. 35, s. 3 (*ante*, p. 49), which enabled the assignee of each part of the reversion, when severed, to take the benefit of a condition for re-entry on *non-payment of rent*, when the rent had been legally apportioned. The sections, however, under discussion apportion *all* conditions which previously would have run with the unsevered reversion. They must, of course, be limited to such conditions as are applicable to the severed parts.

22 & 23 Vict. c. 35, s. 3.

Conveyancing Act, 1881.

S. 58, which provides that covenants relating to land of inheritance are to be deemed to be made with the covenantee, his heirs and assigns, as though they were expressed, and that those relating to land not of inheritance are to be deemed to be made with the covenantee and his assigns as though they were expressed, seems to be a mere re-statement of the existing law. The benefit of covenants, if capable of running at all, ran to the heir and assign of the covenantee, whether named or not; see *Lougher* v. *Williams*, 2 Lev. 92; *The Priors' Case, supra*, p. 56; Co. Litt. 385 a.

What covenants run with the land.

Let us now see what covenants have been decided to *relate to*, or "*touch and concern*," *the land*, or to have "reference to the subject matter of the lease," in such a way that their benefit or burden is capable of running with it. On this subject it may be laid down as a general rule, that all *implied* covenants run with the land. Thus it was resolved in *Spencer's Case*, 4th resolution, that "if a man makes a lease for years by the word *concessi* or *demisi*, which implies a covenant, if the assignee of the lessee be evicted, he shall have a writ of covenant." Since 8 & 9 Vict. c. 106, s. 4, *concessi* does not imply a covenant; but *demisi* still implies

All implied covenants.

one for quiet enjoyment; *Bandy* v. *Cartwright*, 8 Exch. 913; *Penfold* v. *Abbott*, 32 L. J. Q. B. 67. See *post*, p. 161.

What express covenants.

Whether a particular *express* covenant sufficiently "*touches and concerns the thing demised*," to be capable of running with the land, is not unfrequently a question of difficulty. The following, however, certainly do so. For quiet enjoyment; *Noke* v. *Awder*, Cro. Eliz. 436; *Campbell* v. *Lewis*, 3 B. & Ald. 392. Further assurance; *Middlemore* v. *Goodale*, Cro. Car. 503. Renewal; *Roe* v. *Hayley*, 12 East, 464; *Simpson* v. *Clayton*, 4 B. N. C. 758. To repair; *Dean of Windsor's Case*, 5 Rep. 24; 1 Rolle Abr. 521 (l); and *the principal case*. To put in repair; *Martyn* v. *Clue*, 18 Q. B. 661. To leave possession peaceably to the lessor and his assigns, or to leave in good repair; Vin. Abr. Covenant K. 19; *Martyn* v. *Clue*, *supra*. Parke, B., in *Doe* v. *Seaton*, 2 C. M. & R. 730 (see the report in Tyr. & G. 19), was speaking of a case where the reversion had determined, and did not intend to express a doubt that the covenant was one of which, had the reversion continued, the assignee of the reversion might have taken advantage. To repair, renew, and replace tenant's fixtures and machinery fixed to the soil: *secus* as to mere utensils or moveable chattels; *Williams* v. *Earle*, L. R. 3 Q. B. 739. Not to assign without consent of lessor, assigns being named; *Id.*, and see *West* v. *Dobb*, 4 *Id.* 634. In the lease of a public house a covenant to buy all beer from the lessor; *Clegg* v. *Hands*, 44 Ch. D. 503, and *Hinde* v. *Gray*, 11 M. & Gr. 208, note; and a covenant to conduct the house in a proper and orderly manner; *Fleetwood* v. *Hull*, 23 Q. B. D. 35. To leave the land as well stocked with game at the end of the term as it was at the date of the demise; *Hooper* v. *Clark*, L. R. 2 Q. B. 200. To discharge the lessor *de omnibus oneribus ordinariis et extraordinariis*; *Dean of Windsor's Case*, 5 Rep. 25. To permit the lessor to have free passage to two rooms excepted in the demise; *Cole's Case*, 1 Salk. 196, reported as *Bush* v. *Cales*, Carth. 232, 1 Show. 389. To allow the lessor free passage, for himself and his licensees, over the demised premises; *Dynevor* v. *Tennant*, 13 App. Cas. 279. To cultivate the lands demised, in a particular manner: *Cockson* v. *Cock*, Cro. Jac. 125. To reside on the premises, admitted by the court in *Tatem* v. *Chaplin*, 2 H. Bl. 133. Not to carry on a particular trade; *Congleton* v. *Pattison*, 10 East, 136. A covenant to keep buildings within the bills of mortality insured against fire was in *Vernon* v. *Smith*,

Instances of covenants that run.

5 B. & Ald. 1, held to run with the land, for 14 G. 3, c. 78, enabled the landlord to have the sum insured employed in reinstating the premises, so that the covenant, with the aid of the statute, amounted to a covenant to repair. In *Vyvyan* v. *Arthur*, 1 B. & C. 415, the lessee covenanted to grind at the lessor's mill, called Tragamere Mill, all such corn as should grow upon the close demised. This covenant was, in an action brought by the devisee of the lessor against the administratrix of the lessee, held to run with the land, at all events so long as the mill remained the property of the reversioner. In *Sampson* v. *Easterby*, 9 B. & C. 505, 9 Bing. 644, where the lease contained a covenant by the lessee that he would build a new smelting mill, and keep it in repair for working the mines, this covenant was held to run with the reversion. In *Hemingway* v. *Fernandes*, 13 Sim. 228, A. agreed to make a lease of certain land to B., who was the lessee of a colliery, B. covenanting for himself *and his assigns* to make a railway over the land, and to carry thereon all coal gotten out of the colliery, or any other land in the same township, that should be intended for shipment or water sale, paying for the carriage 2*d*. per ton. B. made the railway and afterwards assigned his interest in the land agreed to be demised and the colliery to C., who also worked other collieries in the township. Shadwell, V.-C., is reported to have held that the case fell within the second resolution in *Spencer's Case*, and that the covenant ran with the land, and bound the assignee.

Instances of covenants which do not run.

A covenant by the lessor not to build or keep any house for the sale of beer within half a mile of the demised premises, has been held not to run with the land; *Thomas* v. *Hayward*, L. R. 4 Ex. 311; so also a proviso for re-entry in case the lessee should be convicted of an offence against the game laws; *Stevens* v. *Copp*, *Id.* 20. A covenant by the lessee to pay to the lessor all sums for the time being payable by the lessor on account of taxes, rates, &c., in respect of premises other than those demised, is collateral, and the burden does not run with the land; *Gower* v. *Postmaster-General*, 57 L. T. 527.

Covenants as to things not in existence at the time of demise, assigns not being named. *Minshull* v. *Oakes*.

The latter part of the first resolution in *Spencer's Case*, namely, that if assigns be not expressly mentioned, they are not bound by covenants relating to things not in existence at the time of the lease, was acted upon in *Doughty* v. *Bowman*, 11 Q. B. 444. The Court of Exch., however, in *Minshull* v. *Oakes*, 2 H. & N. 793, not only expressed an opinion that this well-known rule is unreasonable, but also

suggested that *Spencer's Case* itself decided the contrary. The point is curious, and requires to be considered at some length. In *Minshull* v. *Oakes* the court, after referring to other authorities upon the first resolution, said, "On the other hand, Moore, p. 159, pl. 300, *which is evidently Spencer's Case, though the date is later*, gives the decision the other way. The explanation may be that Lord Coke is reporting a variety of arguments and opinions expressed, while Moore gives the ultimate decision. *Smith* v. *Arnold*, 3 Salk. 4, is directly contrary; and in *Bally* v. *Wells*, 3 Wils. 25, the contrary is stated. No reason is given for the alleged difference between where the assignee is and is not named; on the contrary, the reason given for binding in any case an assignee not named, *viz.* that he takes the benefit and burthen, seems equally to apply to every such case."

Covenants as to things not in existence at the time of demise, assigns not being named. *Minshull* v. *Oakes*.

The following is a translation of the important part of the anonymous case in Moore: "In the same term" (Hil. 26 Eliz.) "*Gawdy* moved on the statute of 32 H. 8, whether, if lessee for life" (it will be observed that in *Spencer's Case* the lease was by Spencer and his wife for twenty-one years) "covenants for himself, his executors and administrators, to build a wall during his term, and then he assigns over his estate, the grantee of such reversion or the grantor shall have covenant against the assignee; and they all agreed that he should: for *Meade* said that the statute is that the grantees shall have the like remedies by entry or actions against the assignees, &c., as they ought to have had *against the lessees themselves*. And notwithstanding that the covenant wants the word *assigns*, yet each assignee, by the acceptance of possession, has made himself liable to all covenants concerning the land, but not to collateral covenants; and covenants to repair or build walls or houses are covenants inherent to the land, with which the assignee shall, without special words, be charged."

This case no doubt bears a strong resemblance to Spencer's, but there are good grounds for contending that it is not the same, as well from the difference in the statements of the case as from the fact that *Spencer's Case* was in the Queen's Bench, while that in Moore, as appears from the names of the judges and counsel concerned in it, must have been in the Common Pleas (see *Dugdale*, Orig. Judic., 48, Chronica Series, 94, 95; Foss, Judges of England, vol. 6, p. 158; Moore, 123, pl. 269; 242, pl. 381; Cro. Eliz. 24). Moreover, in reports of cases, determined not

Covenants as to things not in existence at the time of demise, assigns not being named.

Minshull v. *Oakes.*

long after, *Spencer's Case* is cited from Coke, and not from Moore (see *Attoe* v. *Hemmings*, 2 Bulst. 281, 12 Jac. I. before Lord Coke himself; and *Smith* v. *Simonds*, Comb. 64, 3 Jac. II.). Nevertheless, as early as 3 W. & M., the two cases seem to have been regarded as the same; see *Glover* v. *Cope*, 1 Show. p. 287, where, according to the report, Row, *arguendo*, cited *Spencer's Case* from Moore, 159. It may also be remarked in reference to the judgment in *Minshull* v. *Oakes*, so far as it rests on a supposed statement in *Bally* v. *Wells* to the contrary of *Spencer's Case*, that, though such a statement does appear in the report in Wilson, it is not to be found in the report in Wilmot's Notes of Cases (see p. 341); and as the opinion of the court was delivered by Wilmot, C. J., himself, this is probably the more accurate report. Indeed, the statement in Wilson seems to be a mistake, as a little further on the true effect of *Spencer's Case* is stated, and the court are reported to have said: "We rather choose to adhere to Lord Coke's authority, that such a covenant will not bind the assignee unless he be named." In Wilmot's Notes of Cases the point is simply put aside as not necessary to the decision, and no opinion is expressed upon it.

However, whatever be the state of previous authorities, the remarks of the Court of Exch. seem to be based on sound reason, as, except the arbitrary rule that "the law will not *annex* a covenant to a thing not in *esse*," there seems to be no rational distinction between the position of an assignee named and not named as to things not in *esse* at the time of the demise. As to the benefit or burden of such a covenant they would both be in exactly the same position; and if this is a ground, as it is said to be, for holding a named assignee liable, it is also a ground for holding liable one not named. Moreover, the covenant may well be said to be annexed, not to the thing not in *esse*, but to the land itself upon which the thing is to be made or done, and in respect of which, and not of the thing not in *esse*, there is the privity of estate, which is the foundation of the running of covenants. In *Minshull* v. *Oakes*, the court did not in terms overrule *Spencer's Case*, but suggested a distinction, holding that a covenant to repair the messuage, *and all other erections and buildings which should or might be erected during the term*, ran with the land and bound an assignee, though not named. "We think it sufficient to say," said Pollock, C.B., "that as

the covenant is not a covenant absolutely to do a new thing, but to do something conditionally, *viz.*, if there are new buildings to repair them; as when built they will be part of the thing demised, and consequently the covenant extends to its support, and as the covenant clearly binds the assignee to repair things in *esse* at the time of the lease, so does it also those in *posse*, and consequently the assignee is bound. There is only one covenant to repair; if the assignee is included as to part, why not as to all?"

West v. *Dobb.*

In *West* v. *Dobb*, L. R. 4 Q. B. 634, it was argued that *Williams* v. *Earle*, 3 *Id.* 739, decided that a covenant by lessee not to assign without licence, ran with the land, even though assigns were not expressly named, and Blackburn, J., (p. 637 note) is reported to have protested against that case being taken to decide more than that the covenant ran with the land, and bound the assignee, assigns being mentioned. No doubt such was the exact decision in *Williams* v. *Earle*; but it seems probable that Blackburn, J., intended rather to state exactly the effect of the decision than to attach to the distinction the importance given to it by the report. The covenant not to assign without licence is assuredly not one relating to a thing not in *esse* at the time of the demise, so as to come within the rule above discussed. It is either a covenant which touches and concerns the land, so as to bind assigns, whether named or not, or it is a covenant not touching and concerning the land at all, so as, apart from the doctrine of notice, not to bind assigns, even though named. *Williams* v. *Earle* certainly seems to decide that such a covenant does touch and concern the land, in which case, it is submitted that according to the first resolution in the principal case, it is binding on assignees whether named or not.

Lessee's liability on express covenants after assignment.

The liability of the *lessee* to be sued on his *express* covenants is not determined by his assigning over his term and the lessor's acceptance of his assignee; *Barnard* v. *Godscall*, Cro. Jac. 309; *Thursby* v. *Plant*, 1 Wms. Saund. 241 c.; but he may be sued on them either by the lessor, or if he have assigned, by his assignee; *Brett* v. *Cumberland*, Cro. Jac. 521, 2; and so may his personal representative having assets, *ibid.*; *Hellier* v. *Caspard*, 1 Sid. 266, 1 Lev. 127; *Coghill* v. *Freelove*, 3 Mod. 325, 2 Vent. 209; *Pitcher* v. *Tovey*, 4 Mod. 76; and the notes to *Thursby* v. *Plant*, 1 Wms. Saund. *supra*; and the lessee's liability on his covenant to pay rent is not extinguished by the surrender by

his assignee of a part of the demised premises; *Baynton* v. *Morgan*, 21 Q. B. D. 101, 22 *Id.* 74. But though the lessee may, after he has assigned and his assignee has been accepted, be sued on his *express* covenants, it is said he cannot be sued on his implied ones; *Batcheleur* v. *Gage*, Sir W. Jones, 223; see 1 Sid. 447; *Mills* v. *Auriol*, 4 T. R. 98; 1 Wms. Saund. 248 c.; *Williams* v. *Burrell*, 1 C. B. 402. *Sed quære de hoc.* No action of covenant will lie against the assignee of the lessee, except for breaches of covenant happening while he is assignee; and therefore by assigning even to a mere pauper an assignee may get rid of his future liability; *Taylor* v. *Shum*, 1 B. & P. 21; *Le Keux* v. *Nash*, 2 Str. 1221; *Odell* v. *Wake*, 3 Camp. 394; *Onslow* v. *Corrie*, 2 Madd. 330; though not of his liability for breaches already committed during the continuance of his interest; *Harley* v. *King*, 5 Tyrw. 692; and in respect of such breaches there is further an implied contract on the part of each successive assignee to indemnify the original lessee; *Moule* v. *Garrett*, L. R. 5 Ex. 132, 7 *Id.* 101.

On implied covenants?

No action lies against assignee except for breaches while he is assignee.

It has been made a question whether, in cases in which the right of action is given to the assignee by 32 H. 8, c. 34, the original covenantee may not still sue. The better opinion is, that he cannot; see *Beeley* v. *Purry*, 3 Lev. 154, where the point was however not decided. It appears to have been taken for granted in *Green* v. *James*, 6 M. & W. 656; and the cases which have settled that the Act transfers the privity of contract, militate strongly against the existence of any right in the original covenantee; see *Thursby* v. *Plant*, 1 Wms. Saund. *supra*; *Conran* v. *Pedder*, 2 Ir. C. L. R. 200.

Semble where statute gives right of action to assignee original covenantee cannot sue.

Here may be noticed the remarkable case of *Wakefield* v. *Brown*, 9 Q. B. 209, where a covenant to repair and paint was made by the lessee with the lessor, the lessor's landlord, and another party to the deed, who had, and appeared by the lease to have, no estate in the land either in fact or by estoppel. The lease having been assigned, an action for breach of covenant was brought against the assignee of the lessee, by the lessor and his superior landlord, who had survived the other covenantee. The question principally discussed in the judgment, namely, whether both the covenantees could join in the action, turned upon the construction of the covenant, and did not relate to the subject of this note. The other question, which seems to have

Wakefield v. *Brown*.

attracted less attention, was whether, inasmuch as one, if not two, of the covenantees had no estate in the reversion expectant upon the lease containing the covenant, that covenant could run with the land, so as to bind the assignee of the lessee. This latter question, if free from authority, seems to admit of easy solution, because, by the common law, as we have seen and shall presently still further observe, except in the case of landlord and tenant, the burden of covenants does not run with the land, though the benefit does; and in order to make the benefit of a covenant run with the land at the common law, it must be entered into with a person having an estate in the land, and when so entered into only enures during that estate; whilst the statute only deals with actions by the assignee of the reversion against the lessee or his assignee, and actions by the lessee or his assignee against the assignee of the reversion; and not with actions by the lessor against the assignee of the lessee, or *e contrà*, which actions seem therefore to be governed by the common law. The Court of Q. B. however, held the action maintainable, and upon this point said: "The other objection, *that there is no privity of estate*, is certainly not tenable. A covenant to repair and paint clearly runs with the land, and there is privity of estate *between the defendant and one of the plaintiffs* at all events." The reference in this judgment to the existence of privity of estate between the parties to the action, or any of them, as being important to the decision of the question, is somewhat perplexing; privity of estate between the original parties and those who either claim under them, or are sought to be charged with the burden they have created, appearing alone to be material, either at the common law or under the statute. The court, indeed, appear to have either overlooked or disregarded the circumstance that the covenant was with the reversioner and a person having no estate, jointly; a sort of covenant which, it is submitted, does not run with the land, but is collateral, and so the assignee of the lease not liable upon it. In *Magnay* v. *Edwards*, 13 C. B. 479, under similar circumstances, the Court of C. P. merely deferred to the authority of *Wakefield* v. *Brown*, but expressly abstained from concurring in the reasons upon which that case was decided.

Wakefield v. *Brown.*

A covenant to repair made by lessee with reversioner and a stranger jointly, held to run with land and bind assignee of lessee.

Sed quære.

Covenants not between Lessor and Lessee.

Covenants not between lessor and lessee.

Next, as to covenants running with the lands in other cases than those between landlord and tenant. These may be divided into the two following classes:—

1. Covenants made *with* the owner of the land to which they relate.

2. Covenants made *by* the owner of the land to which they relate.

1. Covenants *with* the owner of land.

The benefit runs.

With respect to the former of these classes, *viz.* covenants made *with* the owner of the land to which they relate, there seems to be no doubt that the benefit, *i.e.* the right to sue on such covenants, runs with the land to each successive transferee of it, provided that such transferee be in of the same estate as the original covenantee was. Of this description are the ordinary covenants for title: see *Middlemore* v. *Goodale*, 1 Rolle's Abr. 521 K. pl. 6; Cro. Car. 503, 505; Sir W. Jones, 406; Shepp. Touch. 171; *Kingdon* v. *Nottle*, 4 M. & S. 53; *Campbell* v. *Lewis*, 3 B. & Ald. 392; *Lewis* v. *Campbell*, 8 Taunt. 715; which latter case, as well as *Noke* v. *Awder*, Cro. Eliz. 373, 436, shows that there is no difference between the right of an assignee of freehold, and that of the assignee of a chattel real, to sue on covenants running with the land. Of this description also are the cases of the Prior and of the Coparceners reported in the text, *ante*, p. 56, the anonymous case in Moore, 179 (cited, *arguendo*, in *Milnes* v. *Branch*, 5 M. & S. 416), and *Sharp* v. *Waterhouse*, 7 E. & B. 816.

In all these cases the covenant is for something relating to the land, and the assignee of the land is the person entitled to sue upon it; see *Middlemore* v. *Goodale*, 1 Rolle's Abr. 521; *Spencer* v. *Boyes*, 4 Ves. 370.

Semble, covenantor may be a stranger.

When such a covenant is made, it seems to be of no consequence whether the covenantor be the person who conveyed the land to the covenantee, or be a mere stranger. Thus in the *Prior's Case* reported in the text, and in Co. Litt. 384 b, the prior was a stranger to the land of the covenantee; and a good reason for this is given in the above passage in Co. Litt., where the law is said to be so, *to give damages to the party grieved;* in other words, in order that the person who is injured by the breach of the covenant, who is always the owner of the land *pro tempore*, may be also the person entitled to the remedy upon it by action. *Middlemore* v. *Goodale*, *Noke* v. *Awder*, and *Campbell* v. *Lewis*, above

cited, were all cases in which the covenantor was also the person who conveyed the land to the covenantee; and Sir E. Sugden, in his "Law of Vendors and Purchasers," p. 584 *et seq.* (14th ed.), expresses an opinion, that to enable the assignee of land to take advantage of covenants they must have been entered into by a prior owner thereof. This, however, is contrary to the Prior's case, to the Coparceners' case, to the anonymous case in Moore, 179, and to the opinion of the Real Property Commissioners in their 3rd Report; and Sir E. Sugden himself declares that the consequences of applying such a doctrine to covenants entered into by a vendor, who is often only a mortgagor, or *cestui que trust*, would be most alarming; see a learned note in "Jarman's Bythewood," vol. 7, pp. 572–3, vol. 9, p. 354, of Mr. Sweet's edition. Covenants with the owners of land.

Since the publication of the first edition of this work, a case occurred in the Court of Exch., bearing in some degree upon the above proposition. The case is *Raymond* v. *Fitch*, 5 Tyrw. 985, where the question was, whether the executors of one who had demised land, *excepting the trees* (the circumstance that the trees were excepted does not appear in the statement of the case, but it is to be collected from the observations of counsel and judges, see p. 991 *ad finem*, and the judgment), could sue upon a covenant not to fell or lop them, which had been broken during the testator's lifetime. The defendant contended that where a covenant runs with the land and descends to the heir, there, though there may have been a formal breach in the testator's lifetime, still, if the substantial damage happened after his death, the real, not the personal, representative ought to be plaintiff; see *Kingdon* v. *Nottle*, 1 M. & S. 355, 4 *Id.* 53; *King* v. *Jones*, 5 Taunt. 418; and *Goodman* v. *Boycott*, 2 B. & S. 1. Lord Abinger, however, delivering the judgment of the court, distinguished those cases by saying, "There is no doubt that the covenant here is *purely collateral and does not run with the land*;" and he added, "for the breach of such a covenant after the death of the covenantee, the heir or devisee of the land on which the trees grew could not sue." His lordship does not state whether he based this opinion on the ground that the covenant not to cut down the trees did not sufficiently *touch and concern the land*, or whether, on the ground that the benefit of a covenant made by a stranger (which the lessee was *quoad* the trees) was incapable of running with the land to which it related, to *Raymond* v. *Fitch*.

Covenants with the owners of land.

the heir or devisee thereof. The point was not necessary for the decision of the case, for the court appears to have been of opinion that the loss of the shade and casual profits of the trees during the testator's lifetime was a sufficient injury to the personal estate to vest a right of action in his executor; and it seems unfortunate, therefore, that the *dicta* in the case should have tended to cast any additional doubt on a doctrine so highly reasonable as that the right of action upon a covenant touching and benefiting the land devolves along with the land itself to each successive owner.

Covenant*ee* must have land to which covenant relates.

But though it be not necessary that the covenant*or* should be in anywise connected with the land, it is absolutely essential that the covenant*ee* should, at the time of the making of the covenant, have the land to which it relates. On this point the text is express, *viz.* "If the covenant were to say divine service in the chapel of *another*, there the assignee shall not have an action of covenant, *because the chapel doth not belong to the covenantee*; as it is adjudged in 2 H. 4, 6 b."; see Co. Litt. 384 b., 385 a.; and *Webb* v. *Russell*, 3 T. R. 393. In such a case, however, the covenantee may sue though his assignee cannot; *Stokes* v. *Russell*, 3 T. R. 678.

Assignee must be in of same estate as covenantee.

It has been above stated that, in order that the assignee may sue on such a covenant, he must be in of the same estate in the land which the party had with whom the covenant was originally made, for the covenant is incident to that estate. This rule might possibly be productive of very serious and disagreeable consequences; for when lands are conveyed (as has repeatedly been done for the purpose of barring dower) *to such uses as A. shall appoint, and in default of appointment to A. for life, remainder to B. his executors and administrators during the life of A., remainder to A. in fee*, and A. exercises the power of appointment in favour of a purchaser, that purchaser comes in paramount to A. and above the estate of which he was seised, which is defeated by the exercise of the power as if it never had existed. There is consequently no sameness of estate between A. and the purchaser, which latter will therefore not be entitled to the benefit of covenants entered into with A., since those covenants were incident to the estate which has now been defeated by the appointment; see *Roach* v. *Wadham*, 6 East, 289. To obviate this evil it became usual, whenever the conveyance transferred a seisin to serve uses,—as, for instance, when it was by way of feoffment, or

Difficulty where conveyance to uses to bar dower.

How obviated.

lease and release,—to enter into covenants with the feoffee or releasee to uses, and his heirs, the consequence of which is believed to be, that the benefit of the covenants, being annexed to the seisin, is transferred to, and in a manner executed in, the various persons who become from time to time entitled under the uses which that seisin serves; see Sugd. Gilb. U. 186, *note*. The lessee of the covenantee may enforce a restrictive covenant made with the covenantee and his assigns; *Taite* v. *Gosling*, 11 Ch. D. 273.

2. Covenants *by* owners of land.

With respect to the second of the above two classes, namely, covenants entered into *by* the owners of land, great doubt exists whether these in any case run with the lands, so as to bind the assignee of the covenantor. One inconvenience which would be the result of holding them to do so is, that the assignee would frequently find himself liable to contracts of the very existence of which he was ignorant, and which, perhaps, would have deterred him from accepting a conveyance of the land, if he had known of them; and the reason assigned in the first Institute for allowing the *benefit* of a covenant relating to land to run therewith, *viz.* to give the remedy *to the party grieved*, does not apply to the question respecting the *burden* thereof. This question might have arisen in *Roach* v. *Wadham*, 6 East, 289. There *R.* being seised of an undivided third part of a certain messuage, and the plaintiffs of the two other undivided third parts, they conveyed the whole to *C.* and his heirs, to such uses as *Watts* should appoint, and, subject thereunto, to the use of *Watts* in fee, "yielding and paying, and the said *Watts*, and by his direction the said *C.*, did, and each of them did, grant out of the said messuage to the plaintiffs, their heirs and assigns, for ever, the yearly fee farm rent of 28*l.* payable quarterly." Then followed a *covenant by Watts, for himself, his heirs and assigns*, to pay the rent to the plaintiffs, their heirs and assigns. Then a similar rent of 14*l.* was reserved to *R.* *Watts* afterwards "granted, bargained, sold, aliened, re-leased, ratified, and confirmed, and did also *limit, direct, and appoint*," the messuage to *Wadham*, *S.*, and *P.* (a trustee), habendum to *Wadham*, *S.*, and *P.*, and the heirs and assigns of *Wadham* and *S.*, as tenants in common, subject to the rent of 42*l.*, which *Wadham* and *S.* covenanted with *Watts* to pay in equal shares and proportions. *Wadham* died, leaving the defendant his devisee in fee and executor: the moiety which *Wadham* had covenanted to pay of the 28*l.* rent became after his death in arrear; and this action

Quære, do they bind assignees of covenantor?

Roach v. *Wadham*.

Covenants by the owners of land.

having been brought for the recovery of those arrears, a case was ultimately stated for the opinion of the Court of K. B., the question in which was "whether the defendant as executor or devisee of the testator *Wadham* were liable at law to an action of covenant on the said covenant made by *Watts*." The court held that he was not liable, for that the conveyance by *Watts* to *Wadham*, *S.*, and *P.* operated as an appointment under the power created by the conveyance from *R.* and the plaintiffs to *C.*, and therefore, even supposing the covenant made by *Watts* with the plaintiffs to be capable of running with the land and binding *Watts'* assignee, still it could not affect *Wadham*, who was not privy in estate to *Watts*, but came in paramount to him.

Brewster v. *Kitchell.*

Do covenants by owners of land bind their assignees?

Brewster v. *Kitchell* is another case often referred to on this question; Lord Raym. 317; Comb. 424, 466; 1 Salk. 198; 12 Mod. 166; Holt, 175, 669; 5 Mod. 368. It was a feigned action on a wager, whether the defendant had a right to deduct 4*s.* in the pound out of a rent-charge granted to the plaintiff's ancestor out of certain lands of which the defendant was *terretenant*, which tax of 4*s.* in the pound was granted in 4th & 5th W. & M. Upon a special verdict it appeared, that *R. L.*, being seised in fee of the manor of *Balmore*, granted to *E. B.* a rent-charge out of the manor, to her and her heirs, and there was a covenant for further assurance, and this memorandum was endorsed on the deed, *viz.*: "It is the true intent and meaning of these presents, that the within-named *E. B.*, and her heirs, shall be paid the said rent-charge without deducting of any taxes for the said rent," &c. Afterwards *R. L.*, on the 8th July, 1652, in pursuance of the covenant in the first deed, confirmed the rent to *E. B.* and her heirs, and covenanted that the rent should be paid at certain feasts, free of all taxes. The report proceeds thus: "After several arguments, Holt, C.J., pronounced the opinion of the court, and (by him) the question is upon this special verdict, whether the covenant indorsed upon the deed of the 26 Nov. 1649, or the covenant in the deed of the 8 July, 1652, be sufficient to bind the grantor *and his heirs* to pay the rent, free of all taxes *hereafter to be charged upon it by act of parliament*? And all the judges were of opinion, that this covenant binds *the grantor and his heirs* to pay the rent, free of the 4*s.* in the pound tax." Thus far, therefore, the question of the burden of the covenant running with the lands does not appear to have been taken into consideration. However, in a subsequent

Do covenants by owners of land bind their assignees?

part of his judgment, the report proceeds to state, Lord Holt "made another question, which was not observed at the bar, nor by any of the other judges, *viz.*: whether the *terretenant* is liable to an action upon this covenant; *and he was of opinion, that he was not.* For (by him) if tenant in fee grants a rent-charge out of lands, and covenants to pay it without deduction, for himself and his heirs, you may maintain covenant against the grantor and his heirs, but not against the assignee, for it is a mere personal covenant, and cannot run with the land. . . . And for a case in point, he cited Hardr. 87, pl. 5, *Cook* v. *Earl of Arundel.* . . . Therefore, since it does not appear that the defendant is bound by this covenant (for *non constat* whether he is *terretenant* or not, or what he is), for this reason he was of opinion that judgment ought to be given for the defendant. But the other three judges seemed to be in a surprise and not in truth to comprehend this objection, and therefore they persisted in their former opinion, *talking of agreements, intent of the party, binding of the land, and I know not what.* They gave judgment for the plaintiff, against the opinion of Holt, C.J., for the reasons aforesaid."

The above account is extracted, *verbatim*, from Lord Raymond. The account of the disagreement between Lord Holt and the three judges, given in Salkeld, is extremely jejune, being comprised in a marginal note of about six words. But in 12th Mod. there is a report of *Brewster* v. *Kitchell*, which places the matter in a far clearer and more satisfactory light. Lord Holt is there made to say, in delivering his judgment, "*If this rent was granted, so to be paid, it would be another matter, but here is only a covenant and no words amounting to a grant*; and therefore there can be no relief in this case against the terretenant, but in equity; and therefore, for this point, I do not see how the plaintiff can have his judgment; for if this covenant should charge the land, it would be higher than a *warrantia chartæ*, which only affects the land from judgment therein given: But the other three judges" (says the reporter) "thought that this covenant might charge the land, *being in the nature of a grant, or at least a declaration going along with the grant, showing in what manner the thing granted should be taken.*" So that the real difference between Lord Holt and the three judges appears to have been, not whether an action of covenant could be maintained against the defendant as assignee of the land, but whether that which Lord Holt con-

Do covenants by owners of land bind their assignees?

sidered a covenant, was not, in reality, part of the grant; for, if it were, the plaintiff was entitled to judgment beyond all dispute, the action not being one of covenant, but a feigned issue to ascertain the net amount of the rent-charge. So that, considering the case in this light, there is Lord Holt's opinion that a covenant to pay the rent-charge would not run with the land,—an opinion from which none of the other judges dissented; the point on which they really differed being whether that which Lord Holt considered a mere covenant, was not, in point of fact, part and parcel of the grant; in which case Lord Holt himself had admitted, that "it would be another matter." With respect to the accuracy of the report in Mod., there seems no reason for distrusting it. It is given at considerable length and cannot be said to disagree with that of Lord Raymond, who admits that he had no distinct remembrance of the grounds on which the judges based their dissent from Holt's opinion.

Cook v. *Earl of Arundel.*

In *Cook* v. *Arundel* (the case cited by Lord Holt from *Hardr.*, reported also in 1 Abr. Eq. 26), the Duke of Norfolk being seised of *Blackacre* and *Whiteacre*, subject to a certain rent, granted *Blackacre* to A., covenanting that it should be discharged of the rent, and granting, afterwards, *Whiteacre* to B. A. filed a bill to charge *Whiteacre* with the whole rent, urging that the covenant ran therewith, and bound B. But the court thought the covenant binding only on the Duke and his representatives, and dismissed the bill; see *Cornbury* v. *Middleton*, Cases in Chanc. 208.

Holmes v. *Buckley.*

The case of *Holmes* v. *Buckley*, 1 Abr. Eq. 27, is another case thought to bear upon this point, and was as follows: A. and R., his wife, being seised in right of R. of two pieces of ground, granted by indenture to J. H. and his heirs a watercourse through the two pieces of ground, and covenanted for them, their heirs and assigns, to cleanse it, and that all fines and recoveries to be levied or suffered of the grounds should enure to the strengthening and confirming the watercourse. Afterwards a recovery was had, and a deed executed, *declaring the uses to be as aforesaid*. The watercourse, by mesne assignments, came to the plaintiff, and the two pieces of ground to the defendant, who built on them, *and much heightened the ground which lay over the watercourse, and rendered it much more chargeable and inconvenient to repair, and, as it was alleged and in part proved, the building had much obstructed the watercourse*. The bill was to establish the enjoyment of the watercourse and the right to

have it cleansed, according to the covenant, by the defendant and all claiming under him. It was objected, that the covenant being a personal covenant, was not at all strengthened by the recovery; and that the plaintiff, and those under whom he claimed, being sensible of it, had cleansed for forty years at their own charges. But the court was of opinion, that this was a covenant which ran with the land, and was made good by the recovery; and though the plaintiff had cleansed at his own charge, while it was easy to do and of little charge, yet, since the right was plain upon the deed, *and the cleansing made chargeable by the building*, it was reasonable the defendant should do it; and decreed accordingly.

Do covenants by owners of land bind their assignees? *Holmes* v. *Buckley.*

It will be observed on this case, that not only may it be urged here, as in *Brewster* v. *Kitchell*, that the covenant was, in fact, part of the grant, but that, even if there had been no covenant, the defendant was guilty of a wrongful act when he obstructed and injured the plaintiff's watercourse, subject to which he took his own estate, and of the existence of which he had notice, for the deed declaring the uses of the recovery, under which deed he must have claimed, made mention of the previous grant of the watercourse; and the court appears to have relied upon the wrongful obstruction as a ground of its decree, as is plain from the words, "*and the cleansing made chargeable by the building.*" On the other hand, if the effect of the case be taken to be, that the court thought the covenant one on which an action might have been maintained at law by the plaintiff against the defendant, it seems questionable whether it do not prove too much; for, as both the parties were assignees, one of the land, and the other of the watercourse, it would, in order to support such an action of covenant, be necessary to hold, not merely that the burden of the covenant ran with the land, but that the benefit of it ran with the watercourse; for, otherwise, the plaintiff not being the original covenantee, would have no right of action: and it would probably be found somewhat difficult to contend that a covenant could run with such an easement as a watercourse; see *Milnes* v. *Branch*, 5 M. & S. 417, and *post*; but see *Portmore* v. *Bunn*, 1 B. & C. 694.

The case of *Barclay* v. *Raine*, 1 S. & Stu. 449, has been thought to bear upon this controversy, but a close examination will show that it cannot with propriety be cited as an authority on either side. A. being seised of *Blackacre* and

Barclay v. *Raine.*

Do covenants by owners of land bind their assignees?

Barclay v. *Raine.*

Whiteacre, under the same title, and comprised in the same deeds, sold *Blackacre* to *T.*, and delivered the deeds to him, *T.* covenanting for their production to A., his heirs, executors, administrators, and assigns. *This deed was lost, and though a copy of it existed, the copy was in a mutilated state, partly illegible.* A. afterwards sold *Whiteacre* to *B.*, the father of the plaintiffs: *T.* then sold *Blackacre* to *S.*, who refused to give a fresh covenant for the production of title-deeds. On the sale to *S.* part of the purchase-money was secured by mortgage, and the title-deeds, together with the mortgage-deed, were lodged with *T.* The plaintiffs, who had contracted to sell *Whiteacre* to the defendant *R.*, applied to *T.* for a covenant to produce the title-deeds, and he executed a covenant by which he covenanted with the defendant to produce the title-deeds, *while he should continue mortgagee.* The defendant objected to this as insufficient, and *T.* then executed another deed, in which he acknowledged the execution of the first covenant, and also that the deeds were, at the date of this last deed, in his possession. Under these circumstances, the question was, whether the defendant could be compelled to complete his purchase. Leach, V.C., decided that he could not, and is reported (p. 455) to have said: "that equity never compels a purchaser to take without the title-deeds unless he have a covenant to produce them; that a mere equitable right to their production, even if it existed, would not be sufficient, and that *T.'s covenant to produce did not run with the land.*" It is obvious that this last observation, if made at all, could not have been intended to apply to the second covenant executed by *T.*, which would be clearly insufficient, inasmuch as it was restricted to the time during which he should continue mortgagee; when he ceased to be mortgagee *S.* would be entitled to the deeds, and it was therefore necessary that some covenant should exist, the effect of which should last beyond that period. It was therefore immaterial whether the *second* covenant would or would not run with the land, and the true question was: 1st, whether the covenant *first* executed by *T.* would bind *S.*; 2ndly, if so, whether it would bind *S.* for the benefit of *R.*; and, 3rdly, supposing the covenant would bind *S.*, and would enure to *R.'s* benefit, *whether there was sufficient legal evidence of its contents*; for, if not, it would of course be as useless as if it never had existed; see *Bryant* v. *Busk*, 4 Russ. 1. Now the first of these points would have involved the question whether the *burden* of *T.'s* covenant would run with

Blackacre to his vendee *S.*? The second would have involved the question, whether the *benefit* of it would run along with *Whiteacre* from A., the covenantee, to *B.*, and from him to *R.*? But it became unnecessary to decide either of these two points, because it appears clear that the *third* point was against the vendor; in other words, it appears clear that, whatever might have been the effect of the covenant, there was no legal evidence of its contents. The deed was lost, the copy was mutilated and partly illegible; and, if entire, would only have been secondary evidence of the original if duly proved to be a true copy, and it does not appear that that could have been done: and the deed lastly executed by *T.*, even had it set out the contents of the first deed, which in all probability it did not, would not have been evidence against *S.*, as it was not executed till after *T.* had parted with his interest in the lands to him. The questions, therefore, whether either the benefit or burden of *T.'s* covenant ran with the land, did not arise; and it might have been supposed that the V.-C., in pronouncing judgment, would have omitted all consideration of them, had it not been that the reporter puts into his mouth the following words: "*T.'s covenant to produce does not run with the land.*" However, in 7 Jarman's Bythewood, p. 375, under the report of *Barclay* v. *Raine*, there is the following note: "His Honour lately denied his having used the expression here imputed to him; he did *not* say that T.'s *first* covenant did not run with the land (*for his Honour thought it clearly did*), but that the *second* covenant was restricted to the period of his being mortgagee;" Rolls, 28th July, 1830. It seems, therefore, that Sir John Leach's private opinion was, that *T.'s* first covenant *did* run with the land; but whether he thought that the *benefit* of it ran with *Whiteacre*, or the *burden* with *Blackacre*, or that both *benefit* and *burden* ran with the land, is left completely *in ambiguo*. One thing, however, is quite plain, *viz.*, that *Barclay* v. *Raine* is no decision on the present question; since, had his Honour thought that there was a sufficient covenant, and sufficient evidence of its contents, he must have decided in favour of the plaintiffs, and against *R.*, who would then have had no excuse for not completing his purchase.

Do covenants by owners of land bind their assignees? *Barclay* v. *Raine*.

Covenants like that to pay a rent-charge issuing out of the land have reference to an interest possessed by the covenantee independently of the covenant; but there are other covenants unconnected with any interest in the land, such as a covenant by the owner of the land, that it shall

Covenants imposing restrictions on the enjoyment of the land in favour of persons having

no property therein.

Quære, do they run with the land?

never be built upon, or never be planted, or imposing any other restriction on the mode of its enjoyment, in favour of a person having no property therein. The possibility of making these covenants run with land has been questioned, not merely on the general ground above stated, namely, that the burden of a covenant cannot run with land except between landlord and tenant, though the benefit may; but also on the ground that they infringe the rule of law against perpetuities, by tending to impede the free circulation of property. An instance of a covenant of this sort is to be found in a note to Fitzherbert's Natura Brevium, fo. 145, for which he cites the Year-book 4 H. 3, 57, not in print. The note is as follows :—"A man covenants that neither he nor his heirs shall erect any mill in such a place, and an action of covenant is thereupon brought *by* the heir, and well." I presume that the words *by the heir* signify the heir of the covenantee, and probably the main question in that case was whether the heir, who had perhaps inherited some mill which the covenant was framed to protect, or the executor of the covenantee, should bring the action. It has been remarked by very high authority, that, "in the case cited by Hale (the supposed commentator on Fitz. N. B.), the covenant was held to be good; but that does not go far towards removing the doubt, for that case occurred at a period long before the law of perpetuity was introduced;" 3rd Report of the R. P. Commissioners, 54. In addition to which it may be observed that, even had the case occurred since the rule against perpetuities, it might not have effectually resolved the doubt as to the operation of that rule, for the action was brought against the covenantor himself, of whose liability there could be no question; and as the word *assigns* does not occur in the covenant, it may be doubted whether the assignees would have been bound by it, as it can hardly be said to relate to a thing *in esse*, parcel of the covenantor's land; and if the assignees would not be bound by it, it could have no tendency to impede the circulation of the land, or to create a perpetuity.

Keppel v. *Bailey*.

These subjects were discussed in Chancery in *Keppel* v. *Bailey*, 2 M. & K. 517, where the questions were elaborately argued, and every authority on either side, it is believed, cited, either in the argument or the judgment. In that case E. and J. Keppel, tenants of iron-works under a long lease, covenanted with the proprietors of a railroad and their assigns, that they, their executors, administrators, and

assigns, would procure all the limestone wanted for the iron-works from the Trevil quarry, and carry it along the railroad, paying a certain toll. The Keppels assigned their lease of the iron-works to the defendants, who took with notice of the covenant by the Keppels, but began to construct a railroad to other lime-quarries situated eastward of the Trevil quarry. On a bill for an injunction to restrain them from using that or any other new road, it was, among other points, objected to the covenant that it was void, as tending to create a perpetuity, that it was void as in restraint of trade, and that it was not such a covenant as would run with the lands, so as to bind the defendants as assignees of the iron-works. Brougham, L.C., appeared to think that it could not be invalidated on the ground of perpetuity, or of restraint of trade. On the question of perpetuity, see *L. & S. W. R. Co.* v. *Gomm*, 20 Ch. D. 562, and *Mackenzie* v. *Childers*, 43 Id. 265.

Such a covenant held not void on ground of perpetuity, or of restraint of trade.

Upon the great question, however, whether the covenant were capable of running with the iron-works, so as to bind the defendants as assignees thereof, his lordship expressed a decided opinion in the negative:—"Assuming that the Keppels covenanted for their assigns of the Beaufort works, could they by a covenant with persons who had no relation whatever to those works, except that of having a lime-quarry and a railway in the neighbourhood, bind all persons who should become owners of those works, either by purchase or descent, at all times, to buy their lime at the quarry, and carry their iron on the railway; or could they do no more, if the covenant should not be kept, than give to covenantees a right of action against themselves, and recourse against their heirs and executors, as far as those received assets? Consider the question first upon principle. There are certain known incidents to property and its enjoyment; among others, certain burthens wherewith it may be affected, or rights which may be created, or enjoyed with it, by parties other than the owner, all which incidents are recognised by the law. But it must not therefore be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal, that such a latitude should be given. There can be no harm in allowing men the fullest latitude in binding themselves and their representatives, that is, their assets, real and personal, to answer in damages for breach of their

But held not to run with land so as to bind assignee of covenantor.

obligations. This tends to no detriment, and is a reasonable liberty to bestow; but great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. Every close, every messuage, might thus be held in a different fashion, and it would be hardly possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed. The right of way or of common is of a public, as well as of a simple, nature, and no one who sees the premises can be ignorant of what all the vicinage knows. But if one man may bind his messuage and land to take lime from a particular kiln, another may bind his to take coals from a certain pit, while a third may load his with obligations to employ one blacksmith's forge, or the members of one corporate body, in various operations on the premises, besides many other restraints, as infinite in variety as the imagination can conceive; for there can be no reason whatever in support of the covenant in question, which would not extend to every covenant that can be devised. The difference is obviously very great between such a case as this and the case of covenants in a lease whereby the demised premises are affected with certain rights in favour of the lessor. The lessor or his assignees continue in the reversion while the term lasts. The estate is not out of them, though the possession is in the lessee or his assigns. It is not at all inconsistent with the nature of property that certain things should be reserved to the reversioner all the while the term continues; it is only something taken out of the demise, some exception to the temporary surrender of the enjoyment. It is only that they retain more or less partially the use of what was wholly used by them before the demise, and what will again be wholly used by them when that demise is at an end."

Randall v. *Rigby.*

In *Randall* v. *Rigby*, 4 M. & W. 130, where there was a covenant to pay a perpetual rent issuing out of land, Parke, B., said: "No doubt this is collateral or in gross in one sense, that it does not run with the land or rent." The question was also discussed in *Bedford* v. *British Museum*, 2 M. & K. 552, and *Collins* v. *Plumb*, 16 Ves. 454, but not decided, the parties being left to their *legal* remedies, if any.

Bedford v. *British Museum.*

Upon the whole, there appears to be no authority which has decided, apart from the equitable doctrine of *notice*, that the *burden* of a covenant will run with land in any case

except that of landlord and tenant; while the opinion of Lord Holt in *Brewster* v. *Kitchell*, 1 Salk. 197, and of Lord Brougham in *Keppel* v. *Bailey*, *supra*, and the reason and convenience of the thing, all militate the other way. This question was again much considered in *Austerberry* v. *Oldham*, 29 Ch. D. 750, where all the cases which might seem to countenance the opinion that the burden of covenants between persons other than landlord and tenant could run with the land were reviewed, and the C.A., though not absolutely deciding the point, inclined to the opinion that the burden cannot run except between landlord and tenant. In that case A. conveyed to trustees in fee a piece of land intended to form part of the site of a road which was proposed to be made across the lands of A. and other proprietors who made grants in similar terms, and the trustees, for themselves, their heirs and assigns, covenanted with A., his heirs and assigns, that they would form the land conveyed into a road, to form part of the proposed line of road, and would for ever afterwards maintain the road and every part of it in repair. The road was made, and A. afterwards conveyed to the plaintiff the land abutting on either side of the road. The defendants were the trustees' assigns, and the question was whether the benefit of the covenant to repair ran to the plaintiff and the burden to the defendants. Cotton and Lindley, L.JJ. (the latter not quite so strongly) were of opinion that the benefit did not run to the plaintiff. Fry, L.J., entertained some doubt on this point, inclining to the view that it might. On the question of the burden running to the defendants, Cotton, L.J., did not pronounce a decided opinion, but Lindley and Fry, L.JJ., agreed in holding that it did not. It is difficult to conceive any case in which the burden could be held to run if it was incapable of running in this instance, and though the judges guarded themselves from affirming the general proposition, it is submitted that the point is virtually decided by this case, and that, except between landlord and tenant, the burden of covenants cannot run with the land at law. See further *Bailey* v. *Stephens*, 12 C. B. N. S. 91, *per* Willes, J.; *Ellis* v. *Bridgnorth*, 15 Id. 78; and *Richards* v. *Harper*, L. R. 1 Ex. 199, where the majority of the court seem to have thought that the burden of a covenant with the owner of adjacent land, to let him mine there without paying for injury to the covenantor's land, would not run with the land.

Semble, burden of covenants does not run except between lessor and lessee. *Austerberry* v. *Oldham*.

In *Tulk* v. *Moxhay*, 2 Phil. 774, it was laid down by Lord Doctrine of

notice independent of question whether covenant runs with land.

Tulk v. *Moxhay.*

Cottenham, that a covenant made by the purchaser of land that he or his assigns would use, or abstain from using, the land in a particular way, may be enforced in equity against all purchasers, with notice of the covenant, without reference to the question whether such covenant run with the land or not; and he there explained Lord Brougham's judgment in *Keppel* v. *Bailey*, and stated that this equity is wholly independent of the common law question as to the covenant running with the land. The doctrine of *Tulk* v. *Moxhay* has been followed and extended in subsequent cases, and *Keppel* v. *Bailey* must now be considered as overruled so far as it ignores the effect of taking with notice of a restrictive covenant; *Luker* v. *Dennis*, 7 Ch. D. 227. And, since by the Judicature Act, 1873, ss. 24 and 25, law and equity are to be concurrently administered, and in cases of conflict the rules of equity are to prevail, it seems that, wherever the facts admit of it, these cases must henceforth be decided upon the question of notice alone.

Who are affected by it.

This equitable doctrine affects a purchaser of the land, a lessee or sub-lessee of the land, and, where the restrictive covenant has been made in a lease, a sub-lessee of the lessee or of his assignee; and even a mere occupier will be restrained from breaking the covenant; *Mander* v. *Falcke*, (1891) 2 Ch. 554. An injunction will not, however, be granted against an underlessee because his tenant is, against his will, breaking the covenant contained in the original lease; *Hall* v. *Ewin*, 37 Ch. D. 74; or against the covenantor because his assignee is breaking the covenant; *Clements* v. *Welles*, 1 Eq. 200. A purchaser of land subject to a restrictive covenant, who mortgages part of the land without any express restriction, is not entitled to enforce the restrictive covenant against the mortgagee, though the latter had notice of the restriction; *King* v. *Dickeson*, 40 Ch. D. 596.

Notice.

The land must have been taken with notice of the covenant, either actual or constructive. A lessee has constructive notice of his lessor's title, and is in a similar position as regards notice as a purchaser. A purchaser or lessee is bound to make reasonable inquiry into the vendor's or lessor's title, that is, to require the usual title whatever the usual title may be. If he have notice of any deed forming part of the chain of title of his vendor or lessor, he has constructive notice of the contents of such deed, even if he is told that it does not prejudicially affect the title or

contain any restrictive covenant; *Patman* v. *Harland*, 17 Ch. D. 353; see *Carter* v. *Williams*, 9 Eq. 678; *Wilson* v. *Hart*, 1 Ch. 463; *Clements* v. *Welles*, 1 Eq. 200; *Feilden* v. *Slater*, 7 Eq. 523. The Conveyancing Act, 1882, s. 3, does not affect this question, for sub-s. 2 provides that nothing in s. 3 shall exempt a purchaser from the obligation of any covenant, etc., contained in any instrument under which his title is derived.

45 & 46 Vict. c. 39.

It extends only to restrictive covenants.

Haywood v. *Brunswick, &c., Society.*

The doctrine of *Tulk* v. *Moxhay*, however, cannot be extended to other than restrictive covenants. Therefore, where A. conveyed land to B. to the use that B. should pay to A. an annual chief rent, and B., for himself, his heirs, executors, and assigns, covenanted with A., his heirs, executors, and assigns, to pay the rent, and to build, keep in repair, and, when necessary, rebuild on the land messuages of the value of double the rent, it was held that an assignee to whom A. had conveyed the chief rent with the benefit of the covenant could not compel B.'s assign, who took with notice, to repair the messuages; *Haywood* v. *Brunswick Soc.*, 8 Q. B. D. 403, overruling *Cooke* v. *Chilcott*, 3 Ch. D. 694, so far as it asserts a contrary view. It was also held that the covenant could not be enforced at law apart from the equitable doctrine of notice. In *L. & S. W. R. Co.* v. *Gomm*, 20 Ch. D. 562, *Haywood* v. *Brunswick Soc.* was approved and followed. *Quære*, whether an assignee with notice of a covenant to build can be compelled to allow it to be performed by the covenantor; *Andrew* v. *Aitken*, 22 Ch. D. 218.

Equitable doctrine as to running of benefit.

In *Renals* v. *Cowlishaw*, 9 Ch. D. 125, 11 Id. 866, following *Keates* v. *Lyon*, 4 Ch. 218, it was held by Hall, V.-C., and the C.A., that the assignees of the vendor of an estate, part of which had been sold subject to a restrictive covenant not to carry on particular trades, were not entitled to enforce the covenant against the assignees of the vendee, upon the ground that the benefit of a restrictive covenant does not pass to a purchaser from the covenantee unless it is shown that it was intended that he should have the benefit of such covenant. Hall, V.-C., said: "It may, I think, be considered as determined that anyone who has acquired land, being one of several plots laid out for sale as building plots, where the court is satisfied that it was the intention that each one of the several purchasers should be bound by, and should as against the others have the benefit of, the covenants entered into by each of the purchasers, is entitled

to the benefit of the covenant; and that this right, that is, the benefit of the covenant, enures to the assign of the first purchaser; in other words, runs with the land of such purchaser. . . . A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such covenant need not be express, but may be collected from the transaction of sale and purchase." This statement of the law was approved in the H.L. in *Spicer* v. *Martin*, 14 App. Cas. 12, as being "perfectly sound, consistent with the authorities, and consistent with good sense." In the latter case it was decided that the benefit of a similar restrictive covenant did pass to the purchaser.

There must be an agreement or intention to pass the benefit.

Building estates.

In the case of building estates sold in lots with restrictive covenants, it is a question of fact whether it is intended that each purchaser shall be liable, in respect of those restrictive covenants, to each of the other purchasers; "and, if it is found that it was the intention that the purchasers should be bound by the covenants *inter se*, a court of equity will, in favour of any one of the purchasers, insist upon the performance of the covenants by any other of them, and will do so, under such circumstances, without introducing the vendor into the matter;" *Nottingham Co.* v. *Butler*, 15 Q. B. D. 261, *per* Wills, J., approved in the C. A., 16 Id. 778, and in *Collins* v. *Castle*, 36 Ch. D. 243; *Renals* v. *Cowlishaw*, 9 Id. 125, *per* Hall, V.-C.; *Mackenzie* v. *Childers*, 43 Id. 265. "The mere fact that the vendor does not bind himself expressly to enforce the covenants which he takes for the benefit of the purchasers is immaterial;" *Nottingham Co.* v. *Butler*, 16 Q. B. D. 778, *per* Lindley, L.J. In *Sheppard* v. *Gilmore*, 57 L. J. Ch. 6, and *Re Fawcett and Holmes*, 42 Ch. D. 150, it was held that the benefit of the covenant did not pass.

A person who is entitled to the benefit of a restrictive covenant may, by his conduct or omissions, debar himself from the right to enforce such covenant in equity; *Sayers* v. *Collyer*, 24 Ch. D. 180, 28 Id. 103, explaining *Bedford* v. *British Museum*, 2 My. & K. 552.

Equitable assignee.

In *Moore* v. *Greg*, 2 Phil. 717, Lord Cottenham decided that an equitable assignee of a lease is not liable to be called upon in equity to fulfil the covenants in like manner as he would have been bound to do if the assignment had been

complete at law; see *Cox* v. *Bishop*, 26 L. J. Ch. 389. It is apprehended, however, that an equitable assignee of a lease would, like any other purchaser with notice, be restrained by a court of equity from infringing a covenant like that in *Tulk* v. *Moxhay*. The distinction is obvious between the enforcement of "an equity attached to the property" (to use Lord Cottenham's words), the breach of which cannot be adequately compensated by damages in an action against the person legally liable on the covenant, and the enforcement in equity of the performance of covenants to pay rent and the like, the breach of which is capable of being fully compensated in damages, while the person in whom the lease is legally vested is liable upon those covenants.

Sometimes covenant amounts to a grant.

It should be observed that in some cases the terms of a covenant may operate as a grant of an incorporeal hereditament so as to render it unnecessary to determine whether, *quâ* covenant, the burden of it runs with the land; *Rowbotham* v. *Wilson*, 8 H. L. C. 348; *Morland* v. *Cook*, 6 Eq. 252, as explained by Cotton, L.J., in *Austerberry* v. *Oldham*, 29 Ch. D. 750, 774; Gale on Easements, 6th ed., p. 61. So a right may be reserved subject to a condition or qualification which will bind assignees; as, for instance, if a right to mine under land conveyed be reserved by the grantor for himself and assigns "so that compensation be paid for damage done to the surface by the exercise of such right," the assignees of the incorporeal right will take subject to the condition, which may be enforced by the assignees of the surface; *Aspden* v. *Seddon*, 1 Ex. D. 496.

Subject-matter with which a Covenant may run.

With what covenant may run.

As to the subject-matter to which a covenant may be incident, so as to run with it to the assignee:—The principal case shows that covenants will not run with personal property; and see *Gorton* v. *Gregory*, 3 B. & S. 90, where the covenant related to improvements in the land, and also to new articles to be introduced on to it for the purpose of trade; *Mears* v. *S. W. R. Co.*, 11 C. B. N. S. 850; *Tancred* v. *Allgood*, 4 H. & N. 438; *Lancashire Wagon Co.* v. *Fitzhugh*, 6 Id. 502. In *Milnes* v. *Branch*, 5 M. & S. 411, B., being seised in fee, conveyed to the defendant and J., their heirs and assigns, to the use that B., his heirs and assigns, might have a rent out of the premises, and subject thereto to the

Not with personalty.

Nor with rent.

use of the defendant in fee, and the defendant covenanted with B., his heirs, *and assigns*, to pay B., his *heirs and assigns*, the rent, and within a year to build messuages on the premises for securing the rent. B. within a year demised the rent to the plaintiffs for 1000 years. It was held that covenant would not lie for the plaintiffs, either for non-payment of the rent or for not building the messuages; and the court expressed a clear opinion that a covenant could not run with *rent*. So in *Randall* v. *Rigby*, 4 M. & W. 135, where the defendant had covenanted to pay a rent charged upon land; "No doubt," said Parke, B., "this covenant is collateral or in gross in one sense, that it does not run with the land or rent; for that *Milnes* v. *Branch* is an authority;" see *Butler* v. *Archer*, 12 Ir. C. L. R. 104; *Haywood* v. *Brunswick Soc.*, 8 Q. B. D. 403. In *Bally* v. *Wells*, Wilmot's Notes, 341 (see 3 Wils. 25), it was held, however, that a covenant might run with tithes. That was an action brought by *Bally*, rector of *Monkton*, against *Wells*, assignee of *Whitmarsh*, to whom the plaintiff had demised all the tithes of the parish for six years, by a lease containing a covenant whereby *Whitmarsh*, for himself, his executors, administrators, and assigns, covenanted "not to let any of the farmers now occupying the estate at *Monkton* have any part of the tithes aforesaid," without the consent of *Bally*. *Whitmarsh* assigned his interest in the tithes to the defendant, who let several farmers, occupiers, have part of the tithes without the consent of *Bally*, who thereupon brought an action of covenant; and after verdict for him, it was urged, in arrest of judgment, that tithes are incorporeal, lying in grant, and therefore that such a covenant cannot run with them. The court, however, gave judgment for the plaintiff. In *Egremont* v. *Keene*, 2 Jones (Exch., Ireland), 307, a covenant to pay rent reserved on a demise of the tolls of a market was held to run with the tenement, and bind the assignee of the lessee; but see Co. Litt. 44 b, 47 a. In *Muskett* v. *Hill*, 5 B. N. C. 694, the question whether a covenant could run with an assignable right to search for and take minerals was discussed, but not decided; see *Portmore* v. *Bunn*, 1 B. & C. 694. The same point afterwards arose in *Martyn* v. *Williams*, 1 H. & N. 817, in respect of a licence to dig, work, and search for china clay during a term; and it was held that a covenant by the grantee of the licence to leave the works in repair at the end of the term ran with the interest of the owner of the fee expectant upon

But runs with tithes.

With the tolls of a market.

With right to take minerals.

the determination of the term in the incorporeal right to enter and take the clay, and that the assignee of the fee might sue upon it. In this case the court observed that 32 H. 8, c. 34, extends in express terms to incorporeal hereditaments and tenements, and is not confined merely to lands; accord. *Norval* v. *Pascoe*, 34 L. J. Ch. 83, where a similar covenant was held to run with the subject-matter of the grant.

With incorporeal hereditaments.

It was once supposed that covenants would not run with an estate to which the covenantee is only entitled by estoppel; *Noke* v. *Awder*, Cro. Eliz. 436; *Lyn* v. *Wyn*, O. Bridg. 131; *Whitton* v. *Peacock*, 2 B. N. C. 411. But the contrary was maintained in former editions of this work for reasons which were afterwards adopted and acted upon in *Cuthbertson* v. *Irving*, 4 H. & N. 742, *post*.

With estates by estoppel.

Upon this question, before it had been thus decided, Parke, B., in *Gouldsworth* v. *Knights*, 11 M. & W. 337, had expressed an opinion in the affirmative; and there seemed to be no sound reason why the assignee of a reversion should not establish his title by way of estoppel. An estoppel does not necessarily involve a falsehood. On the contrary, facts are ascertained through the medium of estoppel without reference to the question whether really true or false; and it would be a sheer fallacy to assume that a fact, established by estoppel, has *therefore* no real existence. For judicial purposes it ought to be dealt with as if it really existed. It is clear that the assignee of a lessor is entitled to some extent to the benefit of estoppel, and it seems difficult to contend that the law of estoppel, subject of course to all the limitations and exceptions which form part of that branch of the law, does not apply in favour of the assignee, equally in an action of covenant as in an action of ejectment, or of use and occupation; *Rennie* v. *Robinson*, 7 Moore, 539; *Gouldsworth* v. *Knights*, 11 M. & W. 337. The lessee has (in a case of considerable authority) been held estopped from pleading *nil habuit in tenementis* in an action of covenant at suit of the assignee of the lessor; *Palmer* v. *Ekins*, 2 Lord Raym. 1550; and it seems that he ought not in such a case to be allowed to plead any plea which would be satisfied by proof simply that the lessor had *no* title when he made the lease.

The cases which have been supposed chiefly to countenance a contrary opinion are *Noke* v. *Awder*, Cro. Eliz. 436; *Whitton* v. *Peacock*, 2 B. N. C. 411; and *Carvick* v. *Blagrave*, 1 B. & B. 531; but the decision in *Cuthbertson* v.

Cuthbertson v. *Irving*.

Irving, 4 H. & N. 742, 6 Id. 135, renders it unnecessary to examine them at length. In that case the action was by the assignee of the lessor against the lessee upon a covenant to repair, made with the lessor and his heirs. The defendant denied the assignment to the plaintiff, and alleged that the lessor had at the time of the demise no reversion, and that no reversion had vested in the plaintiff. At the trial a special case was stated, by which it appeared that the lessor was without a legal title at the time of making the lease, that the lease did not, in terms, show the contrary, and that the assignment to the plaintiff disclosed the want of title, but contained apt words to convey a reversion in fee. Upon these facts the court directed judgment for the plaintiff, and stated that in their opinion, "so long as the lessee continues in possession under the lease, the law will not permit him to set up any defence founded on the fact that the lessor *nil habuit in tenementis*; and, upon the execution of the lease, there is created, in contemplation of law, a reversion in fee simple by estoppel in the lessor, which passes by descent to his heir, and by purchase to an assignee or devisee." This judgment was affirmed in the Exch. Cham., where reference was made to the discussion contained in this note upon the authorities bearing upon the point.

In order to appreciate the point actually for the first time decided in this case, it is necessary to consider briefly what was the previous state of the authorities upon this question. In the first place, the very proposition that covenants could not run with an estate to which the covenantee was entitled by estoppel only, in terms excluded the case of a covenant in a conveyance which is effectual at first by estoppel only, but has subsequently become a valid conveyance in point of interest in consequence of the acquisition of an estate by the conveyor. In such a case, it is clear that the assignee of the covenantee, not being entitled "*only* by estoppel," may sue equally as if the conveyance had from the first transferred an estate in interest. For example, if one having no estate make an ordinary lease by indenture, and subsequently acquire the fee, the lease becomes an estate in interest, and the lessor and his assigns on the one hand, *Webb* v. *Austin*, 8 Scott, N. R. 419, and the lessee and his assigns on the other, *Sturgeon* v. *Wingfield*, 15 M. & W. 224, may maintain all such actions on the covenants as if the lessor had had the fee at the date of the lease.

Perhaps, also, the proposition might have been correctly limited to cases where it *appeared*, upon the pleadings of the assignee himself, that there was no estate with which the covenant could run.

The following is an attempt to state the results of the authorities upon this subject, and to distinguish what is established law from what still remains in doubt :—

Where estate by estoppel becomes estate in interest, covenants run.

1. As we have already seen, where an estate by estoppel becomes an estate in interest, by the lessor's subsequent acquisition of an estate, the parties and their assignees are in the same position as if the estate had been *ab initio* an estate in interest; *Webb* v. *Austin*, 8 Scott, N. R. 419; *Sturgeon* v. *Wingfield*, 15 M. & W. 224. So far as *Whitton* v. *Peacock*, 2 B. N. C. 411, is an authority to the contrary, it cannot be considered as law; see 2 Wms. Saund., p. 831, ed. 1871; *Church* v. *Dalton*, 2 Ir. C. L. R. 249.

Do they run with estates by estoppel, even though truth appear by instrument creating estoppel?

2. It has been decided that, where it appears upon the face of the deed containing the covenant that the lessor has not the legal estate in the property, an assignment does not transfer the benefit or burden of the covenant. Thus, where a lease was made by indenture, reciting that the lessor had only an equitable title, it was held that the lessor, and not his assignee, could sue upon the covenants; *Pargeter* v. *Harris*, 7 Q. B. 708. That was only an instance of the rule that an instrument makes no estoppel where the truth appears by the same instrument.

But this doctrine, though recognized in *Cuthbertson* v. *Irving*, was modified, if not actually overruled, by *Jolly* v. *Arbuthnot*, 28 L. J. Ch. 547 (decided upon the authority of *Dancer* v. *Hastings*, 12 Moo. 34), and *Morton* v. *Woods*, L. R. 3 Q. B. 658, 4 Id. 293, 303. In *Pargeter* v. *Harris* the action was by lessor against lessee upon the covenant to pay rent. The lessor set out an equitable title, and the defence was that the lessor had assigned his reversion after the making of the lease, so that the right to sue upon the covenant to pay rent, being one that ran with the reversion, must be taken to be in the assignee and not in the lessor. It was held that as it appeared on the face of the indenture of lease that the lessor's title was only equitable, it did not create a reversion by estoppel with which the covenant could run, and that the covenant therefore being in gross the lessor and not his assignee could sue upon it.

Jolly v. *Arbuthnot*.

In *Jolly* v. *Arbuthnot*, 28 L. J. Ch. 274, 547, a receiver of an estate was appointed by a mortgagor and mortgagee by

deed, whereby the mortgagor attorned tenant to the receiver and gave him a power of distress. The mortgagor having become bankrupt, the receiver distrained. Romilly, M.R., held that, as the truth appeared by the recitals in the deed, the mortgagor's assignees were not estopped from denying the tenancy, and that the power of distress, being a mere licence to seize the mortgagor's goods, was a power in gross and consequently inoperative against his assignees. But this decision was reversed by Lord Chelmsford, on appeal, on the ground that, as the mortgagor's attornment to the receiver did in fact create the relation of landlord and tenant between them, the power of distress *was not a power in gross*, but was annexed to the tenancy so as to be available against the assignees.

Morton v. *Woods.*

The same principle was acted upon in *Morton* v. *Woods*, *supra*. There a mortgagor in possession executed a mortgage to the defendants by deed reciting the previous mortgage, and by a clause therein he attorned tenant to the defendants at a rent. The deed contained no express power of distress. The defendants having distrained for rent, the mortgagor contended that, since it appeared on the face of the deed creating the tenancy that he had no legal estate, he was not estopped from setting up that the defendants had no legal reversion so as to give them a right of distress. The Exch. Cham., however, held, affirming the decision below, that the parties having agreed to establish the relation of landlord and tenant between them, the mortgagor was estopped from denying that the defendants had a legal reversion, although the truth appeared upon the face of the deed itself.

From these decisions it seems to follow that a covenant such as that in *Pargeter* v. *Harris* could not now be held to be a *covenant in gross*, inasmuch as, though it appeared on the face of the deed that the lessor had no legal estate, the creation of a tenancy by the act and agreement of the parties did confer a reversion (whether strictly speaking by estoppel or not) upon the lessors, so as to give them privity of estate against an assignee of the lessee by virtue of which they might have distrained (*Jolly* v. *Arbuthnot*); and such an estate being so created would also, it is submitted, be capable of assignment by the lessor, so as to give the assignee an estate by estoppel, within the principle of *Cuthbertson* v. *Irving*, against the lessee. That case having decided that an estate by estoppel is one with which cove-

nants may run, and that an assignee of the lessor is not precluded from taking advantage of the estoppel against the lessee, even though the deed under which the lessee claims shows an absence of legal title in his lessor, why, in the case supposed, should a lessee be allowed to deny against the assignee of the lessor that which he is precluded from denying as against his lessor? It might indeed be argued that, as in those cases where the truth appears by the deed creating the estoppel (if it can be strictly so called) the parties are not precluded from denying anything which appears upon the deed itself, it is open for them to contend that though an estate to which certain legal interests may attach has been created by their own agreement, it is not nevertheless one with which covenants may run, since the want of the legal estate is apparent from the deed itself, and cannot be assumed against the lessee, as in cases of pure estoppel, to have been in the lessor. But since the benefit and burden of covenants attach not by quantum but by privity of estate, it seems to follow in the present state of the authorities that an assignment may transfer the benefit or burden of covenants even though it appears on the face of the deed containing the covenant that the lessor had not the legal estate.

Where truth appears in pleading of assignees.

3. It was once thought that, where it appeared in the pleadings of the assignee himself who sought to enforce the covenant, that the covenantee had no estate, even though it also appeared that there was an estoppel which *might have been* relied upon, the assignee would fail on his own showing; *Noke* v. *Awder*, Cro. Eliz. 436; for in such a case, the party entitled to the benefit of the estoppel contradicts instead of relying upon it; see *Ludford* v. *Barber*, 1 T. R. 95, *per* Buller, J. But this opinion, which is scarcely consistent with the decision in *Cuthbertson* v. *Irving*, is rendered of slight importance by the changes in the system of pleading, introduced by the Judicature Acts.

Where no estoppel as to a particular estate, lessee may set up truth against assignee of lessor.

4. Where the assignee states as part of his title that some particular estate was in the lessor at the time of the lease, and it does not appear that the lessee is estopped by the lease from denying *that particular estate* as against the lessor, he may deny it in the action at suit of the assignee; *Carvick* v. *Blagrave*, 1 B. & B. 531; *Weld* v. *Baxter*, 11 Exch. 816, 1 H. & N. 568.

Where want of title does not appear either

5. In an action by lessor against assignee of lessee, it is unnecessary for the lessor to allege his title; and, if it

on deed or pleading, the assignee of lessee cannot raise the question against lessor.

neither appears by the lease, as in *Portmore* v. *Bunn*, 1 B. & C. 694, nor by the lessee's pleadings, that he had no title (see *supra*), it is not competent for the assignee to raise the question whether he had an estate in interest, or only by estoppel; *Taylor* v. *Needham*, 2 Taunt. 278; *Cooper* v. *Blandy*, 1 B. N. C. 45; *Warburton* v. *Ivie*, 1 Jones (Exch. Ireland), 313.

6. If a lease be made by indenture, in such a form as to create between the lessor and lessee an estoppel to deny that the lessor had a reversion, and the lessor conveys all his interest, it has been decided, as we have seen, that the assignee can sue the lessee or his assignee for breaches of covenant in respect of which the lessor might have sued, had there been no assignment; *Cuthbertson* v. *Irving*, *supra*.

Where lessor, a limited owner, had an interest at date of assignment, assignee may sue on covenants.

In the case of a lease for years, made by a tenant for life, or in tail, who dies before the end of the term, an assignee, who has become so during the lessor's life, may sue upon the covenants; but not one who has become so after the lease has become actually void by the lessor's death; *Andrews* v. *Pearce*, 1 B. & P. N. R. 158; *Williams* v. *Burrell*, 1 C. B. 402. These cases are referred to only to prevent misapprehension. They do not affect the present question, because in them an interest passed by the lease, and there was no estate, either in interest or by estoppel, at the time of assignment.

Secus, where his interest had determined at date of assignment.

How far the lease acts as an estoppel.

But though it has been decided that the assignee of a reversion established by the medium of an estoppel may sue upon the covenants in the lease, it must be conceded that the question, to what extent the parties are estopped by the execution of a lease, is one of much nicety, and only to be answered in each case by reference to the terms of the instrument.

Can tenancy subsist between assignee of whole residue of term and assignor?

Akin to this part of the subject is the question revived by the decision of the Court of Q. B. in *Pollock* v. *Stacy*, 9 Q. B. 1033, that the relation of landlord and tenant, properly so called, can be created between assignor and assignee upon a conveyance of the entire residue of a term, there being no reversion either in fact or by estoppel; a decision contrary to the opinion expressed by the Court of Exch. in *Barrett* v. *Rolph*, 14 M. & W. 348; see also *Wollaston* v. *Hakewill*, 3 Scott, N. R. 593.

The same question had previously caused a difference of opinion on the Irish bench, where the Court of Q. B. had held that *Pluck* v. *Digges*, 5 Bligh, N. S. 31, had authorita-

tively settled the question in the negative; *Fawcett* v. *Hall*, Alc. & N. 248; but the Court of Exch. had been of a contrary opinion; *Walsh* v. *Feely*, 1 Jones, 413. The latter Court, however, "after reviewing all the cases upon the subject, have since concurred with the Queen's Bench," 2 Furlong on Landlord and Tenant, 1121, referring to *Porter* v. *French*, 9 Ir. L. R. 514; so that both those Courts are now of accord with the Court of Exch. in England. The distinction itself has been abolished in Ireland by 23 & 24 Vict. c. 154, s. 3, which enacts that "the relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure or service, and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent."

Without professing to discuss the question here, it may be observed that it was not fully argued in either *Barrett* v. *Rolph* or *Pollock* v. *Stacy*, and that it cannot be considered as settled by the refusal of the rule in the latter case. For that discussion the inquiry must begin earlier than the *nisi prius* ruling in *Poultney* v. *Holmes*, 1 Str. 405, acted upon by the Court of Q. B. The distinction between conveyances by way of subinfeudation, and by way of assignment, of estates in fee (see Wright's Tenures, 156), does not appear to have existed in the case of lesser estates, or to have been acted upon after the statute of *quia emptores* for any purpose relating to lands of socage tenure, until it was brought back to light in *Poultney* v. *Holmes*, to meet the supposed hardship of a particular case. The authorities collected in the note to *R.* v. *Wilson*, 5 M. & Ry. 157, as tending to establish the contrary, seem, even in the opinion of the very learned annotator (see p. 162), to fail in that object. Assuming, for the sake of argument, the position in *Poultney* v. *Holmes* to be correct, in what relation do the supposed under-tenant of all the lessee's interest and the superior landlord stand? May the landlord treat the supposed under-tenant as his tenant, by reason of his having acquired the entire residue of the term? It will hardly be contended that he cannot; see *Palmer* v. *Edwards*, 1 Doug. 187, n. If he can, then the supposed under-tenant may hold one and the same land immediately of two several lords, which cannot be, according to Littleton, § 231, and Lord Coke, Co. Litt. 152 b. Perhaps the true distinction may be, between cases where it

appears judicially that the entire interest has been conveyed, and cases where, by reason of estoppel, it does not so appear. In *Baker* v. *Gostling*, 1 B. N. C. 19, relied on in *Pollock* v. *Stacy* as confirming *Poultney* v. *Holmes*, there appears to have been a reversion by estoppel, and, where there is such an estoppel, it is not necessary, as between the parties estopped, to advert to the question whether in fact the instrument operates as an assignment or not. In *Cremen* v. *Hawkes*, 2 J. & L. 674, Sugden, L.C., considered that there was no right to sue in equity upon such an instrument, containing express powers of distress and entry, which might be enforced at law; see *Doe* v. *Bateman*, 2 B. & Ald. 168. And the remedy for *actual* use and occupation, though under an invalid assignment, is of course not touched by the above controversy. See further Litt. §§ 214, 215, 216, 231, 232, and the Commentary; the notes to 2 Wms. Saund., 418, c, d, e, *et seq.* (p. 834, ed. 1871); and a note in Alcock & Napier, 258, containing an opinion of Burton, J., the reasoning in which goes near, if not the whole way, to conclude the discussion. See also *Beardman* v. *Wilson*, L. R. 4 C. P. 57, where *Pollock* v. *Stacy* is explained.

SEMAYNE'S CASE.

MICH. 2 *JAC.* 1.—*IN THE KING'S BENCH.*

[REPORTED 5 COKE, 91.]

Sheriff when entitled to break doors—Application of maxim, "Every man's house is his castle."

IN an action on the case by Peter Semayne, plaintiff, and Richard Gresham, defendant, the case (*a*) was such: the defendant and one George Berisford were joint-tenants of a house in Blackfriars in London, for years; George Berisford acknowledged a recognizance in the nature of a statute-staple (*b*) to the plaintiff, and being possessed of divers goods in the said house died, by which the defendant was possessed of the house by survivorship, in which the goods continued and remained; the plaintiff sued process of extent on the statute to the sheriffs of London: the sheriffs returned the conusor dead, on which the plaintiff had another writ to extend all the lands which he had at the time of the statute acknowledged, or at any time after, and all his goods which he had at the day of his death; which writ the plaintiff delivered to the sheriffs of London, and told them that divers goods, which were the said George Berisford's at the time of his death, were in the said house; and thereupon the sheriffs, by virtue of the said writ, charged a jury to make inquiry, according to the said writ, and the sheriffs and jury *accesserunt ad domum prædictam, ostio domus prædict' aperto existen' et bonis prædictis in prædicta domo tunc existen'*, and they offered to enter the said house, to extend the goods according to the said writ; and the defendant, *præmissorum non ignarus*, intending to disturb the execution, *ostio præd' domus tunc aperto existen'*, *claudebat*

(*a*) Co. Ent. 12, pl. 11. Mo. 668. Yelv. 28, 29. Cr. El. 908, 909. 2 Roll. Rep. 294. From the Report of this case in Sir F. Moore, 668, it appears that there was a division of opinion among the Judges, and that one of the dissentient Judges withdrew his opinion; see also Croke, 908.

(*b*) See an account of this sort of recognizance, and the mode of proceeding thereon, 2 Wms. Saund. 217, ed. 1871, *in notis.*

contra vicecom' et jurator' præd'; whereby they could not come and extend the said goods, nor the sheriff seize them, by which he lost the benefit and profit of his writ, &c. And in this case these points were resolved.

1. That *the house of every one is to him as his* (*c*) *castle and fortress, as well for his defence against injury and violence, as for his repose*; and although the life of a man is a thing precious and favoured in law; so that although a man kills another in his defence, or kills (*d*) one *per infortun'*, without any intent, yet it is felony, and in such case he shall forfeit his goods and chattels (*e*), for the great regard which the law has to a man's life; but if thieves come to a man's (*f*) house to rob him, or murder, and the owner or his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing; and therewith agree 3 E. 3, Coron. 303 and 305; and 26 Ass. pl. 23. So it is held in 21 H. 7, 39, *every one may assemble his friends and neighbours* (*g*) *to defend his house against violence:* but he cannot assemble them to go with him to the market (*h*) or elsewhere for his safeguard against violence: and the reason of all this is, because *domus sua cuique est tutissimum refugium.*

2. It was resolved, *when any house is recovered by any real action, or by eject' firmæ, the sheriff may break the house and deliver the seisin or possession to the demandant or plaintiff*, for the words of the writ are *habere facias seisinam* or *possessionem*, &c., and after judgment it is not the house, in right and judgment of law, of the tenant or defendant.

3. *In all cases when the king* (*i*) *is party, the sheriff* (*if the doors be not open*) *may break the party's house either to arrest him, or to do other execution of the king's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his*

(*c*) 3 Inst. 162. Cr. El. 753. 2 Co. 32 a. 7 Co. 6 a. 8 Co. 126 a. 11 Co. 82 a. 1 Bulst. 146. Stanf. Cor. 14 b.

(*d*) Co. Lit. 391 a. Hale's Pl. Cor. 32. Stanf. Cor. 15 c, 16 d. This proposition seems to be too broadly stated.

(*e*) Not so now; *see* 24 & 25 Vict. c. 100, s. 7; 33 & 34 Vict. c. 23.

(*f*) 3 Inst. 56. Stanf. Cor. 14 a. Cor. 192. 3 E. 3, Cor. 205, 330. Br. Cor. 100. 1 Roll. Rep. 182. 22 H. 8, c. 5.

(*g*) 11 Co. 82 b. Br. Riots, &c. 1. 21 H. 7, 39 a. Fitz. Tresp. 246. 3 Inst. 161, 162.

(*h*) 11 Co. 82 b. 1 Roll. Rep. 182.

(*i*) O. Benl. 121. 1 Bulst. 146. Cr. El. 908, 909. Moor. 606, 668. Yelv. 28, 29. Cr. Car. 537, 538. 3 Inst. 161. Dy. 36, pl. 40. 12 Co. 131. 4 Inst. 177. Goldsb. 79. 2 Jones, 233, 234. 4 Leon. 41. 13 E. 4, 9 a.

coming, and to make request to open the doors; and that appears well by the statute of Westminster, 1, c. 17 (which is but an affirmance of the common law), as hereafter appears, for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man), by which great damage and inconvenience might ensue to the party, when no default is in him: for perhaps he did not know of the process, of which if he had notice, it is to be presumed that he would obey it; and that appears by the book in 18 E. 2 (*k*), Execut. 252, where it is said that the king's officer who comes to do execution, &c., may open the doors which are shut, and break them, *if he cannot have the keys*; which proves that he ought first to demand them. 7 E. 3 (*l*), 16: J. beats R. so as he is in danger of death, J. flies, and thereupon hue and cry is made, J. retreats into the house of T., they who pursue him, *if the house be kept and defended by force* (which proves that first request ought to be made), may lawfully break the house of T., for it is at the king's suit. 27 Ass. p. 66: the king's bailiff may distrain for issues (*m*) in a sanctuary. 27 (28) Ass. p. 35: by force of a *capias* on an indictment of trespass the sheriff may (*n*) break his house to arrest him; but in such case, if he breaks the house when he may enter without breaking it (that is on request made, or if he may open the door without breaking), he is a trespasser. 41 Ass. 17: on issue joined on a traverse of an office in Chancery, *venire facias* was awarded returnable in the King's Bench, without mentioning *non* (*o*) *omittas propt' aliquam libertat'*; yet, forasmuch as the king is party, the writ of itself is *non omittas propt' aliquam libertat'*. 13 E. 4, 9: for felony (*p*) or suspicion of felony, the king's officer may break the house to apprehend the felon, and that for two reasons; 1. For the commonwealth, for it is for the commonwealth to apprehend felons. 2. In every felony the king has interest, and where the king has interest the writ is *non omittas propter aliquam libertatem*; and so the liberty or privilege of a house doth not hold against the king.

(*k*) Yelv. 29. 5 Co. 92 b. Cr. El. 909. Moor. 668.

(*l*) 4 Inst. 177.

(*m*) Br. Distress, 35. Br. Trespass, 151.

(*n*) Fitz. Trespass, 232. Br. Trespass, 248.

(*o*) Br. Prerogative le Roy, 109. Br. Franchise, 18. Br. Process, 102. Fitz Prerogative, 21.

(*p*) 13 E. 4, 9 a. Fitz. Bar. 110. 4 Inst. 177. 1 Bulstr. 146. 2 Bulstr. 61.

4. *In all cases, when the door is* (*q*) *open, the sheriff may enter the house, and do execution, at the suit of any subject, either of the body or of the goods; and so may the lord in such case enter the house* (*r*) *and distrain for his rent or service*; 38 Hen. 6, 26 a; 8 E. 2, Distr. 21; and 33 E. 3, Avow. 256; the lord may distrain in the house, although lands are also held in which he may distrain; see 29 (*s*) Ass. 49. *But the great question in this case was, if by force of a* capias *or* fieri facias *at the suit of the party the sheriff, after request made to open the door, and denial made, might break the defendant's house, to do execution, if the door be not opened.* And it was objected that the sheriff might well do it for divers causes. 1. Because it is by process of law; and it was said that it would be granted on the other side, that a house is not a liberty; for if a *fieri facias* or a *capias* be awarded to the sheriff at the suit of a common person, and he makes a mandate to the bailiff of a liberty who has return of writs, who *nullum dedit respons'*, in that case another writ shall issue with *non omittas propter aliquam libertatem*; yet it will be said on the other side that he shall not break the defendant's house, as he shall do of another liberty; for whereas in the county of Suffolk there are two liberties, one of St. Edmund Bury, and the other of St. Ethelred of Ely, suppose a *capias* comes at the suit of A. to the sheriff of Suffolk to arrest the body of B., the sheriff makes a mandate to the bailiff of the liberty of St. Ethelred, who makes no answer, in that case the plaintiff shall have a writ of *non omittas*, and by force thereof he may arrest the defendant within the liberty of Bury, although no default was in him. 2. Admitting it to be a liberty, the defendant himself shall never take advantage of a liberty: as if the bailiff of a liberty be defendant in any action, and process of *capias* or *fieri facias* comes to the sheriff against him, the sheriff shall execute the process against him; for a liberty is always for the benefit of a stranger to the action. 3. For necessity the sheriff shall break the defendant's house after such denial as aforesaid, for at the common law a man should not have any execution for debt, but only of the defendant's goods. Suppose then the defendant would keep all his goods in his house, the defendant himself, by his own act,

(*q*) 1 Brownl. 50. Cr. Jac. 486.
(*r*) Br. Trespass, 226. Br. Issue, 26.
(*s*) Br. Disseisor, 52. Fitz. Assize 286. Lucas, 290. Cro. Jac. 555.

would prevent not only the plaintiff of his just and true debt, but there would also be a great imputation to the law, that there should be so great a defect in it, that in such case the plaintiff by such shift without any default in him should be barred of his execution. And the book of 18 E. 2 (*t*), Execut. 252, was cited to prove it, where it is said, that it is not lawful for any one to disturb the king's officer who comes to execute the king's process; for if a man might stand out in such a manner, a man would never have execution, but there it appears (as has been said) that there ought to be request made before the sheriff breaks the house. 4. It was said, that the sheriffs were officers of great authority, in whom the law reposed great trust and confidence, and are to be of sufficiency to answer for all wrongs which should be done; and they had *custodiam comitat'*, and therefore it should not be presumed that they would abuse the house of any one, by colour of doing their office in execution of the king's writs, against the duty of their office, and their oath also. *But it was resolved, that it is not lawful for the sheriff (on request made and denial) at the suit of a* (*u*) *common person, to break the defendant's house,* sc. *to execute any process at the suit of any subject*: for thence would follow great inconvenience, that men as well in the night (*x*) as in the day should have their houses (which are their castles) broke, by colour whereof great damage and mischief might ensue; for by colour thereof, on any feigned suit, the house of any man, at any time, might be broke when the defendant might be arrested elsewhere, and so men would not be in safety or quiet in their own houses. And although the sheriff be an officer of great authority and trust, yet it appears, by experience, that the king's writs are served by bailiffs, persons of little or no value: and it is not to be presumed that all the substance a man has is in his house, nor that a man would lose his liberty, which is so inestimable, if he has sufficient to satisfy his debt. And all the said books, which prove that when the process concerns the king the sheriff may break the house, imply that at the

(*t*) Yelv. 29. 5 Co. 91 b. Moor. 668. Cr. El. 909. O. Benl. 121. *See* 18 E. 4, 4, *contra*, *post*, p. 104.

(*u*) 1 Jones, 429, 430. 1 Brownl. 50. 1 Bulstr. 146. Cr. Jac. 556. O. Benl. 121. 4 Inst. 177. Palm. 53. Dyer, 36, pl. 41. Moor. 668. Cr. Car. 537, 538. Cr. El. 908, 909. Yelv. 29. Hob. 62, 263, 264. 4 Leon. 41. 11 Co. 82. March, 3, 4. 18 E. 4, 4 a. Br. Execut. 100. Br. Trespass, 390.

(*x*) 9 Co. 66 a. Cr. Jac. 280, 486. Jenk. Cent. 291. Hale's Pl. Cor. 45. Owen, 63.

suit of the party the house may not be broken: otherwise the addition (at the suit of the king) would be frivolous. And with this resolution agrees the book in (*y*) 13 E. 4, 9, and the express difference there taken between the case of felony, which (as has been said) concerns the commonwealth, and the suit of any subject, which is for the particular interest of the party, as there it is said. In (*z*) 18 E. 4, 4 a, by Littleton and all his companions it is resolved that the sheriff cannot break the defendant's house by force of a *fieri facias*, but he is a trespasser by the breaking, and *yet the execution which he then doth in the house is good*. And it was said that the said book of (*a*) 18 E. 2, was but a short note, and not any case judicially adjudged, and it doth not appear at whose suit the case is intended, but it is an observation or collection (as it seems) of the reporter. And if it be intended of a *Quo* (*b*) *minus*, or other action in which the king is party, or is to have benefit, the book is good law.

5. It was resolved, that *the house of any one is not a castle or privilege but for himself, and shall not extend to protect any* (*c*) *person who flies to his house, or the goods of any other which are brought and conveyed into his house, to prevent a lawful execution, and to escape the ordinary process of law; for the privilege of his house extends only to him and his family, and to his own proper goods, or to those which are lawfully and without fraud and covin there; and therefore in such cases, after denial on request made, the sheriff may break the house*; and this is proved by the statute of West. 1, c. (*d*) 17, by which it is declared, that the sheriff may break a house or castle to make replevin, when the goods of another which he has distrained are by him conveyed to his house or castle to prevent the owner to have a replevin of his goods; which Act is but an affirmance of the common law in such points. But it appears there, that, before the sheriff in such case breaks the house, he ought to demand the goods to be delivered to him: for the words of the statute are, "after that the cattle shall be solemnly demanded by the sheriffs," &c.

(*y*) 13 E. 4, 9 a. 5 Co. 92 a. Fitz. Bar. 110. 4 Inst. 177.

(*z*) Cro. Eliz. 909. Yelv. 29. Br. Execution, 100. Br. Trespass, 390.

(*a*) 18 E. 2, Execut. 252. Yelv. 29. Moor. 668. Cr. El. 909. 5 Co. 91 b, 92 b. O. Benl. 121.

(*b*) Plowd. 208 a. 2 Show. 87.

(*c*) Cr. Car. 544.

(*d*) 2 Inst. 192, 193, 194; repealed S. L. R. Act, 1863; S. L. (Ir.) R. Act, 1872.

6. It was resolved, admitting that the sheriff, after denial made, might have broke the house, as the plaintiff's counsel pretend he might, then it follows that he has not done his (*e*) duty, for it doth not appear that he made any request to open the door of the house. Also the defendant, as this case is, has done that which he might well do by the law, *scil.* to shut the door of his own house.

Lastly, the general allegation (*f*), *præmissorum non ignarus*, was not sufficient in this case, where the notice of the premises is so material; but in this case it ought to have been certainly, and directly, alleged; for, without notice of the process of law, and of the coming of the sheriff with the jury to execute it, the shutting of the door of his own house was lawful. And judgment was given against the plaintiff.

(*e*) Stile, 447.
(*f*) Hard. 2. 1 Mod. Rep. 286. *See* Hollingsworth *v.* Brodrick, 7 A. & E. 40.

Although the sheriff, as appears from this case, may justify the *breaking open* the doors of a *third person's* house (after request made) in order to execute the process of the law upon the defendant or his property, removed thither in order to avoid an execution, still he does so at his peril; for if it turn out that the defendant was not in the house, or had no property there, he is a trespasser; *Johnson* v. *Leigh*, 6 Taunt. 246; *Ratcliffe* v. *Burton*, 3 B. & P. 223, explained in *Hutchison* v. *Birch*, 4 Taunt. 619; Com. Dig., *Execution*, C. 5; see *White* v. *Wiltshire*, Palm. 52, 2 Rolle, 138; *Biscop* v. *White*, Cro. Eliz. 759; and *Cooke* v. *Birt*, 5 Taunt. 765; but his right to *enter* the *defendant's* own house does not depend on any such contingency, for that is the most natural place for the defendant or his goods to be; and on the same principle, where there is a judgment against an administratrix *de bonis testatoris*, and she marries, the sheriff may enter her husband's house to search for the testator's goods; *Cooke* v. *Birt*, 5 Taunt. 765; and although the sheriff must not break open the *outer* door of the defendant's house in order to execute the process (see *Kerbey* v. *Denby*, 1 M. & W. 336), yet, having obtained admission within the house, he may justify the afterwards breaking open *inner* doors in order to execute the process,

Sheriff breaks open a third person's house at his peril.

But not so of *entry* into defendant's house.

Having entered, may break inner doors.

as he may cupboards, trunks, &c.; *R.* v. *Bird*, 2 Show. 87; *Lee* v. *Gansel*, Cowp. 1, where the door of a lodger's room was broken open; *Hutchison* v. *Birch*, 4 Taunt. 619, which shows that no request is necessary, before breaking open inner doors; see *Ratcliffe* v. *Burton*, 3 B. & P. 223. In *Penton* v. *Browne*, 1 Sid. 186, it was held that a barn or outhouse, not adjoining to or parcel of the dwelling-house, may be broken open in order to levy an execution. Upon this case Bowen, L.J., in *American Co.* v. *Hendry*, 68 L. T. 742, said: "The law so laid down appears to me to be a departure from older law. I should, with submission, have myself supposed that the sheriff in a civil suit had no more right to break a detached inclosure than a landlord's bailiff had." The outer door of a building, of whatever kind, may not be broken to make a distress for rent; *Brown* v. *Glenn*, 16 Q. B. 254; *American Co.* v. *Hendry*, *supra*; see *Long* v. *Clarke*, (1894) 1 Q. B. 119. If the defendant, after being arrested, escape, the sheriff may break open either his own house or that of a stranger, for the purpose of retaking him; *Anon.* 6 Mod. 105; Lofft, 390; see *Lloyd* v. *Sandilands*, 8 Taunt. 250; *Sandon* v. *Jervis*, E. B. & E. 942; and where a bailiff who has entered the house to distrain, or execute process, is forcibly ejected, he may break open the door in order to re-enter; *Eagleton* v. *Gutteridge*, 11 M. & W. 465; *Pugh* v. *Griffith*, 7 A. & E. 827; *Aga Kurboolie Mahomed* v. *The Queen*, 4 Moo. P. C. 239; *Bannister* v. *Hyde*, 2 E. & E. 627.

Sheriff may break defendant's house to *retake*.

So, of bailiff ejected.

As already stated, the sheriff cannot justify breaking open the outer door of a stranger's house, unless the defendant or his goods are actually there; if they be not there he is a trespasser. This doctrine has been carried still farther; for it has been held that, even though he may have grounds for suspicion, he cannot justify entering the stranger's house although he break no door, unless the defendant or his goods were actually there. In *Cooke* v. *Birt*, 5 Taunt. 765, Dallas, J., said: "The sheriff may enter the house of a stranger if the door be open; but it is at his peril whether the goods be found there or not; if they be not, he is a trespasser." The expressions of Gibbs, C.J., were to the same effect. In *Johnson* v. *Leigh*, 6 Taunt. 246, in trespass for breaking and entering the plaintiff's house, and breaking the *inner* doors, locks, &c., the defendant justified entering as sheriff, under a *testatum capias* against T. J., the outer door being open, and there being reasonable and sufficient cause to suspect and believe, and the defendant suspecting and believing, that

Semble, sheriff enters house of third person at his peril.

T. J. was in the house. On demurrer, the plea was held to be bad, and Gibbs, C.J., said: "In *Hutchison* v. *Birch*, 4 Taunt. 619, the goods were in the house; here the defendant only avers a suspicion that T. J. was in the house: I protest that the court have not decided this point, or dropped, in the case of *Hutchison* v. *Birch*, anything which favours the opinion, that it may not go abroad to the world that we have so decided."

Unless defendant be actually resident there.

However, it is apprehended that circumstances might exist, under which the sheriff would be justified in entering a stranger's house on suspicion, though the defendant were not actually there. For instance, if the defendant were on a visit with the stranger, the stranger's dwelling-house would seem to be, *pro tempore*, the defendant's dwelling-house, so as to entitle the sheriff to enter it, upon the principle, on which *Cooke* v. *Birt* was decided, of its being the place where it would be natural to expect the defendant, or his goods, to be. I have seen a plea framed on that idea; and indeed the point was virtually so ruled by *Sheers* v. *Brooks*, 2 H. Bl. 120, where it was held, that, when the defendant resided in a stranger's house, the bail above might justify entering it in order to seek for him, the outer door being then open; for, said Lord Loughborough, "I see no difference between a house of which he is solely possessed, and a house in which he resides with the consent of another;" but the defendant must at least be residing in the stranger's house at the time; *Moorish* v. *Murrey*, 13 M. & W. 52, where a plea that "for six months next *preceding* the trespasses," the defendant "*had* resided" in the plaintiff's house, was held insufficient, even after verdict. It seems to follow from this, that, as a house in which the defendant habitually resides is on the same footing with respect to executions as his own house, the sheriff would not be justified in breaking the outer door of such a house even after demand of admittance and refusal. There may, perhaps, be another case in which the sheriff might justify entering a stranger's house, upon bare suspicion; *viz.*, if the stranger were to use fraud, and to inveigle the sheriff into a belief that the defendant was concealed in his house, for the purpose of favouring his escape, while the officers should be detained in searching, or for any other reason, it might be held that he could not take advantage of his own deceit so as to treat the sheriff, who entered under the false supposition thus induced, as a trespasser; or, perhaps, such conduct might be held to amount

Semble, in such case sheriff may not break.

Semble, entry may be justified by fraud of stranger.

to a licence to the sheriff to enter; see *Price* v. *Harwood*, 3 Camp. 108; *Walker* v. *Willoughby*, 6 Taunt. 530; and an anonymous case in Chitty's Gen. Prac. of Law, 1st ed. vol. 3, p. 354, n. *x*.

What is an entry without breaking.

As to the means by which an entry may be effected without being considered a breaking of the door, it has been held that a landlord may, in order to make a distress, open the outer door "in the ordinary way in which other persons can do it, when it is left so as to be accessible to all who have occasion to go into the premises," *e.g.*, by pulling out a moveable staple, lifting a latch, or turning a key left in the door; and the court in so deciding questioned the authority of the passage in Com. Dig., *Execution*, *C.* 9, that a sheriff cannot open the outer door, though it be only latched, and said that at all events that passage only applied to a *dwelling*-house; *Ryan* v. *Shilcock*, 7 Exch. 72, more fully reported 21 L. J. Ex. 55. In *Curtis* v. *Hubbard*, 1 Hill's New York R. 337, on the other hand, it was laid down that to make the sheriff a trespasser, it is enough that the outer door be shut; that merely opening is a breaking in law; that lifting a latch is as much a breaking in law as the forcing of a bolted door; and that whatever would be a breaking in burglary would be a breaking by the sheriff. It seems not altogether easy to reconcile the dicta in *Ryan* v. *Shilcock* with the cases as to burglary (collected in Archbold, 21st ed., 576). If a pane in a window of the house is broken, but not by the officer, he may lawfully put his hand through the aperture in order to make the arrest; *Sandon* v. *Jervis*, E. B. & E. 942. If the window be shut, but not fastened, it may not be opened for the purpose of distraining; and therefore where a man employed by the landlord upon the premises (but not for the purposes of a distress) had at the broker's suggestion effected an entrance from the area by opening a window, which was shut but not fastened, and then opened the front door to the broker, it was held that the entry must be taken to be all one act, and was unlawful; *Nash* v. *Lucas* L. R. 2 Q. B. 590; but entry may be lawfully made for the purpose of distraining by further opening a window already partially open; *Crabtree* v. *Robinson*, 15 Q. B. D. 312; or by climbing over the curtilage wall and then entering the house by an open window; *Long* v. *Clarke*, (1894) 1 Q. B. 119, approving of *Eldridge* v. *Stacey*, 15 C. B. N. S. 458, and not *Scott* v. *Buckley*, 16 L. T. 573. In *Long* v. *Clarke* the C.A. held that to climb over a wall was not to break in,

Lord Esher saying: "I see no difference between getting over a wall to get into the curtilage and getting on to the wall of the house in getting in at a window in it, and it seems to me to be plain that if a landlord can get into a curtilage without breaking anything he may do so, just as he can get into a window on the same conditions."

Distinction between process at suit of king and private person.

The distinction taken in the principal case between process at the suit of the king and that of an individual, is recognised in *Burdett* v. *Abbot*, 14 East, 157; *Launock* v. *Brown*, 2 B. & Ald. 592; 2 Hale, P. C. 117; Foster on Homicide, p. 320. The sheriff may break open outer doors, to execute a writ of attachment issued for disobedience to an order of court directing delivery up of documents; *Harvey* v. *Harvey*, 26 Ch. D. 644, where the distinction was made between attachment as an ancillary remedy for compelling payment of money, and attachment for disobedience to an order other than for payment of money, as the latter partakes of a criminal character; see *Re Freston*, 11 Q. B. D. 545; *Re Dudley*, 12 Id. 44.

Necessity for previous demand.

It is laid down in the text, that, before the sheriff breaks the outer door of a stranger's house, in those cases in which he has a right to do so, he ought to demand admission; and this is also necessary when he breaks open the defendant's own outer door in order to execute the process of the Crown; *Launock* v. *Brown*, 2 B. & Ald. 592; even in case of felony, 2 Hale, P. C. 117; Foster on Homicide, 320; or in order to retake the defendant after an escape; see *Genner* v. *Sparkes*, 1 Salk. 79; *White* v. *Wiltshire*, 2 Rolle's Rep. 138, see Palm, 52, where the bailiffs were imprisoned, and the door broken to rescue them. On a similar principle, in *De Gondouin* v. *Lewis*, 10 A. & E. 117, the court thought that before seizing contraband goods from the person the officers ought to demand them. But though it was said in *Ratcliffe* v. *Burton*, 3 B. & P. 223, that admission should be demanded before breaking an *inner* door, the contrary was decided in *Hutchison* v. *Birch*, 4 Taunt. 619. In *Pugh* v. *Griffith*, 7 A. & E. 827, the sheriff's officer, under a *fi. fa.*, had lawfully entered a house and seized goods there, and the outer door being locked upon him, he was held justified in breaking it open to carry away the goods, there being no one whom he could request to open it. In *Sandon* v. *Jervis*, E. B. & E. 935, 942, where the sheriff's officer was held justified in breaking open the outer door after having arrested the plaintiff under a *ca. sa.* by touching him through a hole

None as to inner doors.

Breaking out.

Breaking in after arrest.

in a window of the house, it is not stated whether or no there had been any demand of entry. In *Aga Kurboolie Mahomed* v. *The Queen*, 4 Moo. P. C., 239, a sheriff's officer in the execution of a bailable writ lawfully entered a house, but before he could arrest was forcibly expelled; he obtained assistance, and without demand of re-entry, broke open the outer door, re-entered, and made the arrest, and he and his assistants were held justified; and Lord Campbell, in delivering the judgment, said: "The outer door being open, they were entitled to enter the house under civil process, and they being lawfully in the house to arrest him, he was guilty of a trespass by expelling them. The act of locking the outer door was unlawful, and he could confer no privilege upon himself by that unlawful act."

Breaking to re-enter.

The law upon this subject is well, and at the same time briefly, summed up by Sir Michael Foster, in his Discourse of Homicide, pp. 319, 320, as follows:—

Rules laid down in Foster on Homicide.

"The officer cannot justify breaking open an outward door or window in order to execute process in a civil suit. If he doth he is a trespasser. But if he findeth the outward door open, and entereth that way, or if the door be opened to him from within, and he entereth, he may break open inward doors if he findeth *that* necessary in order to execute his process. . . .

"The rule, that '*every man's house is his castle*,' when applied to the case of arrests upon legal process, hath been carried as far as the true principles of political justice will warrant, perhaps beyond what, in the scale of sound reason and good policy, they will warrant. . . . But this rule is not one of those that will admit of any extension. It must, therefore, as I have before hinted, be confined to the breach of windows and outward doors intended for the security of the house against persons from without endeavouring to break in.

"It must likewise be confined to a breach of the house in order to arrest *the occupier or any of his family* who have their domicile, their ordinary residence there. For if a stranger *whose ordinary residence is elsewhere*, upon a pursuit, taketh refuge in the house of another, this is not *his* castle, he cannot claim the benefit of sanctuary in it." See Watson on the Office of Sheriff, 2nd ed., 128.

"The rule is likewise confined to the case of arrests *in the first instance*; for, if a man being legally arrested (and laying hold of the prisoner and pronouncing the words of arrest is an actual arrest), escapeth from the officer and taketh shelter,

though *in his own house*, the officer may, upon fresh suit, break open doors in order to retake him, having first given due notice of his business and demanded admission, and been refused.

Rules laid down in Foster on Homicide.

"And let it be remembered that not only in this, but in every case where doors may be broken open in order to arrest, whether in cases criminal or civil, there must be such notification, demand, and refusal, before the parties concerned proceed to that extremity.

"The rule already mentioned must likewise be confined to the case of arrests upon process in civil suits; for, where a felony hath been committed, or a dangerous wound given, or even where a minister of justice comes armed with process founded on a breach of the peace, the party's own house is no sanctuary for him; doors may in any of these cases be forced; the notification, demand, and refusal before mentioned having been previously made. In these cases, the jealousy with which the law watches over the public tranquillity (a laudable jealousy it is), the principles of political justice, I mean the justice which is due to the community *ne maleficia remaneant impunita*, all conspire to supersede every pretence of private inconvenience, and oblige us to regard the dwellings of malefactors, when shut against the demands of public justice, as no better than the dens of thieves and murderers, and to treat them accordingly. But bare suspicion touching the guilt of the party will not warrant a proceeding to this extremity, though a felony hath been actually committed, unless the officer cometh armed with a warrant from a magistrate, grounded on such suspicion."

Doctrine that execution good though sheriff a trespasser.

It is laid down in the principal case that the sheriff breaking an outer door to do execution "is a trespasser by the breaking, and yet the execution which he then doth in the house is good." The authority referred to for this proposition is the Year Book, 18 E. 4, Pasch. 4 *a*. In that case, after *fi. fa.* issued, the defendant locked up all his goods in his house, whereupon the sheriff broke open the outer door of the house, entered, and seized the goods; and the question, which appears to have been raised on a motion, though the form of the proceeding is not distinctly stated, was, whether the sheriff had done any wrong or not. "Littleton and all his companions held, that the party may have a writ of trespass against the sheriff for the breaking of the house, notwithstanding this *fi. fa.*, for the *fi. fa.* shall not

excuse him of the breaking of the house, but of the taking of the goods only." It is laid down accordingly, in Bac. Abr., *Execution* (N), on the authority of the principal case, "that if the sheriff in executing a writ break open a door, where he has no authority for so doing by law, yet the execution is good, and the party has no other remedy but an action for trespass against the sheriff." This, so far as relates to an execution *against goods*, is consistent with the doctrine acted upon by the Q. B. in *De Gondouin* v. *Lewis*, 10 A. & E. 117, where a custom-house officer, without demand, or any circumstance to justify the use of force, violently took contraband goods out of the plaintiff's hands. An action of trespass was brought for the seizure, but not for the assault. The court held that the fact of the goods being forfeited was an answer to the action, notwithstanding that, if the plaintiff had sued for the assault, there would have been no justification. And the reason of the thing, as well as the authority of Coke and of Littleton, seems to be with the decisions, for the execution creditor not taking part in the execution has been guilty of no wrong, and the maxim *nullus commodum capere potest de injuriâ suâ propriâ* (see Co. Litt. 148 *b*) is therefore not violated by holding so much of the acts of the sheriff as was for the benefit of the execution creditor valid, and the rest illegal. However, according to Bac. Abr., *Execution* (N), in *Yates* v. *Delamayne*, T. T. 17 G. 3, "the court set aside an execution levied on defendant's *goods* in his dwelling-house, because the officer forcibly broke into the house to execute the writ." That case, though hard it may be considered, if interfering with a strict legal right of the execution creditor, is perhaps not irreconcilable with the doctrine under discussion; because it is quite consistent with the validity of the execution in point of law, that the court, to prevent abuse of its process and danger of collusion between execution creditor and sheriff, should, in the exercise of its *summary* jurisdiction, undo the proceedings, according to the principle acted on in *Barratt* v. *Price*, 9 Bing. 566, and other cases, and recognised in *Hooper* v. *Lane*, 6 H. L. C. 443. It was the practice, in like manner, to discharge persons taken under process against the person by means of an illegal entry into a dwelling-house; *Hodgson* v. *Towning*, 5 Dowl. 410; and there is authority for saying that an arrest of the *person* by means of an illegal breaking of the outer door, is altogether void, and that the sheriff is liable, in case of such arrest, not merely for the

Semble, true as to goods.

But court may exercise its summary jurisdiction to avoid execution.

Semble, arrest of person void.

breaking and entering of the house, but also for the assault and imprisonment; see *Kerby* v. *Denby*, 1 M. & W. 336; but 32 & 33 Vict. c. 62, which abolished imprisonment for debt, except in certain special cases, rendered this point less likely to arise.

The effect, upon the seizure of the goods, of a previous illegal entry was touched upon, but not decided, in *Brunswick* v. *Slowman*, 8 C. B. 317, and in *Percival* v. *Stamp*, 9 Exch. 167, which latter case seems to be an authority in favour of the view that the execution is valid.

Effect of doctrine that seizure is satisfaction, where goods are restored to debtor.

It may here be added, that in a case like *Yates* v. *Delamayne*, *supra*, inasmuch as the seizure by the sheriff under a *fi. fa.* of goods to the value of the judgment debt is said to operate by way of satisfaction (*Wilbraham* v. *Snow*, 2 Wms. Saund., ed. 1871, p. 87, n. (1); and *per cur.*, *Holmes* v. *Newlands*, 5 Q. B. 367), a question may arise as to the position of the execution creditor, upon an application by the judgment debtor to have all proceedings on the judgment stayed, after the execution has been set aside and the goods ordered to be restored to the execution debtor. Probably such an application would be refused, after the judgment debtor had succeeded in getting the execution set aside and the goods restored. If not, the alternative would be, to hold the sheriff liable to the execution creditor as upon a lawful seizure; and indeed in such a case it would perhaps be difficult to suggest what valid defence the sheriff could make. It would, however, be a wild sort of justice to make him pay the debt and costs by way of additional punishment of his illegal entry, for which he would, at all events, be liable to answer in damages to the debtor. At least it would seem that the jurisdiction exercised in *Yates* v. *Delamayne*, except in cases where the execution creditor has employed a special bailiff, or been privy to the illegal entry, ought to be administered with great caution. It is, however, said by Holt, C.J., in *Clerk* v. *Withers*, 6 Mod. 293 (to which the above note in Wms. Saund. refers), that the seizure does not discharge the debtor if the execution is afterwards avoided. The taking of a debtor's *person* on a *ca. sa.*, though operating as an election binding the creditor to proceed only by that means, was not an absolute extinguishment of the debt; see *Thompson* v. *Parish*, 5 C. B. N. S. 685; *Taylor* v. *Waters*, 5 M. & S. 103; *Foster* v. *Jackson*, Hob. 59; *Woodward* v. *Pell*, L. R. 4 Q. B. 58; nor did such taking and subsequent discharge destroy an attorney's

lien for costs; *O'Brien* v. *Lewis*, 32 L. J. Ch. 665; and 32 & 33 Vict. c. 62, which abolishes imprisonment for debt generally, but creates, by s. 5, a power of committal for certain classes of debts, under certain conditions, provides that no imprisonment under that section "shall operate as a satisfaction or extinguishment of any debt or demand, or cause of action, or deprive any person of the right to take out execution against the lands, goods, or chattels, of the person imprisoned in the same manner as if such imprisonment had not taken place" (s. 5, sub-s. 2).

The sheriff cannot arrest or detain a debtor already in custody on an invalid writ.

The case of *Hooper* v. *Lane*, 6 H. L. C. 443, decided that the sheriff cannot arrest or detain a debtor already in custody on an invalid writ; see *Ockford* v. *Freston*, 6 H. & N. 466; but also *Bateman* v. *Freston*, 30 L. J. Q. B. 133; *Ex p. Freston*, 30 L. J. Ch. 460.

CALYE'S CASE.

PASCH. 26 *ELIZ.—IN THE KING'S BENCH.*

[REPORTED 8 COKE, 32.]

Liability of Innkeepers.

IT was resolved, *per totam curiam*, that if a (*a*) man comes to a common inn, and delivers his horse to the hostler, and requires him to put him to pasture, which is done accordingly, and the horse is stolen, the innholder shall not answer for it; for the words of the writ which lieth against the hostler are *Cum secundum legem et consuetud' regni nostri Angliæ* (*b*) *hospitatores, qui hospitia com' tenent ad hospitandos homines, per partes ubi hujusmodi hospitia existunt transeuntes, et in eisdem hospitantes, eorum bona et catalla infra hospitia illa existentia absque subtractione seu amissione custodire die et nocte tenentur, ita quod pro defectu hujusmodi hospitatorum, seu servientium suorum, hospitibus hujusmodi damnum non eveniat ullo modo: quidam malefactores quendam equum ipsius A. precii* 40*s. infra hospitium ejusdem B., &c., inventum pro defectu ipsius B. ceperunt, &c.*; see *Registr., fol.* 105, *inter Brevia de Transgr'*, and F. N. B. 94 a, b; by which original writ (*which is in such case the ground of the common law*) all the cases concerning hostlers may be decided. For, 1, It ought to be a (*c*) common inn; for if a man be lodged with another (who is not an innholder) upon request, if he be robbed in his house by the servants of him who lodged him, or any other, he shall not answer for it; for the words are *hospitatores qui com' hospitia tenent, &c.* And so are the books in (*d*)

(*a*) 1 Roll. 3, 4. 4 Leon. 96. 2 Brownl. 255.

(*b*) Plowd. 9 b. The register is falsely printed, scilicet, distractione pro subtractione. F. N. B. 94 a, b. Book of Entries, Hosteler, 366, 377. 1 And. 29. 3 Keb. 73. Dyer, 266 b.

(*c*) 1 Roll. 2, (D.) 1. Dr. & Stud. 137 b. Hob. 245.

(*d*) Fitz. Hosteler, 2. Br. Action sur le Case, 58

22 Hen. 6, 21 b, (*e*) 38; (*f*) 2 Hen. 4, 7 b; (*g*) 11 Hen. 4, 45 a, b; (*h*) 42 Ass. pl. 17; (*i*) 42 E. 3, 11 a; 10 El. (*k*), Dyer, 266; 5 Mar., Dyer, 158 (*l*). And the writ need not mention that the defendant keeps *commune hospitium*, for the words of the writ in the Register are *infra hospitium ejusdem B.*; but it is to be so intended in the writ; for the recital of the writ is, *hospitatores qui communia hospitia tenent, &c.*, and the one part ought to agree with the other, and the latter words depend on the other; and the plaintiff ought to *declare* that he keeps *commune hospitium*: and so the said books in (*m*) 22 Hen. 6, 21, (*n*) 11 Hen. 4, 45 a, b, 10 Eliz., Dyer (*o*), 266, &c., are well reconciled.

2. The words are *ad hospitandos homines, per partes ubi hujusmodi hospitia existunt transeuntes, et in eisdem hospitantes*; by which it appears that common inns are instituted for passengers and wayfaring men; for the Latin word for an inn is *diversorium*, because he who lodges there is *quasi divertens se a viâ*; and so *diversoriolum*. And therefore, if a (*p*) neighbour, who is no traveller, as a friend, at the request of the innholder lodges there, and his goods be stolen, &c., he shall not have an action; for the writ is *ad hospitandos homines, &c., transeuntes, in eisdem hospitantes, &c.*

3. The words are, *eorum bona et catalla infra hospitia illa existentia, &c.* So that the innholder, by law, shall answer for nothing that is out of his inn, but only for those things which are *infra hospitium*. And because the horse which at the request of the owner is put to pasture, is not *infra hospitium*, for this reason the innholder is not bound by law to answer for him, if he be stolen out of the pasture; for the thing with which the hostler shall be charged ought to be *infra hospitium*; and therewith agree the books in (*q*) 11 Hen. 4, 45 a, b; 22 Hen. 6, 21 b; 42 E. 3, 11 a, b; 42 Ass. pl. 17, where Knivet, C.J., saith, that

(*e*) 22 Hen. 6, 38 b. Fitz. Hosteler, . Br Action sur le Case, 59.

(*f*) Fitz. Hosteler, 4. Br. Action sur le Case, 28. Br. Action sur le Statute, 39.

(*g*) Br. Action sur le Case, 41. Br. General Brief, 16. Fitz Hosteler, 5.

(*h*) Br. Action sur le Case, 86. Palm. 523. 1 Roll. 3.

(*i*) Fitz. Hosteler, 6. Br. Action sur le Case, 15. Statham, Action sur le Case, 6.

(*k*) Dyer, 266, pl. 9. 3 Keb. 73.

(*l*) Dyer, 158, pl. 52. 1 And. 29, 30. 3 Keb. 73. 1 Roll. 3, 4.

(*m*) Fitz. Hosteler, 2. Br. Action sur le Case, 58.

(*n*) 1 Roll. 4. Br. Action sur le Case, 41. Br. Gen. Brief, 16. Fitz. Hosteler, 5.

(*o*) Dyer, 226, pl. 9. 3 Keb. 73.

(*p*) 1 Roll. 3, (E.) 4. 2 Brownl. 254.

(*q*) 1 Roll. 4.

the innholder is bound to answer for himself, and for his family, of the chambers and stables, for they are *infra hospitium*. And with this resolution in this point agreed the opinion of the Justices of Assize (*viz.*, the two Chief Justices Wray and Anderson) in the county of Suffolk in Lent vacation, 26 Eliz., that if an (*r*) innholder lodges a man and his horse, and the owner requires the horse to be put to pasture, and there he is stolen, the innholder shall not answer for him. (*s*) But it was held by them, that if the owner doth not require it, but if the innholder of his own head puts his guest's horse to grass, he shall answer for him if he be stolen, &c. And it is to be observed, that this word *hostler* is derived from *hostle*; and *hospitator*, which is used in writs for an innholder, is derived from *hospitio*, and *hospes est quasi hospitium petens*.

4. The words are *ita quod pro defectu hospitator', seu servientium suorum, &c., hospitibus hujusmodi damn' non eveniat, &c.*; by which it appears that the innholder shall not be charged, unless there be a default in him or his servants in the well and safe keeping and custody of their guest's goods and chattels within his common inn; for the innkeeper is bound in law to keep them safe without any stealing or purloining; and it is no excuse for the innkeeper to say that he delivered the (*t*) guest the key of the chamber in which he is lodged, and that he left the chamber-door open; but he ought to keep the goods and chattels of his guest there in safety; and therewith agrees 22 Hen. 6, 21 b; 11 Hen. 4, 45 a, b; 42 Edw. 3, 11 a. And although the guest does not deliver his goods to the innholder to keep, nor acquaints him with them, yet if they be carried away, or stolen, the innkeeper shall be charged, and therewith agrees 42 Edw. 3, 11 a. And although they who stole or carried away the goods be unknown, yet the innkeeper shall be charged; 22 Hen. 6, 38; 8 R. 2, Hostler, 7: *vide* 22 Hen. 6, 21. But if the guest's servant, or he who (*u*) comes with him, or he whom he desires to be lodged with him, steals or carries away his goods, the innkeeper shall not be charged: for there the fault is in the guest to have such a companion or servant; and the

(*r*) 1 Roll. 3, 4. 4 Leon. 96. 2 Brownl. 255.

(*s*) 1 Roll. 3, 4. 4 Leon. 96. 2 Brownl. 225.

(*t*) Moor. 78, pl. 207; 158, pl. 299. 2 Brownl. 255. (See L. R. 6 C. P. 520.)

(*u*) Cro. El. 285.

words of the writ are, *pro defectu hospitator' seu servientium suorum*; *vide* 22 Hen. 6, 21 b. But if the innkeeper appoints one to lodge with him, he shall answer for him, as it there appears. The innkeeper (*x*) requires his guest that he will put his goods in such a chamber under lock and key, and then he will warrant them, otherwise not, the guest lets them lie in an outer court, where they are taken away, the innkeeper shall not (*y*) be charged, for the fault is in the guest, as it is held 10 Eliz., Dyer, 266.

5. The words are *hospitibus damnum non eveniat*; these words are general, and yet forasmuch as they depend on the precedent words they will produce two effects, *viz.*, 1. They illustrate the first words. 2. They are restrained by them: for the first words are, *eorum bona et catal' infra hospitia illa existentia absque subtractione custodire, &c.*, which words *bona et catalla*, by the said words *ita quod, &c., hospitibus damnum non eveniat*, although they do not of their proper nature extend to (*z*) charters and evidences concerning freehold or inheritance, or (*a*) obligations, or other deeds or specialities, being things in action, yet in this case it is expounded by the latter words to extend to them (*b*); for by them great damages happen to the guest; and therefore if one brings a bag or chest, &c., of evidences into the inn, or obligations, deeds, or other specialities, and by default of the innkeeper they are taken away, the innkeeper shall answer for them, and the writ shall be *bona et catalla* generally; and the declaration shall be special. 3. These words, *bona et catalla*, restrain the latter words to extend only to moveables; and therefore, by the latter words, if the guest be beaten in the inn, the innkeeper shall not answer for it; for the injury ought to be done to his moveables, which he brings with him; and by the words of the writ, the innholder ought to keep the goods and chattels of his guest, and not his person; and yet in such case of battery, *hospiti damnum evenit*, but that is restrained by the former words, as hath been said. And these words aforesaid, *absque subtractione seu amissione*, extend to all moveable goods, although of them felony cannot be committed; for the words are

(*x*) Moor. 158.
(*y*) *Vide* Salk. 19.
(*z*) 2 Roll. 58. 22 E. 4, 12 a, b.
(*a*) Dy. 5, pl. 2. 2 Roll. 58. Yelv. 68.
(*b*) See *Threfall* v. *Borwick*, L. R. 7 Q. B. 711, 10 Id. 210.

not *absque felonicâ captione, &c.*, but *absque subtractione*, which may extend to any moveables, although of them (*c*) felony cannot be committed, as of charters, evidences, obligations, deeds, specialities, &c.

(If a horse is at livery, and eats more than he is worth, an action lies against the owner; but the horse cannot be used or sold, Moore, 876, 877; but by the custom of London and Exeter the horse may be sold; but see Popham, 127, *Robinson* v. *Walter* (*d*).)

(*c*) 3 Inst. 109. 10 E. 4, 14 a. Fitz. Endict. 19. Br. Coron. 155. See now 24 & 25 Vict. c. 96, ss. 1, 27, 29, 30.

(*d*) See now 41 & 42 Vict. c. 38, *post*, p. 126.

This is the leading case upon the subject of the liabilities of innkeepers in respect of their guests' property. Those liabilities have been limited by the Innkeeper's Liability Act, 1863. This Act saves an innkeeper from liability to make good to any guest any loss of or injury to property, brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, *to a greater amount than* 30*l.*, except: (1) where the property has been stolen, lost, or injured, through the wilful act ("wilful" applies to "act" only, *Squire* v. *Wheeler*, 16 L. T. 93), or the default, or neglect of the innkeeper, or any servant in his employ: or (2) where the property has been deposited expressly for safe custody with the innkeeper; provided that in case of such deposit he may require as a condition of his liability that the property be deposited in a box or other receptacle, fastened and sealed by the person depositing it (s. 1). An innkeeper, however, is not entitled to the benefit of the Act in respect of property which he refuses to receive for safe custody, or which the guest is unable through the innkeeper's default to deposit (s. 2); or in respect of property brought to his inn while there is no copy of s. 1 of the Act, printed in plain type, exhibited in a conspicuous part of the hall or entrance to his inn (s. 3). Where the word "act" after "wilful" was omitted from the copy which was exhibited, the copy was held not to be sufficient; *Spice* v. *Bacon*, 2 Ex. D. 463; in which case it was doubted whether "a mere clerical error" would make the copy insufficient. Sect. 4 defines "inn" and "innkeeper."

26 & 27 Vict. c. 41.
§ 1.
§ 2.
§ 3.
§ 4.

Where guest used room as show-room.

Burgess v. *Clements.*

In a case subsequent to *Calye's*, a factor lost goods at an inn out of a private room, chosen by him, and granted to him by the innkeeper, for the purpose of exhibiting his goods to customers. The innkeeper had told him that there was a key and that he might lock the door, but this he neglected to do, although, on two occasions, while he was showing goods to a customer there, a stranger put his head into the room. Richards, B., told the jury that *primâ facie* the innkeeper was answerable for the goods of his guest in his inn, but that the guest might, by his own conduct, discharge him from responsibility, and left it for them to say whether he had done so here: the jury found that he had: and, on motion for a new trial, the court approved of the direction and thought the verdict correct. "The law," said Lord Ellenborough, "obliges the innkeeper to keep the goods of persons coming to his inn, *causâ hospitandi*, safely, so that, in the language of the writ, *pro defectu hospitatoris hospitibus damnum non eveniat ullo modo* . . . . But there may no doubt be circumstances, as where the guest, by his own misconduct, induces the loss, which form an exception to the general liability, as not coming within the words *pro defectu hospitatoris*. Now, let us consider, 1st, whether the plaintiff came to the inn *causâ hospitandi*; and, 2ndly, whether by his conduct he did not induce the loss. It does not appear whether he had a sleeping-room, but I think we may presume he had, but he desires a private room up some steps in order to show his goods. Now, an innkeeper is not bound by law to find show-rooms for his guests, but only convenient lodging-rooms and lodging. As to what is laid down in *Calye's Case* respecting the delivery of the key to the guest, it plainly relates only to the chamber-door in which he is lodged; and I agree that if an innkeeper gives the key of the chamber to his guest, this will not dispense with his own care, or discharge him from his general responsibility as innkeeper. . . .

"The cases," continued his lordship, "show that the rule is not so inveterate against the innkeeper, but that the guest may exonerate him by his fault, as if the goods are carried away by the guest's servant, or the companion whom he brings with him, for so it is laid down in *Calye's Case*. Now, what is the conduct of the plaintiff in this case? The innkeeper not being bound to find him more than lodging, and a convenient room for refreshment, this does not satisfy his object, but he inquires for a third room, for the purpose

of exposing in it his wares to view, and introducing a number of persons over whom the innkeeper can have no check or control, and thus for a purpose wholly alien from the ordinary purpose of an inn, which is *ad hospitandos homines*. Therefore, the care of these goods hardly falls within the limits of the defendant's duty as innkeeper. Besides, after the circumstances relating to the stranger took place, which might well have awakened the plaintiff's suspicion, it became his duty, *in whatever room he might be*, to use at least ordinary diligence; and particularly so, as he was occupying the chamber for a special purpose: *for though, in general, a traveller who resorts to an inn may rest on the protection which the law casts around him, yet, if circumstances of suspicion arise, he must exercise ordinary care.* It seems to me that the room was not merely entrusted to the plaintiff in the ordinary character of a guest frequenting an inn, but that he must be understood as having taken a special charge of it, and that he was bound to exercise ordinary care in the safe keeping of his goods, and it is owing to his neglect, and not to the fault of his innkeeper, that the accident happened; and this was a question proper to leave to the jury;" *Burgess* v. *Clements*, 4 M. & S. 306; *accord. Farnworth* v. *Packwood*, 1 Stark. 249.

Burgess v. *Clements.*

Guest must use ordinary care.

So where the innkeeper's ostler placed the guest's horse in a stable with another horse that kicked him, and the innkeeper, to rebut the presumption of negligence, gave evidence to show that the horse had been properly taken care of; Cresswell, J., told the jury that the innkeeper was liable, if he or his servants had been guilty of direct injury or of negligence, otherwise not; the jury found for the innkeeper; and the court (though they held that evidence of damage to or loss of the goods of a guest *primâ facie* raises a presumption of negligence in the innkeeper) considered the direction proper; *Dawson* v. *Chamney*, 5 Q. B. 164. In *Armistead* v. *Wilde*, 17 Q. B. 261, where a cash-box, easily opened, was left in the commercial room of an inn, under circumstances showing gross negligence in the guest, the jury were directed that *gross* negligence on the guest's part would relieve the innkeeper from his common law liability, and the jury having found for the innkeeper, on the ground that the guest had been guilty of gross negligence, the verdict was upheld, Lord Campbell observing that he doubted if it were necessary to show *gross* negligence (upon which point see *post*). But in another case, where a

Dawson v. *Chamney.* Innkeeper once held not liable, unless direct injury or negligence.

Loss *primâ facie* evidence of innkeeper's negligence.

Not liable where gross negligence in guest.

Goods lost from commercial room.

traveller went to an inn with several packages, one of which was, by his desire, taken into the commercial room, into which he was shown, and the others into his bedroom, which, according to the usual practice of that inn, was the place to which goods were taken, unless orders were given to the contrary, and the package taken into the commercial room was stolen, the innkeeper was held responsible, and Holroyd, J., distinguished the case from *Burgess* v. *Clements* by saying, that there the plaintiff asked for a room which he used for the purposes of trade, *not merely as a guest in the inn*; *Richmond* v. *Smith*, 8 B. & C. 9.

Innkeeper liable for *money* lost

So in *Kent* v. *Shuckard*, 2 B. & Ad. 803, the plaintiff and his wife arrived at the inn, and took a sitting-room and bedroom so situated that, the door of the sitting-room being open, a person there could see the entrance into the bedroom. On the next day the plaintiff's wife went into the bed-room, and laid on the bed a reticule, which contained money, and returned into the sitting-room, leaving the door between that and the bedroom open. About five minutes later she sent for the reticule, which was not to be found. The innkeeper was held responsible, and it was held that there was no distinction between money and goods as to the liability of innkeepers.

Where gig stolen from street.

So in *Jones* v. *Tyler*, 1 A. & E. 522, the plaintiff drove his gig to the defendant's inn on Bewdley fair-day, and asked whether there was room for the horse; the defendant's ostler took the horse out of the gig and put him into a stable; and while the plaintiff carried his coat and whip from the gig into the house, and took refreshment there, the ostler placed the gig outside of the inn-yard, in a part of the open street where the defendant was in the habit of placing his guests' carriages on fair-days. The gig was stolen thence; and the court held the innkeeper responsible, for it did not appear that the gig was put in the street at the plaintiff's request or instance: the place was, therefore, a part of the inn, for the innkeeper by his conduct treated it as such; and if he wished to protect himself, he should have told the plaintiff that he had no room in his yard, and that he would put the gig in the street, but could not be answerable for it.

Guest must take ordinary care.

It is not necessary in order to exonerate the innkeeper that he should establish that the guest was guilty of *gross* negligence (if this term is used in the sense of greater negligence than the mere want of ordinary care); the innkeeper

is not liable if "the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man might be reasonably expected to take under the circumstances;" *Cashill* v. *Wright*, 6 E. & B. 891, 900.

Morgan v. *Ravey*. Innkeeper held liable unless loss by guest's negligence, act of God, or Queen's enemies.

In *Morgan* v. *Ravey*, 6 H. & N. 265, the plaintiff was staying at an hotel in London. In his bed-room was hung up a notice, that, in consequence of robberies having taken place at night in London hotels, the proprietor requested visitors to bolt their doors, and leave their valuables at the bar, otherwise he would not be responsible. This notice plaintiff saw, but swore he read only the word "notice." He did not bolt his door (because, as he said, he did not know how), nor did he leave his watch or other valuables at the bar; and next morning they were gone; and the jury having found that there was no negligence on his part, the court refused to disturb the verdict. The court in this case distinguished and explained *Dawson* v. *Chamney*, *supra*, and laid down that the innkeeper is liable where there is a loss not arising from the guest's negligence, the act of God, or the Queen's enemies. According to the register he is liable only "*pro defectu*," but it will be observed that his duty is stated there to be "*absque substractione seu amissione custodire die et nocte*." If the loss would not have happened if the guest had used the ordinary care which a prudent man might reasonably be expected to have taken *under all the circumstances*, the innkeeper is not liable; *Oppenheim* v. *White Lion Hotel*, L. R. 6 C. P. 515; see *Herbert* v. *Markwell*, 45 L. T. 649; *Huntley* v. *Bedford Hotel*, 56 J. P. 53; *Medawar* v. *Grand Hotel*, (1891) 2 Q. B. 11. The guest's omission to lock his door is not necessarily an act of negligence, but it may be so under the circumstances; Id.

In *Angus* v. *McLachlan*, 23 Ch. D., p. 336, Kay, J., is reported to have held that an innkeeper "was not bound to be more careful in keeping the goods of his guests than he was as to his own." Probably the report, which on this point is incomplete, is inaccurate in attributing to the learned judge a view clearly inconsistent with the above authorities.

Burden of proof.

At common law, if the goods of a guest be lost, the onus is upon the innkeeper to show that he is not liable by reason of the guest's negligence having caused or conduced to the loss. If, however, the innkeeper is protected by the Act of 1863, the onus is upon the guest to show that the innkeeper is liable *beyond* £30 by proving

that the loss was due to the wilful act, or the neglect or default, of the innkeeper or his servant; *Medawar* v. *Grand Hotel*, (1891) 2 Q. B. 11.

Special contract.

By a special contract with his guest the innkeeper may limit his liability. A notice posted up in the guest's room that "articles of value, if not kept under lock, should be deposited with the manager, who will give a responsible receipt for the same," though read by the guest, is no evidence of such a special contract; *Huntley* v. *Bedford Hotel*, 56 J. P. 53.

Who is "a guest."

It is not necessary, in order that a man may be *a guest*, so as to fix the innkeeper with liability, that he should have come for more than temporary refreshment; *Bennett* v. *Mellor*, 5 T. R. 273; see *Medawar* v. *Grand Hotel*, *supra*; *Strauss* v. *County Hotel Co.*, 12 Q. B. D. 27. In *York* v. *Grindstone*, 1 Salk. 388, 2 Raym. 860, three judges held, against Lord Holt's opinion, that if a *traveller* leave his horse at an inn, and lodge elsewhere, he is a guest, "because it must be fed, by which the innkeeper hath gain; otherwise if he had left a dead thing;" but it is clear that if the innkeeper receive goods as bailee, and not as innkeeper, he is liable, if at all, only as bailee; *Hyde* v. *Mersey, &c., Co.*, 5 T. R. 389; *Gelley* v. *Clerk*, Cro. Jac. 188; Bac. Abr., *Inns*, C. 5; *Williams* v. *Gesse*, 3 B. N. C. 849; *Strauss* v. *County Hotel Co.*, *supra*. The length of time for which the guest has resided seems not to affect his right as such, provided he live there in the transitory condition of a guest; but if he came on a special contract to board and lodge there, it has been said that the law does not consider him a guest, but a boarder; Bac. Abr. *Inns*, C. 5; *Parkhurst* v. *Foster*, 1 Salk. 388; but see *Threfall* v. *Borwick*, L. R. 10 Q. B. 210, where this point was not taken. In *Smith* v. *Dearlove*, 6 C. B. 132, where an innkeeper received a carriage and horses to stand at livery, the fact that, whilst they were there, the owner took occasional refreshment at the inn, and also for a time had a friend supplied with lodging and refreshment there on his credit, was held insufficient to give the innkeeper a lien on the carriage and horses for his charges, since that right depends upon the fact that the goods come into the innkeeper's "possession, in his character of innkeeper, as belonging to a guest."

Inn, what.

The definition of an inn is "*a house where the traveller is furnished with everything he has occasion for while on his way*;" *Thompson* v. *Lacy*, 3 B. & Ald. 283; see Bac. Abr.,

Inns, B.; Burn's Justice, title *Alehouse*. A mere coffee-house is not an inn, at least not within the meaning of a fire policy; *Doe* v. *Laming*, 4 Camp. 77; nor is a boarding-house; *Dansey* v. *Richardson*, 3 E. & B. 144; *Parkhurst* v. *Foster*, 1 Salk. 388; nor is a refreshment bar attached to an hotel, but entered from the street by a separate door; *R.* v. *Rymer*, 2 Q. B. D. 136. As to lodging-houses, see *Holder* v. *Soulby*, 8 C. B. N. S. 254; as to the liability of restaurant-keepers for their guests' coats, *Ultzen* v. *Nichols*, (1894) 1 Q. B. 92.

Duty to receive guests.

"By the common law of England every person who keeps a common inn is under an obligation to receive and afford proper entertainment to every one who offers himself as a guest, if there be sufficient room for him in the inn, and no good reason for refusing him;" *Gordon* v. *Silber*, 25 Q. B. D. 491; see *Fell* v. *Knight*, 8 M. & W. 269; *R.* v. *Ivens*, 7 C. & P. 213; *Hawthorn* v. *Hammond*, 1 C. & K. 404; *R.* v. *Rymer*, 2 Q. B. D. 136.

"The relation of host and guest cannot be terminated abruptly and without notice to the guest. A reasonable time must be allowed for him to carry away or secure his effects;" per Bowen, L.J., *Medawar* v. *Grand Hotel Co.*, *supra*.

Innkeeper's lien.

An innkeeper has a lien for his charges upon all goods that come into his possession, in his character of innkeeper, as belonging to a guest; *Gordon* v. *Silber*, 25 Q. B. D. 491; *Smith* v. *Dearlove*, 6 C. B. 132; and this lien attaches to goods brought to the inn by the guest, though they be not his own; *Robinson* v. *Walter*, 3 Bulstr. 269; 1 Roll. Rep. 449 n.; *Johnson* v. *Hill*, 3 Stark. 172; *Turrill* v. *Crawley*, 13 Q. B. 197; *Snead* v. *Watkins*, 1 C. B. N. S. 267; *Mulliner* v. *Florence*, 3 Q. B. D. 484; *Gordon* v. *Silber*, *supra* (where the goods belonged to the guest's wife who came with him); *Robins* v. *Gray*, (1895) 2 Q. B. 78 (a case of a commercial traveller); and to articles brought by the guest as his own, but not being ordinary travellers' luggage, *e.g.*, a piano; *Threfall* v. *Borwick*, L. R. 7 Q. B. 711, 10 Id. 210; but not to goods of a third person sent to the guest at the inn for temporary use, *e.g.*, a piano on hire; *Broadwood* v. *Granara*, 10 Exch. 417. His lien upon the carriage and horses brought with him by his guest is not limited to his charge for their keep, but extends to his charge for the guest's own entertainment; *Mulliner* v. *Florence*, 3 Q. B. D. 484. Occasional absences *animo revertendi* during a long stay will not defeat the lien; *Allen* v. *Smith*, 12 C. B. N. S. 638;

see also *Day* v. *Bather*, 2 H. & C. 14, where the plaintiff left his horse at an inn and went away for a fortnight, and a third person during that time drove the horse out and injured it, and the innkeeper was held liable. An innkeeper who accepts security from his guest for hotel charges does not necessarily thereby waive his lien; *Angus* v. *McLachlan*, 23 Ch. D. 330.

At common law an innkeeper had no right to sell or otherwise part with the property of a guest upon which he had a lien; *Mulliner* v. *Florence*, 3 Q. B. D. 484. Now by The Innkeepers Act, 1878, the landlord of an hotel, inn, or licensed public-house has, in addition to his ordinary lien, the right to sell by auction any goods, chattels, carriages, horses, wares, or merchandise, deposited with him or left in the house he keeps, or in the coach-house, stable, stable-yard, or other premises appurtenant or belonging thereto, where the person depositing or leaving such goods is or becomes indebted to him, either for board or lodging, or for the keep or expenses of any horse or other animals left with, or standing at livery in the stable or fields occupied by, him: provided (1), that no sale be made until after the goods have been for six weeks in the landlord's custody or on his premises without the debt having been satisfied; (2), that the landlord, after having, out of the proceeds of the sale, paid himself the amount of the debt, together with the costs and expenses of the sale, pay on demand to the person who deposited or left the goods the surplus, if any; (3), that the sale be made only for the debt in respect of which the landlord has a lien upon the goods; and (4), that the sale be advertised, one month beforehand, in one London newspaper and one country newspaper circulating in the district where the goods or some of them were deposited or left, with a description of the goods, and the name of the owner or person who deposited or left them, if known.

41 & 42 Vict. c. 38.

Innkeeper's statutory power of sale.

The vulgar error that an innkeeper might detain the person of his guest until payment of his bill, was exploded in *Sunbolf* v. *Alford*, 3 M. & W. 248.

Detention of guest.

THE SIX CARPENTERS' CASE.

MICH.—8 *JACOBI* 1.

[REPORTED 8 COKE, 146*a*.]

If a man abuse an authority given him by the law, he becomes a trespasser ab initio.—Contra, of an authority given by the party.—The abuse is good matter of replication.—Mere nonfeasance does not amount to such abuse as makes a man a trespasser ab initio.

IN trespass brought by John Vaux against Thomas Newman, carpenter, and five other carpenters, for breaking his house, and for an assault and battery, 1 Sept. 7 Jac., in London, in the parish of St. Giles *extra* Cripplegate, in the ward of Cripplegate, &c., and upon the (*a*) new assignment, the plaintiff assigned the trespass in a house called the Queen's Head. The defendants to all the trespass *præter fractionem domus* pleaded not guilty; and as to the breaking of the house, said that the said house, *præd' tempore quo, &c., et diu antea et postea*, was a common wine tavern of the said John Vaux, with a common sign at the door of the said house fixed, &c., by force whereof the defendants, *præd' tempore quo, &c., viz., horâ quartâ post meridiem*, into the said house, the door thereof being open, did enter, and did there buy and drink a quart of wine, and there paid for the same, &c. The plaintiff, by way of replication, did confess that the said house was a common (*b*) tavern, and that they entered into it, and bought and drank a quart of wine, and paid for it; but further said, that one John Ridding, servant of the said John Vaux, at the request of the said defendants, did there then deliver them another quart of wine, and a pennyworth of bread, amounting to 8*d*., and then they there did drink the said wine, and eat the bread, and upon request did refuse to pay for the same. Upon which the defendants did demur in law: and the only point in this case was, if the denying to pay for the wine, or non-

(*a*) 2 Co. 6 a., 18 b. (*b*) Kelw. 33 a.

payment, which is all one (for every non-payment, upon request, is a denying in law), makes the entry into the tavern tortious. And first, it was resolved: *when entry, authority, or* (*c*) *licence is given to any one by the law, and he abuses it, he shall be a trespasser ab initio; but where entry, authority, or licence is given by the* (*d*) *party, and he abuses it, there he must be punished for his abuse, but shall not be a trespasser ab initio.* And the reason of this difference is, that in the case of a general authority or licence (*e*) of law, the law adjudges by the subsequent act, *quo animo*, or to what intent he entered, for *acta exteriora indicant interiora secreta*; *vide* 11 H. 4, 75 b. But when the party gives an authority or licence himself to do anything, he cannot, for any subsequent cause, punish that which is done by his own authority or licence. And therefore the law gives authority to enter into a common inn or tavern; so to the lord to distrain; to the owner of the ground to distrain damage-feasant; to him in reversion to see if waste be done; to the commoner to enter upon the land to see his cattle; and such like; *vide* 12 E. 4, 8 b; 21 E. 4, 19 b; 5 H. 7, 11 a; 9 H. 6, 29 b; 11 H. 4, 75 b; 3 H. 7, 15 b; 28 H. 6, 5 b. But if he who enters into the inn or tavern doth a trespass, as if he (*f*) carries away anything; or if the lord who distrains for rent, or the owner for damage-feasant, works or kills the (*g*) distress; or if he who enters to see waste break the house, or (*h*) stays there all night; or if the commoner cuts down a tree; in these and the like cases, the law adjudges that he entered for that purpose; and because the act which demonstrates it is a trespass, he shall be a trespasser *ab initio*, as it appears in all the said books. So if (*i*) a purveyor takes my cattle by force of a commission, for the king's house, it is lawful; but if he sells them in the market, now the first taking is wrongful; and therewith agrees 18 H. 6, 19 b. *Et sic de similibus.*

2. It was resolved *per totam curiam*, that (*k*) *not doing cannot*

(*c*) 2 Roll. 561. Yelv. 96, 97.

(*d*) 5 H. 7, 11 a. Perk. sect. 191. Yelv. 96, 97. 21 E. 4, 19 b.

(*e*) 2 Roll. 561. 21 E. 4, 19 b, 76 b, per Catesby. Yelv. 96, 97. Perk. sect. 191. 5 H. 7, 11 a.

(*f*) Perk. sect. 191. Cro. Car. 196. Yelv. 96.

(*g*) 12 E. 4, 8 b. 9 Co. 11 a. 1 And. 65. Cro. Jac. 148. Perk. sect. 191.

(*h*) 2 Roll. 561. 11 H. 4, 75 b. Fitz. Tresp. 176. Br. Tresp. 97. Br. Replica. 12.

(*i*) 2 Roll. 561. 18 H. 6, 9 b. 2 Inst. 546.

(*k*) Cr. Car. 196. 2 Bulstr. 312. 1 Roll. Rep. 130.

make the party, who has authority or licence by the law, a trespasser ab initio, because not doing is no trespass; and therefore if the lessor distrains for his rent, and thereupon the lessee tenders him the rent and arrears, &c., and requires his beasts again, and he will not deliver them, this not doing cannot make him a trespasser *ab initio*; and therewith agrees 33 H. 6, 47 a. So if a man takes cattle damage-feasant, and the other offers sufficient amends, and he refuses to re-deliver them, now if he sues a replevin, he shall recover (*l*) damages only for the detaining of them, and not for the taking, for that was lawful; and therewith agrees F. N. B. 69 g; Temps, E. 1, Replevin, 27; 27 E. 3, 88; 45 E. 3, 9. So in the case at bar, for not (*m*) paying for the wine, the defendants shall not be trespassers, for the denying to pay for it is no trespass, and therefore they cannot be trespassers *ab initio;* and therewith agrees directly in the point (*n*) 12 E. 4, 9 b. For there Pigot, Serjeant, puts this very case, if one comes into a tavern to drink, and when he has drunk he goes away and will not pay the taverner, the taverner shall have an action of trespass against him for his entry. To which Brian, Chief Justice, said, the said case which Pigot has put is not (*o*) law, for it is no trespass, but the taverner shall have an action of debt: and there before (*p*) Brian held, that if I bring cloth to a tailor, to have a gown made, if the price be not agreed in certain before, how much I shall pay for the making, he shall not have an action of debt against me; which is meant of a general action of debt: but the tailor in such a case shall have (*q*) a special action of debt; *scil.* that A. did put cloth to him to make a gown thereof for the said A., and that A. would pay him as much for making, and all necessaries thereto, as he should deserve, and that for making thereof, and all necessaries thereto, he deserves so much, for which he brings his action of debt: in that case, the putting of his cloth to the tailor to be made into a gown, is sufficient evidence to prove the said special contract, for the law implies it: and if the tailor overvalues the making, or the necessaries to it, the jury may mitigate it, and the plaintiff shall recover so much as they shall find, and shall be barred for

(*l*) Lit. Rep. 34. Dr. & Stu. l. lib. 2, 112 b. Hetl. 16.
(*m*) 1 Roll. Rep. 60. 2 Bulstr. 312.
(*n*) 1 Sid. 5. 12 E. 4, 9 a, b.
(*o*) 12 E. 4, 9 b.
(*p*) 12 E. 4, 9 b.
(*q*) 1 Sid. 5.

the residue. But if the tailor (as they use) makes a bill, and he himself values the making, and the necessaries thereof, he shall not have an action of debt for his own value, and declare of a retainer of him to make a gown, &c., for so much, unless it is so specially agreed. But in such case he may (*r*) detain the garment until he is paid, as the hostler may the horse; *vide* Br. Distress, 70. And all this was resolved by the court. *Vide* the Book in 30 Ass. pl. 38, John Matrever's case, it is held by the court, that if the lord or his bailiff comes to distrain, and (*s*) before the distress the tenant tenders the arrears upon the land, there the distress taken for it is tortious. The same law for damage-feasant (*t*), if before the distress he tenders sufficient amends; and therewith agrees 7 E. 3, 8 b, in the Mr. of St. Mark's case; and so is the opinion of Hull to be understood in 13 H. 4, (*u*) 17 b, which opinion is not well abridged in the title Trespass, 180. Note, reader, this difference, that *tender upon the* (*x*) *land before the* (*y*) *distress makes the distress tortious; tender after the distress and before the impounding, makes the detainer, and not the taking, wrongful* (*z*); *tender after* (*a*) *the impounding makes neither the one nor the other wrongful; for then it comes too late, because then the cause is put to the trial of the law, to be there*

(*r*) Hob. 42. Yelv. 67. Cro. Car. 271, 272. Br. Distress, 71. Palm. 223. Hut. 101. 22 E. 4, 49 b. Moor. 877. 5 Ed. 4, 2 b. 1 Roll. Rep. 449. 2 Roll. Rep. 438. 2 Roll. 85, 92. 3 Bulstr. 269, 270.

(*s*) Br. Distr. 37. Br. Tender, &c. 18. (*Bennett* v. *Bayes*, 5 H. & N. 391.)

(*t*) *Singleton* v. *Williamson*, 7 H. & N. 747.

(*u*) 2 Roll. 561. (See *Anscomb* v. *Shore*, 1 Camp. 285, 1 Taunt. 261: Replevin for taking and impounding; *plea*, a tender *after* the taking and before impounding: held good, for the detaining after tender is a new taking. *Evans* v. *Elliott*, 5 A. & E. 142; *Tennant* v. *Field*, 8 E. & B. 337.)

(*x*) 2 Sid. 40.

(*y*) 5 Co. 76 a. 2 Inst. 107.

(*z*) The remedy for the detention is not confined to replevin; *Loring* v. *Warburton*, E. B. & E. 507; but see *Glynn* v. *Thomas*, 11 Exch. 870.

(*a*) 2 Roll. 561. 1 Brownl. 173. 2 Inst. 107. 5 Co. 76 a. (It seems to have been thought in *Smith* v. *Goodwin*, 4 B. & Ad. 415, that this doctrine does not apply to a distress for rent, but that a tender of the rent and charges after impounding would make the subsequent detainer tortious. In that case, however, there was a seizure, an impounding upon the premises, then a tender of the rent and charges, then a relinquishment of the distress, and then *a second seizure*. See *Vertue* v. *Beasley*, 1 M. & Rob. 21, Parke, B. In *Thomas* v. *Harries*, 1 M. & Gr. 695, 1 Scott, N. R. 524, Maule, J., thought that under 11 Geo. II. c. 19, s. 22, the right of tender remained as long as the distress was on the premises; but the other judges differed from him. The doctrine laid down in the *Six Carpenters' Case* is affirmed by *Ellis* v. *Taylor*, 8 M. & W. 415; *Ladd* v. *Thomas*, 4 P. & D. 9, 12 A. & E. 117; *West* v. *Nibbs*, 4 C. B. 172. But the Queen's Bench has since held quite consistently with the *Six Carpenters' Case*, and in accordance

determined (*b*). But after the law has determined it, and the avowant has return irreplevisable, yet if the plaintiff makes him a sufficient tender, he may have an action of *Detinue* for the detainer after: or he may, upon satisfaction made in court, have a writ for the re-delivery of his goods: and therewith agree the said books in 13 H. 4, 17 b; 14 H. 4, 4; *Registr' Judic'*, 37; 45 E. 3, 9; and all the aforesaid books; *vide* 14 Ed. 4, 4 b; 2 H. 6, 12; 22 Hen. 6, 57; Doctor and Student, lib. 2, cap. 27; Br. Distress, 72; and Pilkington's Case, in the Fifth Part of my Reports, fol. 76; and so all the books which *primâ facie* seem to disagree, are upon full and pregnant reason well reconciled and agreed.

with the prevailing opinion, though dissenting from *Thomas* v. *Harries*, *Ellis* v. *Taylor*, and *Ladd* v. *Thomas*, that by the equity of the Statute of Wm. and Mary a tender of the rent and expenses after impounding, but within five days of the taking, renders a subsequent detention unlawful; *Johnson* v. *Upham*, 2 E. & E. 250. A tender of rent without expenses after a warrant of distress has been delivered to the broker, but before its execution, is good; *Bennett* v. *Bayes*, 5 H. & N. 391.)

(*b*) *Singleton* v. *Williamson*, 7 H. & N. 747; but see C. L. P. Act, 1860, s. 23 (repealed, 46 & 47 Vict. c. 49; but see ss. 5, 6, 7).

From this case, which is one of the most celebrated in Lord Coke's Reports, three points are to be collected :—

Three points decided in principal case.

1. That if a man abuse an authority given to him by the law, he becomes a trespasser *ab initio*.

2. That in an action of trespass, if the authority be pleaded, the subsequent abuse may be replied.

3. That a mere *nonfeasance* does not amount to such an abuse as renders a man a trespasser *ab initio*.

1st Point. Abuse of authority given by law

The first of these points has been frequently confirmed. In *Oxley* v. *Watts*, 1 T. R. 12, plaintiff sued in trespass for taking a horse; defendant justified taking him as an estray; replication, that, after that taking, defendant worked the horse, and so became a trespasser *ab initio*. On motion in arrest of judgment, the court held the replication good, and defendant a trespasser *ab initio*. The same point was decided, on demurrer, in *Bagshaw* v. *Goward*, Cro. Jac. 147; *accord. Gargrave* v. *Smith*, Salk. 221; *Bory's Case*, 1 Vent. 217; *Aitkenhead* v. *Blades*, 5 Taunt. 198. One consequence of this doctrine was, that, if a party, entering lawfully to make a distress, committed any subsequent abuse, he became

a trespasser *ab initio*. In *Gargrave* v. *Smith*, Salk. 221, and *Dye* v. *Leatherdale*, 3 Wils. 20, this was expressly decided. But, if there be a seizure of several chattels, some of which are by law seizable, and some not, or some of which are subsequently abused, and the rest not, the seizure is or becomes illegal, only as to the chattels which it was unlawful to seize, or which were subsequently abused, and the seizure of the rest continues legal; *Dod* v. *Monger*, 6 Mod. 215; *Harvey* v. *Pocock*, 11 M. & W. 740.

11 G. 2, c. 19. Distress for rent by landlord.

As it was found that the doctrine of trespass *ab initio* bore extremely hard on landlords, the Distress for Rent Act, 1737, ss. 19 & 20, provided for their relief, that where distress be made for *rent* justly due, and any *irregularity* or *unlawful act* be afterwards done by the distrainer, the distress shall not be deemed unlawful nor the distrainer a trespasser *ab initio*; but the party aggrieved by the unlawful act or irregularity may recover for the special damage sustained, unless tender of amends has been made before action brought.

17 G. 2, c. 38. Distress for poor-rate.

The Poor Relief Act, 1743, s. 8, gave the same relief, in case of an *irregularity*, to a party distraining for money justly due for the relief of the poor, and the same right to the party aggrieved.

To support an action for irregularity actual damage must be proved; *Rodgers* v. *Parker*, 18 C. B. 112; *Lucas* v. *Tarleton*, 3 H. & N. 116. If an entry be so made as to render the seizure wholly illegal *ab initio*, the measure of damages is the whole value of the goods seized without deducting the rent satisfied by the seizure; *Attack* v. *Bramwell*, 3 B. & S. 520.

Sheriff.

A sheriff who enters premises under a *fi. fa.*, becomes a trespasser by remaining there for more than a reasonable time, and the trespass may be alleged to have been committed after the expiration of the reasonable time; *Ash* v. *Dawnay*, 8 Exch. 237; *Playfair* v. *Musgrove*, 14 M. & W. 239; but see *Aitkenhead* v. *Blades*, 5 Taunt. 198. It seems doubtful whether he thereby becomes a trespasser *ab initio*. In *Smith* v. *Eggington*, 7 A. & E. 167, it was held that the sheriff, if indeed a trespasser at all, was not a trespasser *ab initio* for detaining a prisoner for more than 30 days contrary to the 1 W. 4, c. 36, s. 15, r. 5 (now repealed), but of the applicability of which Act to the prisoner it was not averred that the sheriff had notice; and Littledale, J., drew a distinction between cases where the excess might have been originally contemplated and cases where it could not possibly

have been so, and thought that the doctrine of trespass *ab initio* does not apply to the latter cases. See *per* Bayley, J., *Shorland* v. *Govett*, 5 B. & C. 485.

The note upon the 2nd point decided in the principal case has been omitted, in view of subsequent changes in the system of pleading. 2nd Point.

As to becoming a trespasser *ab initio* by *nonfeasance*, see the *dicta* in *Jacobson* v. *Blake*, 6 M. & Gr. 925. In *West* v. *Nibbs*, 4 C. B. 172, a landlord who accepted the rent in arrear, and expenses, after impounding a distress, and then retained possession of the goods distrained, was held guilty only of a *nonfeasance*, and therefore not a trespasser *ab initio*, though probably liable for a conversion of the goods to his own use; and *Evans* v. *Elliott*, 5 A. & E. 142, was distinguished on the ground that it was an action of replevin, and *Vertue* v. *Beasley*, 1 M. & Rob. 21, on the ground that in that case there was a removal of the goods after the tender. 3rd Point. *Nonfeasance*.

Akin to the subject-matter of this note is the second point mentioned in the head note to *Taylor* v. *Cole*, 3 T. R. 292, which appeared as a leading case in some former editions of this work, viz.:— *Taylor* v. *Cole*, person having right of possession may enter peaceably, or being in may retain it without action.

"A person having a right of possession may enter peaceably, and being in possession may retain it without first establishing his right by action. If the assertion of his right be accompanied by a breach of the peace, that is the proper subject of criminal prosecution."

This point is one of general importance, and gave rise to a difference of opinion in the Court of C. P. in *Newton* v. *Harland*, 1 M. & Gr. 644, where the majority of the court held (Coltman, J., dissenting), that if a person who has a right to enter, makes "a forcible entry," and in so doing assaults the person who is in actual possession, an action lies for the assault, and that it is no defence to the action that no more force was used, in committing the assault, than was necessary for the purpose of ejecting the plaintiff. The ground upon which the majority of the court so decided appears to be that, as a forcible entry is illegal, lawful possession cannot be thereby acquired, and therefore the assault, not being in defence of a lawful possession, cannot be justified. *Newton* v. *Harland*.

It is clear that a person who has a right to enter and take possession, may do so peaceably, without being liable in an action for trespass to the land; *Taunton* v. *Costar*, 7 T. R. 431; *Butcher* v. *Butcher*, 7 B. & C. 399; *Wildbor* v. *Rain-* Remedies of persons entitled to enter land.

forth, 8 Id. 4; *Browne* v. *Dawson*, 12 A. & E. 624; *Delaney* v. *Fox*, 1 C. B. N. S. 166; *Pollen* v. *Brewer*, 7 Id. 371; *Jones* v. *Foley*, (1891) 1 Q. B. 730; and it seems to be equally clear that even if he enters forcibly he is not liable in such an action; *Turner* v. *Meymott*, 1 Bing. 158; *Harvey* v. *Bridges*, 14 M. & W. 437, 1 Exch. 261; *Davison* v. *Wilson*, 11 Q. B. 890; *Burling* v. *Read*, Id. 904; *Wright* v. *Burroughes*, 3 C. B. 685; *Beddall* v. *Maitland*, 17 Ch. D. 174. When he has peaceably and lawfully entered and become possessed, he may turn out all previous occupiers, as being trespassers, provided that he use no more force than is necessary; or he may bring an action of trespass against them; *Hey* v. *Moorhouse*, 6 B. N. C. 52; *Butcher* v. *Butcher*, 7 B. & C. 399; *Browne* v. *Dawson*, 12 A. & E. 624; *Scott* v. *Brown*, 51 L. T. 747; see *Lows* v. *Telford*, 1 App. Cas. 414.

Newton v. *Harland.*

It is believed that at the time when *Newton* v. *Harland* was decided the almost universal opinion of the profession was in accordance with that expressed by Coltman, J. (who dissented from the majority of the court), to the effect that the only remedy for the assault was a criminal prosecution. The law as laid down in *Newton* v. *Harland* was doubted in *Harvey* v. *Bridges*, 14 M. & W. 45, by Parke and Alderson, BB., each of whom had tried the action of *Newton* v. *Harland*; and in *Blades* v. *Higgs*, 30 L. J. C. P. 347, Erle, C.J., in delivering the judgment of the court, seems to say that *Harvey* v. *Bridges* overruled *Newton* v. *Harland*. In neither of those cases, however, nor in any subsequent case, was any decision given contrary to that in *Newton* v. *Harland*; and *Newton* v. *Harland* was followed by Fry, J., in *Beddall* v. *Maitland*, 17 Ch. D. 174, and *Edwick* v. *Hawkes*, 18 Id. 199, where he held that if an entry is made under such circumstances as render it a "forcible entry" within the meaning of the statutes relating to forcible entries, the person so entering is liable in an action for any assault or other independent wrong or injury, such as damage to furniture, done in the course of or after the forcible entry.

Beddall v. *Maitland.*

Remedies of commoner.

A commoner is justified in pulling down without doing any unnecessary damage any erection which obstructs the exercise of his right of common; *Arlett* v. *Ellis*, 7 B. & C. 346; but if the erection be a house with persons actually in it, he is only justified in pulling it down after notice and request to remove it; *Perry* v. *Fitzhowe*, 8 Q. B. 757; *Davies* v. *Williams*, 16 Id. 546; *Jones* v. *Jones*, 1 H. & C. 1; see *Lane* v. *Capsey*, (1891) 3 Ch. 411.

Remedies of owner of chattel.

An owner of goods is justified in entering, in pursuit of his goods, on lands on to which the owner of the lands has wrongfully carried the goods; *Patrick* v. *Colerick*, 3 M. & W. 483; see *Webb* v. *Beavan*, 6 M. & Gr. 1055; *Burridge* v. *Nicholetts*, 6 H. & N. 383; *Austin* v. *Dowling*, L. R. 5 C. P. 534, 539; but the mere fact that his goods are on the lands does not justify his entering; *Anthony* v. *Haneys*, 8 Bing. 187; see *Williams* v. *Morris*, 8 M. & W. 488. The point actually decided in *Blades* v. *Higgs*, *supra*, was that an owner of a chattel, entitled to possession of it, can justify an assault made for the purpose of recapturing it, after demand and refusal.

LAMPLEIGH *v.* BRATHWAIT.

MICH. 12 *JACOBI.—ROT.* 712.

[REPORTED HOBART, 105.]

A mere voluntary courtesy will not uphold an assumpsit; but a courtesy moved by a previous request will.—Labour, though unsuccessful, is a good consideration.—Of assumpsit and considerations generally.

ANTHONY LAMPLEIGH brought an assumpsit against Thomas Brathwait, and declared that, whereas the defendant had feloniously slain one Patrick Mahune, the defendant, after the said felony done, instantly required the plaintiff to labour, and do his endeavour to obtain his pardon from the king; whereupon the plaintiff upon the same request, did, by all the means he could and many days' labour, do his endeavour to obtain the king's pardon for the said felony, viz., in riding and journeying at his own charges from London to Roiston, when the king was there, and to London back, and so to and from Newmarket, to obtain pardon for the defendant for the said felony; afterwards, *scil.* &c., in consideration of the premises (*a*), the said defendant did promise the said plaintiff to give him 100*l.*, and that he had not, &c., to his damage 120*l.*

To this the defendant pleaded non assumpsit; and found for the plaintiff, damage 100*l.* It was said in arrest of judgment, that the consideration was passed.

But the chief objection was, that it doth not appear that he did anything towards the obtaining of the pardon, but riding up and down, and nothing done when he came there. And of this opinion was my brother (Warburton), but myself and the other two judges were of opinion for the plaintiff (*b*), and so he had judgment.

First, it was agreed, that a mere voluntary courtesy will not have a consideration to uphold an assumpsit. But if that

(*a*) In *Norman* v. *Cole*, 3 Esp. 253, this consideration was held illegal; see per Pollock, C. B., *Egerton* v. *Brownlow*, 4 H. L. C. 148; and per Willes, J., *Elliot* v. *Richardson*, 39 L. J. C. P. 343.

(*b*) See 1 Wms. Saund. 211 c, *in notis*, 2 Id. 136, *in notis*.

courtesy were moved by a suit or request of the party that gives the assumpsit, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference; Pasch. 10 Eliz., Dyer, 272, *Hunt and Bate*; see *Oneley's Case*, 19 Eliz., Dyer, 355.

Then, as to the main point, it is first clear, that in this case upon the issue non assumpsit, all these points were to be proved by the plaintiff:

1. That the defendant had committed the felony, *prout*, &c.
2. Then that he requested the plaintiff's endeavour, *prout*, &c.
3. That thereupon the plaintiff made his proof, *prout*, &c.
4. That thereupon the defendant made his promise, *prout*, &c.

For wheresoever I build my promise upon a thing done at my request, the execution of the act must pursue the request, for it is like a case of commission for this purpose.

So then the issue found *ut supra* is a proof that he did his endeavour according to the request, for else the issue could not have been found: for that is the difference between a promise upon a consideration executed and executory, that in the executed you cannot traverse the consideration by itself, because it is passed and incorporated and coupled with the promise (*c*). And if it were not indeed then acted, it is *nudum pactum*.

But if it be executory, as, in consideration that you shall serve me a year, I will give you ten pound, here you cannot bring your action, till the service performed. But if it were a promise on either side executory, it needs not to aver performance, for it is the counter-promise, and not the performance, that makes the consideration (*d*); yet it is a promise before, though not binding, and in the action you shall lay the promise as it was, and make special averment of the service done after.

Now if the service were not done, and yet the promise made, *prout*, &c., the defendant must not traverse the promise, but he must traverse the performance of the service, because they are distinct in fact, though they must concur to the bearing of the action.

(*c*) See R. H. 1834; Reg. Gen. H. T. 1853, r. 6; *Passenger* v. *Brookes*, 1 B. N. C. 587, 7 C. & P. 110, 1 Scott, 560, explained in *Bennion* v. *Davison*, 3 M. & W. 179.

(*d*) See notes to *Pordage* v. *Cole*, 1 Wms. Saund. 548, and to *Peeters* v. *Opie*, 2 Id. 742, and to *Cutter* v. *Powell*, *post*, vol. 2.

Then also note here, that it was neither required, nor promised, to obtain the pardon, but *to do his endeavour* to obtain it: the one was his end, and the other his office.

Now then, he hath laid expressly, in general, that he *did his endeavour* to obtain it: viz. *in equitando*, &c., to obtain. Now then, clearly, the substance of this plea is general, for that answers directly the request, the special assigned is but to inform the court; and therefore, clearly, if, upon the trial, he could have proved no riding nor journeying, yet any other effectual endeavour according to the request would have served: and therefore, if the consideration had been, that he should endeavour in the future, so that he must have laid his endeavour expressly, and had done it as he doth here, and the defendant had not denied the promise, but the endeavour, he must have traversed the endeavour in the general, not the riding, &c., in the special; which proves clearly, that is not the substance, and that the other endeavour would serve. This makes it clear, that though particulars ought to be set forth to the court, and those sufficient, which were not done, which might be cause of demurrer; yet being but matter of form, and the substance in the general, which is here in the issue and verdict, it were cured by the verdict; but the special is also well enough; for all is laid down for the obtaining of the pardon which is within the request; and therefore, suppose he had ridden to that purpose, and Brathwait had died, or himself, before he could do anything else, or that another had obtained the pardon before, or the like, yet the promise had holden.

And observe that case, 22 E. 4, 40: condition of an obligation, to show a sufficient discharge of an annuity, you must plead the certainty of the discharge to the court (*e*). The reason whereof, given by Brian and Choke, is, that the plea there contains two parts, one a trial *per pais*, *scil.* the writing of the discharge, the other by the court, *scil.* the sufficiency and validity of it, which the jury could not try, for they agree, that if the condition had been to build a house agreeable to the state of the obligee, because it was a case all proper for the country to try, it might

(*e*) So to a plea of *nul agard* in an action on a bond to perform an award, the replication must, before 15 & 16 Vict. c. 76, have set out the award in order that the court might judge of its sufficiency; see 1 Wms. Saund. 327, n., d.

have been pleaded generally: and then it was a demurrer, not an issue, as is here.

Executory consideration involves request.

WHENEVER the consideration of a promise is *executory*, there must *ex necessitate rei* have been a request on the part of the person promising. For if A. promise B. to remunerate him in consideration that he will perform a specified act, that amounts to a request to B. to perform the act for which he is to be remunerated; see *King* v. *Sears*, 2 C. M. & R. 53; and *Shadwell* v. *Shadwell*, 9 C. B. N. S. 159. In the latter case, the following letter was written to plaintiff by his uncle:—"I am glad to hear of your intended marriage with E. N.; and as I promised to help you at starting, I am happy to tell you that I will pay you 150*l.* yearly during my life, and until your annual income from your profession of Chancery barrister shall amount to 600 guineas." Plaintiff married E. N., and in an action against his uncle's executors for arrears of the annuity, the majority of the Court of C. P. held that the letter amounted to a request to plaintiff to marry E. N., and that the promise was therefore binding.

Consideration must move from plaintiff.

The only difficulty that can arise in such cases is on the question which sometimes occurs *whether the consideration move from the plaintiff*; as, for instance, if A., in consideration of something to be done by B., promise something to C., in this case, C., being a stranger to the consideration, unless he has in some way intervened in the agreement between A. and B., cannot sustain an action on the promise; see *Price* v. *Easton*, 4 B. & Ad. 433; *Osborne* v. *Rogers*, 1 Wms. Saund. 264; *Thomas* v. *Shillibeer*, 1 M. & W. 125; *Tweddle* v. *Atkinson*, 1 B. & S. 393; but if he *has* intervened in the agreement, that is sufficient; *Tipper* v. *Bicknell*, 3 B. N. C. 710; *Webb* v. *Rhodes*, Id. 732. In *M'Coubray* v. *Thomson*, 2 Ir. R. C. L. 226, A. was possessed of a farm, value 196*l.*, which he desired to divide between B. and C., and it was agreed between the parties that, in consideration that A. would hand over to B. the possession of the farm, B. should pay C. 98*l.* It was held that C.'s intervention in the agreement was not sufficient to enable him to maintain an action upon it against B.; *sed quære.*

The common law rule above stated does not apply where it appears that the person with whom the contract is made

is meant to be trustee for a third person for whom the benefit is intended. In such case, the third person is entitled in equity to enforce the contract; see *Gandy* v. *Gandy*, 30 Ch. D. 57, where the cases are collected; and *Re Rotherham Co.*, 25 Ch. D. 103.

Tripartite agreements. *Lilly* v. *Hays.*

In *Lilly* v. *Hays*, 5 A. & E. 548, A. sent 100*l.* to B. and informed him that it was for C.: B. having assented to this, and C. having, by B.'s authority, been informed of it, it was held that B. had in effect made himself C.'s banker as to the 100*l.*, and that C. might maintain *assumpsit* for money had and received against B.; see also *Dutchman* v. *Tooth*, 5 B. N. C. 577; *Noble* v. *National Discount Co.*, 5 H. & N. 225; *Griffin* v. *Weatherby*, L. R. 3 Q. B. 753. The case of *Lilly* v. *Hays* should be carefully distinguished from that class of cases, constituting a long series from *Williams* v. *Everett*, 14 East, 582, to *Orr* v. *Union Bank of Scotland*, 1 Macq. 513, in which it has been held that the mere payment of money by A. to B. for C. is revocable, and confers no right of action upon C.; see *Moore* v. *Bushell*, 27 L. J. Ex. 3; and for the application of the same doctrine in equity, *Hill* v. *Royds*, 8 Eq. 290; see also *Field* v. *Megaw*, L. R. 4 C. P. 660. Perhaps the distinction is that in the one case the receiver of the money has undertaken to hold it as the agent of the person for whom it is destined, and that in the other case he has not. For the distinction between cases in which the defendant has (as in *Lilly* v. *Hays*) constituted himself agent to the plaintiff to pay to him a particular sum of money received from a third person, and cases in which A. being indebted to B., and B. to C., it has been mutually arranged that A. shall pay C., see *Liversidge* v. *Broadbent*, 4 H. & N. 603. To make such an arrangement binding at common law, so as to give C. a right of action against A., there must have been an ascertained debt due *in præsenti* from A. to B., and this, as well as the original debt from B. to C., must have been extinguished in order to create a consideration for A.'s promise to pay C.; 1 Wms. Saund. 210a, *note*; *Fairlie* v. *Denton*, 8 B. & C. 395; *Tatlock* v. *Harris*, 3 T. R. 180, *per* Buller, J.; *Wilson* v. *Coupland*, 5 B. & Ald. 228; *Cochrane* v. *Green*, 9 C. B. N. S. 448; and the notes to *Cumber* v. *Wane*, *post*.

Williams v. *Everett.*

Novation.

36 & 37 Vict. c. 66, s. 25, sub-s. 6. Choses in action assignable at law.

Now by the Judicature Act, 1873, s. 25, sub-s. 6, any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice

in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, is, and is to be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if the Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

Where consideration executed, no action unless previous request.

Where the consideration is *executed*, unless there has been an antecedent request, no action is maintainable upon the promise; for a request must be alleged and proved, if put in issue; *Child* v. *Morley*, 8 T. R. 610; see *Sutton* v. *Tatham*, 10 A. & E. 27; *Stokes* v. *Lewis*, 1 T. R. 20; *Naish* v. *Tatlock*, 2 H. Bl. 319; *Hayes* v. *Warren*, 2 Str. 933; *Richardson* v. *Hall*, 1 B. & B. 50; *Durnford* v. *Messiter*, 5 M. & S. 446. For although courts of law will not, in the absence of fraud, enter into the question of *adequacy* of consideration; *Haigh* v. *Brooks*, 10 A. & E. 309; *Kearns* v. *Durell*, 6 C. B. 596; *Hart* v. *Miles*, 4 C. B. N. S. 371; *Skeate* v. *Beale*, 11 A. & E. 983; *England* v. *Davidson*, Id. 856; yet a mere voluntary courtesy is not sufficient to support a subsequent promise; but when there was a previous request, the courtesy was not merely voluntary, nor is the promise *nudum pactum*, but couples itself with, and relates back to, the previous request, and the merits of the party which were procured by that request, and is therefore on a good consideration; see *Pawle* v. *Gunn*, 4 B. N. C. 448; *Bradford* v. *Roulston*, 8 Ir. C. L. R. 468. When, however, it is above said that the request must be alleged and *proved*, it must be understood that there are some cases in which the consideration, though *executed*, is of such a nature that it must have been moved by a previous request, and in which, therefore, as in a case of executory consideration, the statement that what was done was *at the defendant's request*, is merely *expressio eorum quæ tacite insunt*, and, therefore, unnecessary. Such, for instance, is the case of money lent, which, if lent at all, must obviously have been so with the borrower's concurrence. But the demand for money paid to the defendant's use stands on a different footing, for it may be so paid without his request, which, consequently, ought to be averred in terms, and proved, either directly or by circumstances from which it may be implied by

Request sometimes implied.

law; *Victors* v. *Davies*, 12 M. & W. 758; 1 M. & Gr. 265, *note*. Such a request may be either *express* or *implied*. If it has not been made in express terms, it will be implied under the following circumstances:—

When implied.

First, Where the consideration consists in the plaintiff's having been compelled to do that to which the defendant was legally compellable; *Jeffreys* v. *Gurr*, 2 B. & Ad. 833; *Pownal* v. *Ferrand*, 6 B. & C. 439; *Exall* v. *Partridge*, 8 T. R. 308; *Grissell* v. *Robinson*, 3 B. N. C. 13; *Connell* v. *McGorlich*, 12 Ir. C. L. 153; and *Bradshaw* v. *Beard*, 12 C. B. N. S. 344. As to what amounts to compulsion, see *Johnson* v. *Royal Mail Co.*, L. R. 3 C. P. 38; *Gebhardt* v. *Saunders*, (1892) 2 Q. B. 452, 458. This proposition has been held to be limited to cases where at the time of the compulsion there was some privity between the plaintiff and the defendant; *Griffinhoofe* v. *Daubuz*, 5 E. & B. 746. Where the plaintiff for his own purposes, and without any request by the defendant express or implied, left his goods on the defendant's premises, and upon distress put in by the defendant's landlord, paid the rent and ransomed his goods, it was held, distinguishing *Exall* v. *Partridge*, that he could not recover the amount; *England* v. *Marsden*, L. R. 1 C. P. 529. This case was, however, questioned in *Edmunds* v. *Wallingford*, 14 Q. B. D. 811, where also *Griffinhoofe* v. *Daubuz* was explained upon the facts; see *The Orchis*, 15 P. D. 38, and *infra*, p. 159.

Secondly, Where the defendant has *adopted* and enjoyed the benefit of the consideration, for in that case the maxim applies, *omnis ratihabitio retrotrahitur et mandato æquiparatur*. See *Pawle* v. *Gunn*, 4 B. N. C. 448; *Barber* v. *Brown*, 1 C. B. N. S. 121, 151. With regard to this proposition, however, it must be observed that a person cannot be said in law to *adopt* or *ratify* an act, unless it purports to be done on his behalf; see *per* Bowen, L.J., *Falcke* v. *Scottish, &c. Co.*, 34 Ch. D. 234, 250. A request to do an act will not be implied from the mere fact that a benefit is enjoyed by reason that the act was done. Thus if a person who is interested in, but not the sole beneficial owner of, a life policy, pay the premiums and so save the policy from lapsing, the mere fact that the other beneficiaries derive advantage from the payments gives him no right to be repaid by them; *Leslie* v. *French*, 23 Ch. D. 552; *Falcke* v. *Scottish, &c., Co., supra*; *Re Winchilsea's Policy Trusts*, 39 Ch. D. 168; *Strutt* v. *Tippett*, 62 L. T. 475. Again, if one tenant in common of

a house expend money on its repair, the other tenant is not liable to repay any portion of the money, merely because he enjoys the benefit of the repairs; *Leigh* v. *Dickeson*, 15 Q. B. D. 60, 65.

Thirdly, Where the plaintiff *voluntarily* does that whereunto the defendant was legally compellable, *and* the defendant afterwards, in consideration thereof, *expressly* promises; *Wennall* v. *Adney*, 3 B. & P. 250, *in notis*; *Wing* v. *Mill*, 1 B. & Ald. 104; Selw. N. P., 8th ed., p. 57, *n.* 11; *Paynter* v. *Williams*, 1 C. & M. 818. But it must be observed that there is this distinction between this and the two former cases, *viz.*, that in each of the two former cases the law will imply the *promise* as well as the *request*, whereas in this and the following case the *promise* is not implied, and the *request* is only then implied when there has been an express promise; *Atkins* v. *Banwell*, 2 East, 504.

Fourthly, In certain cases, where the plaintiff *voluntarily* does that to which the defendant is *morally*, though not *legally*, compellable, and the defendant afterwards, in consideration thereof, *expressly* promises; see *Lee* v. *Muggeridge*, 5 Taunt. 36; *Watson* v. *Turner*, B. N. P. 129, 147, 281; *Trueman* v. *Fenton*, Cowp. 544; *Atkins* v. *Banwell*, 2 East, 504. Every *moral* obligation is not perhaps sufficient for this purpose; see *per* Lord Tenterden, *Littlefield* v. *Shee*, 2 B. & Ad. 811. Indeed it seems clearly settled by the elaborate judgment of the Q. B. in *Eastwood* v. *Kenyon*, 11 A. & E. 452, that a mere moral obligation, however sacred, is not a sufficient foundation for a binding promise, and that the class of considerations derived from moral obligation includes only those cases in which there has been a legal right which is become devoid of legal remedy.

Moral obligations.

Such, for instance, is the case of a promise by a debtor whose liability is barred by the Statute of Limitations; see notes to *Whitcomb* v. *Whiting*, *post*, and *Latouche* v. *Latouche*, 3 H. & C. 576. Before the Infants' Relief Act, 1874, a debt not legally binding, because incurred during infancy, was a sufficient consideration for a promise to pay, made after full age; *Williams* v. *Moor*, 11 M. & W. 263; but by s. 2 of that Act no action can be brought on any such promise; see also 55 Vict. c. 4, s. 5.

Legal rights debarred of remedy.

Another instance, before the Bankruptcy Act, 1849, was the case of a bankrupt discharged from debts by his certificate, but whose moral obligation, though devoid of legal sanction, was considered capable of sustaining a new express promise

to pay a debt so discharged, and such a promise might have been made either before or after the certificate; see *Trueman* v. *Fenton*, Cowp. 544; *Kirkpatrick* v. *Tattersall*, 13 M. & W. 766. S. 204 of the above Act annulled the legal efficacy of such promises even though under seal, and made them honorary obligations only. This section was re-enacted in substance by s. 164 of the Bankruptcy Act, 1861. Both Acts were repealed in 1869, and no similar provision was re-enacted in the Bankruptcy Act, 1869. It was nevertheless held that such a promise is bad; *Heather* v. *Webb*, 2 C. P. D. 1; unless there be new consideration; *Jakeman* v. *Cook*, 4 Ex. D. 26; and such a promise, although made for fresh consideration by a compounding debtor before the completion of the composition, is bad; *Ex p. Barrow*, 18 Ch. D. 464. The Bankruptcy Act, 1883, like that of 1869, contains no section in terms avoiding such promises.

As another instance of a debt barred by statute being held a good consideration, may be added *Flight* v. *Reed*, 1 H. & C. 703, where bills of exchange, given after the repeal of the usury laws, in renewal of bills accepted as a security for a loan while those laws were in force, and void under them, were held enforceable.

Past cohabitation.

The tendency of modern decisions has been to confine the legal efficacy of moral obligation to the cases above mentioned. Thus, where a man seduced a woman, and, after cohabitation had ceased, by way of compensation, expressly promised to pay a yearly sum for her support, that promise was held not to be binding in law; *Beaumont* v. *Reeve*, 8 Q. B. 483. See also *Hulse* v. *Hulse*, 17 C. B. 711, where it was held that a payee could not maintain an action on a promissory note given as a gratuity for past services and in the expectation of future services, there being no contract binding him to serve, and therefore no consideration for the note. Compare *Maddison* v. *Alderson*, 8 App. Cas. 467.

Past services.

No promise implied to pay for support of children.

Whether a father impliedly undertakes to repay any person supporting his child whom he deserts was doubted in *Urmston* v. *Newcomen*, 4 A. & E. 899. It seems that no such undertaking would be implied by law. Parke, B., in *Seaborne* v. *Maddy*, 9 C. & P. 497, said, "No one is bound to pay another for maintaining his children, either legitimate or illegitimate, except he has entered into some contract to do so. Every man is to maintain his own children as he himself shall think proper; and it requires a contract to

enable another person to do so, and charge him for it in an action." The same rule was laid down in *Mortimore* v. *Wright*, 6 M. & W. 482, where Lord Abinger said, "In point of law, a father who gives no authority and enters into no contract, is no more liable for goods supplied to his son than a brother, or an uncle, or a mere stranger would be;" and Parke, B., said, "It is a clear principle of law, that a father is not under any legal obligation to pay his son's debts, except, indeed, by proceedings under the 43 Eliz., by which he may, under certain circumstances, be compelled to support his children according to his ability; but the mere moral obligation to do so cannot impose any legal liability;" see *Shelton* v. *Springett*, 11 C. B. 452. In *Bazeley* v. *Forder*, L. R. 3 Q. B. 559, a tradesman recovered from a father the price of clothes supplied for his child by order of his wife, who was living apart through no fault of her own, and had obtained the custody of the child by an order of the court; but the ground of the decision was that, the child being *by act of law* in the wife's custody, necessaries for the child were necessaries for the wife herself. The mother of an illegitimate child is bound by 4 & 5 Will. IV. c. 76, s. 71, to maintain it while she is unmarried or a widow; but if she die, without having made a will in its favour, her estate is not legally liable for its support; *Ruttinger* v. *Temple*, 4 B. & S. 491.

Future maintenance.

The future maintenance of a child is, of course, a sufficient consideration for a promise; *Jennings* v. *Brown*, 9 M. & W. 496; and in *Smith* v. *Roche*, 6 C. B. N. S. 223, and *Knowlman* v. *Bluett*, L. R. 9 Ex. 307, the father of bastard children was held liable on a promise to their mother to pay her an annuity, in consideration of her undertaking to maintain them. Such a promise need not be in express terms, but may be implied from circumstances; *Blackburn* v. *Mackey*, 1 C. & P. 1; *Law* v. *Wilkin*, 6 A. & E. 718; though, according to Lord Abinger in *Mortimore* v. *Wright*, *supra*, "In order to bind a father in point of law for a debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person, and it would bring the law into great uncertainty if it were permitted to juries to impose a liability in each particular case according to their own feelings or prejudices."

Exception, in case of barrister, to rule that promise

A remarkable exception from the rule, that a promise to pay may be implied from a previous request, occurs in the case of a barrister, who can claim no remuneration

implied from request.

for services performed at his client's request, as his profession rebuts the implication of a promise, which would otherwise have arisen. "The relation of counsel and client in litigation creates the incapacity to make a contract of hiring as an advocate. It follows that the requests and promises of the defendant, and the services of the plaintiff," a barrister claiming compensation for professional services, "created neither an obligation, nor an inception of an obligation, nor any inchoate right whatever, capable of being completed and made into a contract by any subsequent promise." These are the words of Erle, C.J., delivering a memorable judgment in *Kennedy* v. *Broun*, 13 C. B. N. S. 677; see also *Mostyn* v. *Mostyn*, L. R. 5 Ch. 457, and *R.* v. *Doutre*, 9 App. Cas. 745. It has been held, however, that a barrister may recover from a solicitor fees which the solicitor has received from his client, as money had and received to his use; see *Ex p. Colquhoun*, 38 W. R. 688.

Physicians.

Another exception from the same rule was to be found in the case of a physician, whose fee, according to usage, was an honorarium; still, not being, like a barrister, under disability, he might make express contracts, rendering his patients legally liable to pay for his services; *Veitch* v. *Russell*, 3 Q. B. 928; *A.-G.* v. *Royal Coll. of Physicians*, 1 J. & H. 561, *per* Wood, V.-C.; *Kennedy* v. *Broun*, *supra*.

21 & 22 Vict. c. 90, s. 31 (now repealed).

Under the Medical Act, 1858, s. 31, however, a physician, if duly registered (*Turner* v. *Reynall*, 14 C. B. N. S. 328), became entitled to recover reasonable remuneration for his services, unless prohibited by a bye-law of his college;

49 & 50 Vict. c. 48, s. 6.

Gibbon v. *Budd*, 2 H. & C. 92; and under the Medical Act, 1886, s. 6, he can recover "any fees to which he is entitled," unless he is a fellow of a college, the fellows of which are prohibited by bye-law from recovering them. By Bye-law 170 of the Royal College of Physicians of London the *fellows* are prohibited from suing for "professional aid rendered."

Arbitrators.

It has been said that the office of an arbitrator is honorary, and that there is no implied promise to pay him for his services; *Virany* v. *Warne*, 4 Esp. 47; *Burroughes* v. *Clarke*, 1 Dowl. 48; *Hoggins* v. *Gordon*, 3 Q. B. 466; but, in *Crampton* v. *Ridley*, 20 Q. B. D. 48, Smith, J., at *Nisi Prius*, expressed a strong opinion that, in mercantile arbitrations, there is an implied promise to pay the arbitrator.

Where covenant rebuts promise.

Another exception may arise where there is a covenant under seal. That rebuts the inference of an implied promise to do what is covenanted; and a subsequent express promise

without *new* consideration is not binding; *Baber* v. *Harris*, 9 A. & E. 532; *Middleditch* v. *Ellis*, 2 Exch. 623; *Matthew* v. *Blackmore*, 1 H. & N. 762.

Evidence of request.

Upon the question, what will amount to evidence of a request where it is necessary to prove one, see *Alexander* v. *Vane*, 1 M. & W. 511, where A. and B. went to C.'s shop, A. ordered goods, and B. said in A.'s presence that he would pay for them if A. did not. This was held evidence of a request from A. to B. to pay in case of his own default.

Principal and agent, and custom of market.

A principal is bound to indemnify his agent against the natural consequences of all acts done by him in pursuance of the authority conferred upon him; and if in obedience to any custom or usage of the business, or any rule of the market in which his principal has deputed him to act, or otherwise in the regular course of his employment, he pays money on behalf of his principal, a *request* to make the payment will be implied; *Sutton* v. *Tatham*, 10 A. & E. 27; *Taylor* v. *Stray*, 2 C. B. N. S. 175; *Smith* v. *Lindo*, 5 Id. 587; *Rosewarne* v. *Billing*, 15 Id. 316; *Bowring* v. *Shepherd*, L. R. 6 Q. B. 309; *Read* v. *Anderson*, 13 Q. B. D. 779; *Hartas* v. *Ribbons*, 22 Id. 254. A person who employs a broker to sell shares on the Stock Exchange must indemnify him against any liability he may incur to the buyer under any rules of the Stock Exchange if such rules are reasonable; *Smith* v. *Reynolds*, 66 L. T. 808.

Nudum pactum, when implied promise exhausts consideration.

One of the most singular, perhaps the most singular case determined on the ground of *nudum pactum*, is *Hopkins* v. *Logan*, 5 M. & W. 241, where it was held that an account stated, and a sum thereupon found to be due to the plaintiff, will not support a promise to pay such sum *in futuro*, though the law would imply a promise to pay it *in præsenti*. The ground of the decision appears to have been, that the promise *implied* by law to pay *in præsenti* exhausted as it were the consideration, and that there was, consequently, no consideration left for any other promise; so that it bears some analogy to *Granger* v. *Collins*, 6 M. & W. 458, where a declaration that B. agreed to take A.'s house at a certain rent, and A., in consideration of the premises, promised that he should enjoy without eviction from C., was held bad for want of a consideration to support the *assumpsit*; see also *Brown* v. *Crump*, 1 Marsh. 567; *Jackson* v. *Cobbin*, 8 M. & W. 790; *Roscorla* v. *Thomas*, 3 Q. B. 234; *Kaye* v. *Dutton*, 8 Scott, N. R. 495; and *Elderton* v. *Emmens*, 4 H. L. C. 624. In *McManus* v. *Bark*, L. R. 5 Ex. 65, an

attempt was made to set up in answer to an action a promise analogous to that sued upon in *Hopkins* v. *Logan*. The defendant made a promissory note. In an action by payee's executor on the note, a subsequent agreement between defendant and the payee that the sum secured by the note should be paid by instalments with interest, was held to be no answer to the action, inasmuch as there was no consideration for the agreement, which was therefore binding on neither party. In *Hopkins* v. *Logan*, as has been just observed, a debt payable *in præsenti* was held no consideration for a promise to pay *in futuro*; but in *Walker* v. *Rostron*, 9 M. & W. 411, the Court of Exch. held that a debt payable *in futuro* was a good consideration for a promise by the debtor's agent to appropriate funds in his hands by way of security for the debt. The distinction seems to be between an *executed* transfer and an *executory* promise. In *Kaye* v. *Dutton*, 8 Scott, N. R. 495, Tindal, C.J., after citing *Hopkins* v. *Logan*, and other cases of that class, points out the possibility of a distinction between them and cases of executed consideration from which no promise can be implied by law, intimating that possibly, although considerations of the former class are only capable of supporting the promise implied by law, yet those of *the latter* may be capable of supporting any promise otherwise unobjectionable. No decision, however, was pronounced upon that point. And it seems impossible to state any rational distinction between the latter class of cases and moral obligations of pure gratitude for favours past, which, as we have seen (*ante*, pp. 143-4), will not sustain a promise. The question was again much discussed, but not decided, in *Elderton* v. *Emmens*, 4 H. L. C. 624; see also *Lattimore* v. *Garrard*, 1 Exch. 809.

Principle of rule as to gifts and sales of chattels.

It is perhaps upon the principle that a gift while executory is *nudum pactum*, and therefore incapable of being enforced, that a parol gift of chattels is held to pass no property to the donee without delivery; *Irons* v. *Smallpiece*, 2 B. & Ald. 551; *Shower* v. *Pilck*, 4 Exch. 478; *Cochrane* v. *Moore*, 25 Q. B. D. 57; or, at least, without a change of possession consequent upon the gift: *Kilpin* v. *Ratley*, (1892) 1 Q. B. 582. The property may be passed by a contract of sale for valuable consideration without delivery; but whether it does pass or not depends upon the intention of the parties; see the Sale of Goods Act, 1893, ss. 17, 18; which is but declaratory of the common law; see *Dixon* v. *Yates*, 5 B. & Ad. 340; *Seath* v. *Moore*, 11 App. Cas. 350.

Right of surety against principal.

It has been above stated that one of the cases in which an *express request* is unnecessary, and in which a promise will be *implied*, is that in which the plaintiff has been compelled to do that to which the defendant was *legally* compellable. On this principle depends the right of a surety who has been damnified to recover an indemnity from his principal; *Toussaint* v. *Martinnant*, 2 T. R. 100; *Fisher* v. *Fallows*, 5 Esp. 171; *Emery* v. *Clark*, 2 C. B. N. S. 582. Thus, the indorser of a bill, who has been sued by the holder, and has paid part of the amount, being a surety for the acceptor, may recover it back as money paid to his use and at his request; *Pownal* v. *Ferrand*, 6 B. & C. 439. So may the acceptor where, under the circumstances, *e.g.*, by reason of a composition or the like, the bill ought not to have been negotiated, or ought to have been taken up by some other person; *Hawley* v. *Beverley*, 6 M. & Gr. 221; *Horton* v. *Riley*, 11 M. & W. 492; *Hooper* v. *Treffry*, 1 Exch. 17. But then the surety must have been *compelled*, *i.e.*, he must have been under a reasonable obligation and necessity, to pay what he seeks to recover from his principal; for, if he *improperly* defend an action, there will be no implied duty on the part of his principal to reimburse him the costs, unless the action was defended at the principal's request; *Roach* v. *Thompson*, 1 M. & M. 487; *Gillett* v. *Rippon*, Id. 406; *Knight* v. *Hughes*, Id. 247; *Smith* v. *Compton*, 3 B. & Ad. 407; *Short* v. *Kalloway*, 11 A. & E. 28, *ubi per* Lord Denman, "No person has a right to inflame his own account against another, by incurring additional expense in the unrighteous resistance to an action he cannot defend;" see *Walker* v. *Hatton*, 10 M. & W. 249; *Tindall* v. *Bell*, 11 Id. 228; and *Ronneberg* v. *Falkland Islands Co.*, 34 L. J. C. P. 34. But if he make a reasonable and prudent compromise, he will be justified in doing so; *Smith* v. *Compton*, *supra*; *Dixon* v. *Fawcus*, 30 L. J. Q. B. 137; and where the claim is of an unliquidated nature and needs investigation, it seems that he may, unless expressly forbidden, incur the expense of investigating it, or at least that very slight evidence is enough to raise an inference that the person ultimately liable has assented to his doing so; *Blyth* v. *Smith*, 5 M. & Gr. 405.

Surety must have been compelled to pay.

His rights as to costs incurred in resisting claim.

May make reasonable compromise.

Investigating claim.

Question for jury.

It seems to be for the jury in each case to say whether, in defending and incurring the costs sought to be recovered, the surety pursued the course which a prudent and reasonable man, unindemnified, would pursue in his own case, and

if the jury find that he did, the costs may be recovered; *Tindall* v. *Bell*, *supra*; *Broom* v. *Hall*, 7 C. B. N. S. 503; *The Legatees*, 1 Swa. Ad. 168; *Mors Le Blanch* v. *Wilson*, L. R. 8 C. P. 227, overruled by *Barendale* v. *L. C. & D. R. Co.*, L. R. 10 Ex. 35; *Fisher* v. *Val de Travers Co.*, 1 C. P. D. 511; *Hammond* v. *Bussey*, 20 Q. B. D. 79. However, it is always advisable for the surety to let his principal know when he is threatened, and request directions from him; for the rule laid down by the K. B. in *Smith* v. *Compton*, 3 B. & Ad. 407, is, that "the effect of want of notice (to the principal) is to let in the party, who is called upon for an indemnity, to show that the plaintiff has no claim in respect of the alleged loss, or not to the amount alleged; that he made an improvident bargain, and that the defendant might have obtained better terms if an opportunity had been given him. . . . The effect of notice to an indemnifying party is stated by Buller, J., in *Duffield* v. *Scott*, 3 T. R. 376, recognised in *Jones* v. *Williams*, 7 M. & W. 493: 'The purpose of giving notice is not in order to give a ground of action; but if a demand be made, which the party indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action was not bound to pay the money;'" see *Parker* v. *Lewis*, 8 Ch. 1035, 1058. See also R. S. C. 1883, O. XVI., rr. 48 *et seq.*, as to third party proceedings since the Judicature Act.

Should consult principal.

Distinction where contract is to do something different from that to which a contractee is liable.

It is very necessary in this place to observe the distinction between a contract to indemnify, or a contract to do *the very thing to which the contractee is liable*, the breach of which, consequently, may raise an obligation to indemnify the contractee against such liability, and a contract to do something not precisely the same as that to which the contractee is liable. In the latter case the Court of Exch. has held, that the costs occasioned by an action against the contractee on such liability were not recoverable over; *Penley* v. *Watts*, 7 M. & W. 601. There a lessee, who had made an under-lease containing covenants not precisely the same as those in the original lease, was held not entitled to recover from his underlessee the costs of an action brought against him by his own lessor for breach of the covenants in the original lease. Both in that case, and in *Walker* v. *Hatton*, 10 M. & W. 249, which affirms it, reflections were

cast upon *Neale* v. *Wyllie*, 3 B. & C. 533, which may be considered as finally overruled by *Logan* v. *Hall*, 4 C. B. 598, where it was held that a lessee, evicted for breach of covenant, could not recover the value of the lease from his sublessee, whose sublease did not contain any covenants the performance of which would necessarily have included a performance of the covenants in the original lease. See Sedgwick on Damages, 325; *Hornby* v. *Cardwell*, 8 Q. B. D. 329, 333; *Pontifex* v. *Foord*, 12 Q. B. D. 152.

Contribution between co-sureties and co-contractors.

On the same ground as the liability of a principal to reimburse his surety, depends the right of one surety or joint contractor, who has been obliged to satisfy the whole demand, to recover a proportionable contribution from his fellow surety or contractor. He is a person who has been compelled to satisfy a demand, parcel of which his fellow was compellable to satisfy; *Cowell* v. *Edwards*, 2 B. & P. 268; *Turner* v. *Davies*, 2 Esp. 478; *Browne* v. *Lee*, 6 B. & C. 697; *Deering* v. *Winchelsea*, 2 B. & P. 270; *Kemp* v. *Finden*, 12 M. & W. 421; *Reynolds* v. *Wheeler*, 10 C. B. N. S. 561; and *Whiting* v. *Burke*, 6 Ch. 342, a case in which the co-sureties were bound by separate instruments. If, however, one has become surety at the instance of the other, particularly if that other has received from the principal a separate indemnity for himself, it will be different; *Turner* v. *Davies*, *supra*; see *Thomas* v. *Cook*, 8 B. & C. 728. A surety's right to reimbursement from the principal accrues, *toties quoties*, as often as he is compelled to make a payment; that to contribution from a surety does not accrue till it is ascertained that one surety has paid more than his just proportion of the debt, after which it accrues, *toties quoties*, on the occasion of each payment that he is subsequently forced to make; *Davies* v. *Humphreys*, 6 M. & W. 168; *Ex p. Snowdon*, 17 Ch. D. 44. And he may recover contribution according to the number of sureties, without reference to the number of principals; *Kemp* v. *Finden*, 12 M. & W. 421. Where there were two sureties to a bond, and, upon the death of one, a new bond was given by the surviving surety and a new surety, all rights being reserved against the estate of the deceased surety, it was held that the estate of the deceased was liable to contribute one third; *Coles* v. *Peyton*, (1893) 3 Ch. 238. In equity the *solvent* sureties are liable to contribute *inter se* to the whole amount, *Peter* v. *Rich*, 1 Cha. R. 19; *Hole* v. *Harrison*, 1 Cha. Ca. 246; *Layer* v. *Nelson*, 1 Vern. 456; whereas at law the

proportion recoverable seems to have been determined by the number of original sureties; see *per* Bayley, J., *Browne* v. *Lee*, 6 B. & C. 697; *Batard* v. *Hawes*, 2 E. & B. 287; but this is probably a case which falls within the provisions of the Judicature Act, 1873, s. 25, sub-s. 11, that where rules of law and equity conflict the latter shall prevail.

At law a surety could only obtain contribution from a co-surety when he had actually paid more than his own proportion; *Davies* v. *Humphreys*, and *Ex p. Snowdon*, *supra*. In equity, however, which now prevails, a surety against whom judgment has been given, or a claim proved, for the full amount, can, before he has paid anything, proceed against his co-surety and the creditor, and obtain an order that the co-surety pay his proportion to the creditor, and that the creditor shall not enforce his judgment against him for the full amount; if the creditor is not made a party to such proceedings an order will be made that the co-surety indemnify the other, when he has paid his proportion, from all further liability; *Wolmerhausen* v. *Gullick*, (1893) 2 Ch. 514; see *English & Scottish Co.* v. *Flatau*, 36 W. R. 238; *Johnstone* v. *Salvage Ass.*, 19 Q. B. D. 458, 460.

Actual payment unnecessary

Securities.

All the co-sureties are entitled to the benefit of any security which has been taken by anyone of them to indemnify himself against the liability undertaken; *Steel* v. *Dixon*, 17 Ch. D. 825; *Berridge* v. *Berridge*, 44 *Id.* 168. As to the right of a joint contractor to contribution, see Lord Kenyon's judgment in *Merryweather* v. *Nixan*, *post*; *Abbot* v. *Smith*, 2 W. Bl. 947; *Hutton* v. *Eyre*, 6 Taunt. 289; *Bayne* v. *Stone*, 4 Esp. 13; *Burnell* v. *Minot*, 4 Moore, 340; *Holmes* v. *Williamson*, 6 M. & S. 158; and *Batard* v. *Hawes*, *supra*.

Joint contractors.

Where several have employed another to do work for their common benefit, there is an implied undertaking by all to contribute rateably *inter se*; *Edger* v. *Knapp*, 6 Scott, N. R. 707; 5 M. & Gr. 755; *Spottiswoode's Case*, 6 De G. M. & G. 345. And where, by the nature of the case, the representative of any party dying is to have the same benefit as the deceased would have had if he had lived, the law will imply the like promise on the part of the deceased, that his representative shall contribute, notwithstanding that he is under no direct liability, in a court of law, to the common creditor; *Prior* v. *Hembrow*, 8 M. & W. 873 (where the count was in the *indebitatus* form for money paid to the use of the executor); and see the judgment in *Batard* v. *Hawes*, 2 E. & B. 296. It is otherwise, indeed, where the

Personal representatives.

Partners.

joint contractors are partners, for then justice could not be done between them without balancing the partnership accounts, which is the office of a court of equity; *Saddler* v. *Nixon*, 5 B. & Ad. 936; unless the partnership was merely in an isolated transaction, *Wilson* v. *Cutting*, 10 Bing. 436; or the transaction was separate from the partnership, *Sedgwick* v. *Daniell*, 2 H. & N. 319; and see *French* v. *Styring*, 2 C. B. N. S. 357.

Remedy of sureties.

Here may be mentioned the statutory remedy given to sureties in cases in which the creditor, whose demand has been satisfied, holds securities against the principal debtor or against parties liable to contribute. The Mercantile Law Amendment Act, 1856, s. 5, provides that, "every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security, which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, upon a proper indemnity, to use the name, of the creditor, in any action or other proceedings at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceedings by him: Provided always, that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable." This enactment extends to the case of a co-defendant who pays the whole of the debt recovered against all the defendants jointly, and entitles him to an assignment of the judgment; *Batchellor* v. *Lawrence*, 9 C. B. N. S. 543. A surety who has paid the creditor is entitled to the benefit of a judgment obtained by the creditor against the principal debtor and sureties, although the judgment has not been actually assigned to him; *Lightbown* v. *M'Myn*,

The Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 5.

33 Ch. D. 575. When one surety has paid the debt, and has taken an assignment of securities from the creditor, he may sue, or prove against, a co-surety for the full amount of the debt, but can actually recover only the amount which the co-surety is liable to contribute; *Morgan* v. *Hill*, (1894) 3 Ch. 400. The surety for a buyer, who pays the vendor, is entitled to the benefit of the vendor's lien; *Imperial Bank* v. *London Docks Co.*, 5 Ch. D. 195. A surety to the Crown, who has paid the debt of his principal, is entitled to the Crown's priority, if the principal's estate is insolvent; *Manisty* v. *Churchill*, 39 Ch. D. 174. On a refusal to assign, an action must be brought to obtain the assignment, and the proceeding must not be by motion; *Phillips* v. *Dickson*, 8 C. B. N. S. 391.

No contribution among tort feasors.

No action for contribution is maintainable by one wrongdoer against another, although the one who claims contribution may have been compelled to satisfy the whole damages arising from the *tort* committed by them both. This was decided in *Merryweather* v. *Nixan*, *post*, p. 383, where Lord Kenyon, in his judgment, having laid down the general principle, observed that "the decision would not affect cases of indemnity where one man employed another to do acts not unlawful in themselves, for the purpose of asserting a right." "From the inclination of the court, in *Philips* v. *Biggs*, Hard. 164, from the concluding part of Lord Kenyon's judgment in *Merryweather* v. *Nixan*, and from reason, justice, and sound policy, the rule that wrongdoers cannot have contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act;" *per* Best, C.J., *Adamson* v. *Jarvis*, 4 Bing. 72 (see *per* Lord Herschel, *Palmer* v. *Wick Co.*, (1894) A. C. 318, 324). Accordingly in *Betts* v. *Gibbins*, 2 A. & E. 57, such an action was held to be maintainable. There, the defendant consigned to the plaintiffs goods for N.; some were delivered, but the rest continued in the plaintiffs' hands until N.'s bankruptcy; thereupon the plaintiffs, by the defendant's orders, refused to deliver them to the assignees, who brought an action of trover; the plaintiffs compromised it by paying the value of the goods together with the costs, and brought this action against the defendants for indemnity. They were held to be entitled to recover. "The principle laid down in *Merryweather* v. *Nixan*," said Taunton, J., "is too plain to be mistaken. *The law will not imply an indemnity between wrongdoers.*

But rule confined to cases where knowledge that act was wrongful.

But the case is altered where the matter is indifferent in itself, and when it turns upon circumstances whether the act be wrong or not. The act done here by changing the destination of the goods at the order of the defendant, was not clearly illegal; and, therefore, not within the rule in *Merryweather* v. *Nixan*." *Accord. Humphreys* v. *Pratt*, 2 Dow. & Cl. 288; *Pearson* v. *Skelton*, 1 M. & W. 504; *Fletcher* v. *Harcot*, Hutt. 55; S. C. as *Battersey's Case*, Winch, 48; *Dugdale* v. *Lovering*, L. R. 10 C. P. 196. In *Dixon* v. *Fawcus*, 30 L. J. Q. B. 137, the defendant gave the plaintiff an order to make some firebricks, and to impress them with a mark which the defendant knew, but the plaintiff did not know, to be R.'s trade-mark. The bricks were made, and marked according to the order, whereupon R. sued for an injunction against the plaintiff, who, after incurring expenses about the defence to the suit, compromised by paying a sum to R., and then brought an action to recover that sum and the expenses, charging the defendant with fraud in directing him to use the trade-mark; on demurrer the action was held maintainable.

Colburn v. *Patmore*. Relation of proprietor to editor in respect of printing libels.

In *Colburn* v. *Patmore*, 1 C. M. & R. 73, a newspaper proprietor sued his editor for falsely, maliciously, and negligently *inserting* a libel, without the plaintiff's knowledge, leave, or authority, "in consequence of which the plaintiff was convicted and fined for falsely and maliciously *printing and publishing* the said libel;" (see, now, 6 & 7 Vict. c. 96, s. 7; and *R.* v. *Holbrook*, 4 Q. B. D. 42). The case was determined against the plaintiff on a slip in the pleading, since it was consistent with the declaration, that the plaintiff, though he did not know of the original insertion of the libel, might afterwards have knowingly and wilfully permitted it to be printed, and so have been convicted in consequence of his own criminal act. But, during the argument, the question whether a newspaper proprietor, convicted and fined for a libel published by his editor without his knowledge or consent, could maintain an action for indemnity, was elaborately discussed, and the court in delivering judgment expressed a strong opinion that he could not. "I am not aware," said Lord Lyndhurst, "of any case in which a man convicted of an act declared by law to be *criminal*, and punished for it accordingly, has been suffered to maintain an action against the party who participated with him in the offence, in order to procure indemnity for the damages occasioned by that conviction; but after hearing the argument, I entertain little or no doubt

that such an action could not be maintained." (See *Shackell* v. *Rosier*, 2 B. N. C. 634.)

Campbell v. *Campbell.* Dormant partner.

In *Campbell* v. *Campbell*, 7 Cl. & F. 181, the appellant and respondent and others were partners in a distillery, and owing to certain illegal transactions, which took place in the management of the distillery by one of the partners, the whole firm, including the pursuer, though absent and ignorant of the delict, became liable to penalties. A prosecution was commenced, and the firm, including the pursuer, consented to a verdict against them for 3000*l.* penalties. The pursuer, after payment of the penalty, brought the action for an indemnity, which was opposed, *inter alia*, on the ground that he was *particeps criminis*, and therefore disentitled; and *Colburn* v. *Patmore*, *supra*, was cited. However, although no decision was pronounced upon the point, Lord Cottenham seems to have thought it clear, that the pursuer, though liable to the penalty, was not *particeps criminis* in the sense which would disentitle him to sue for contribution.

Contribution. Sub-lessees of distinct parcels.

In *Hunter* v. *Hunt*, 1 C. B. 300, an unsuccessful attempt was made to extend the limits of the action for contribution. The plaintiff and defendant were underlessees, by different leases, of distinct parcels of premises held under one original lease at an entire rent. The plaintiff under a threat of distress paid arrears of this rent, and brought his action against the defendant to recover a contribution, proportionate to his interest, as for money paid to his use. The Court of C. P., however, held the action not maintainable. See *Johnson* v. *Wild*, 44 Ch. D. 146.

Tenant paying sum for which landlord primarily liable.

Under the same principle, *viz.*, that a previous *request*, and a *promise* to indemnify, will be implied in favour of a plaintiff, who has been compelled to do that to which the defendant was legally compellable, may be ranked the cases in which *a tenant*, who has been forced to pay some demand to which the landlord was primarily liable, has been held entitled to deduct the amount from his rent, or to recover it from the landlord, as money paid to his use. Such was *Taylor* v. *Zamira*, 6 Taunt. 524. That was an action of replevin, in which the defendant alleged that a quarter's rent was due under a demise. The plaintiff replied that, before the demise and before the lessor had any interest in the premises, the owners of the land had granted to K. an annuity issuing thereout with a power of distress; and that, the annuity being in arrear, he had paid the rent to K.,

under threat of distress, in part payment of the annuity. This reply was held to be good, Gibbs, C.J., remarking, that *Sapsford* v. *Fletcher*, 4 T. R. 511, was decisive that a tenant, threatened with distress for rent due to a superior landlord, might pay it, and deduct the payment from his own rent; that the only difference was, that there his immediate lessor was personally liable to that rent, and that here the land only was liable, but that *nothing could turn on that distinction*. And Burrough, J., said that, had the payment by the plaintiff exceeded the rent due from him, he might have brought *assumpsit* against the defendant for the surplus.

Sapsford v. *Fletcher.*

In *Sapsford* v. *Fletcher, supra*, a tenant, to an avowry for rent arrear, pleaded a payment, under threat of distress, of ground-rent to the superior landlord. It was urged, 1st, that this amounted to a set-off, and was not pleadable in replevin; 2nd, that this was a payment by the tenant in his own wrong, for that no man can make another his debtor by voluntarily paying the debt of that other. But the court said, it was not a set-off, but a payment; and that the payment was not voluntary, but compulsory, for it was made under threat of distress, which the superior landlord had power to levy. In *Johnson* v. *Jones*, 9 A. & E. 809, the same principle was applied to a payment of interest due upon a mortgage prior to the lease; though in *Boodle* v. *Cambell*, 8 Scott, N. R. 104, a payment by a tenant of a proportional part of the rent to a person who claimed part of the demised premises by title paramount to the landlord, and who demanded the rent after it fell due, so that there was nothing in the case that could be considered as an eviction, was held no answer to the landlord's action for rent, not being a payment of any *charge upon the land*, or of any *debt due from* the landlord. In *Baker* v. *Greenhill*, 3 Q. B. 148, it was held that where lands charged with the repair of a bridge were occupied by a person not the owner, the occupier, although primarily responsible to the public for the repairs, was entitled to reimbursement from the owner.

Need not be actual threat of distress.

It is not necessary, for the purpose of rendering the payment one by compulsion, that the superior landlord should actually threaten to distrain; for a demand by one who has power to distrain is equivalent to a threat of distress; and such a payment "is no more voluntary than a donation to a beggar who presents a pistol;" *per* Best, C.J., *Carter* v. *Carter*, 5 Bing. 406; see *Pitt* v. *Purssord*, 8 M. & W. 538.

Assumpsit by tenant for excess.

It was stated, as has been already observed, by Burrough, J., in *Taylor* v. *Zamira*, that, if the payment made by the tenant to the head landlord had exceeded the sum due from him to his lessor, he might have sued his lessor in *assumpsit* for the surplus. This is a corollary of the general rule we are discussing, *viz.*, that, if A. be *compelled* to pay the debt which B. is legally *compellable* to satisfy, A. may sue B. for the amount, and the law implies a previous request from B. to A. to pay the debt, and a subsequent promise to reimburse him.

Demand unnecessary where legal right in payee.

It seems unnecessary that there should even be a demand by the person to whom the money is paid, if there be in him a legal right, by the exercise of which the person who pays may be damnified, unless he pay. *Broughton's Case*, 5 Rep. 24 a, seems to support that proposition, and with an excellent reason, from the Year Book, 18 E. 4, 27 *b*, namely, "that terror of suit, so that he dare not go about his business, is a damnification, although he be not arrested or forced by process, &c." See also *Pitt* v. *Purssord*, 8 M. & W. 538; *Gibbons* v. *Vouillon*, 8 C. B. 483. A tenant does not lose his right to be saved harmless from proceedings for rent payable by his landlord, because his own rent is in arrear; *Briant* v. *Pilcher*, 16 C. B. 354. In *Schlencker* v. *Moxey*, 3 B. & C. 789, however, where a lessee by *deed*, who had been distrained upon for ground rent, declared against his lessor, on an *implied* promise to indemnify, it was held that the covenant for quiet enjoyment by the word *demise* excluded such an implication. The word *grant* was held to have a similar effect in *Baber* v. *Harris*, 9 A. & E. 532; *quære* since 7 & 8 Vict. c. 76, s. 6, and 8 & 9 Vict. c. 106, s. 4; see *ante*, p. 64.

Exceptions.

Express covenant.

No *money* paid to defendant's use.

In *Moore* v. *Pyrke*, 11 East, 53, the general principle was not disputed; but the action failed, because the tenant, instead of paying the rent to the superior landlord, suffered his goods to be distrained and sold, so that, in fact, he never paid any *money* to his lessor's use; and, as the declaration was for money paid, he failed; a reason apparently not approved of by the Court of Exch. in *Rogers* v. *Maw*, 15 M. & W. 444, where the goods of a joint contractor were taken under a *fi. fa.*

Sed quære.

General rule where one person's goods seized for debt of another.

"Speaking generally, and excluding exceptional cases, where a person's goods are lawfully seized for another's debt, the owner of the goods is entitled to redeem them and to be re-imbursed by the debtor the money paid to redeem them; and, in the event of the goods being sold to satisfy the debt,

the owner is entitled to recover the value of them from the debtor." "When it is said that the goods must be lawfully seized, all that is meant is that, as between the owner of the goods and the person seizing them, the latter shall have been entitled to take them;" *Edmunds* v. *Wallingford*, 14 Q. B. D. 811, C. A. So in a case where a ship was arrested in an action *in rem* by her master for a disbursement, the mortgagees of some shares, who paid the amount of the claim in order to release the ship and take possession under their mortgage, were held entitled to recover the amount from the owners of the other shares who were severally liable for the disbursements; *The Orchis*, 15 P. D. 38. In *Griffenhoofe* v. *Daubuz*, 5 E. & B. 746, the question was whether an action could be maintained to recover indemnity from the owner of land for the loss of a stack of wheat which, "while lawfully upon the land," had been distrained and sold for arrears of tithe rent-charge, charged upon the land, but not upon the owner personally. It was held that the action would not lie, there being "no allegation showing any privity entitling the plaintiff to recover in any form of action." This case was explained in *Edmunds* v. *Wallingford*, *supra*, where the C. A. expressed their inability to understand what was meant by "privity" as there used, and said: "Where the owner of the goods seized is, as between himself and the person for whose debt they are seized, liable to pay the debt, it is plain that the general rule is inapplicable; and this explains the case of *Griffenhoofe* v. *Daubuz*."

Want of privity. *Griffenhoofe* v. *Daubuz*.

In *Exall* v. *Partridge*, 8 T. R. 308, Exall placed his carriage under the care of Partridge, a coachmaker, on premises which W. had leased to Partridge and the two other defendants. The latter had assigned their interest to Partridge, but all three were still liable for the rent under their covenant in the lease. W. having distrained the carriage for rent in arrear, Exall paid it, to release the carriage, and he was held entitled to recover the amount from the defendants in an action of *assumpsit* for money paid. "One person," said Lawrence, J., in his judgment, "cannot by a voluntary payment raise an *assumpsit* against another; but here was a distress for rent due from the *three* defendants; the notice of distress expressed the rent to be due *from them all*, the money was paid by the plaintiff in satisfaction of a demand *on all*, and it was paid by compulsion; therefore, I am of opinion that this action may be

Exall v. *Partridge*.

maintained against the three defendants. The justice of the case, indeed, is that the one who must ultimately pay this money should alone be answerable here. But *as all the three defendants were liable to the landlord for the rent in the first instance*, and as, by this payment made by the plaintiff, all the three were released from the demand of rent, I think that this action may be supported against all of them."

Distinction where special contract.

The above words are printed in *italics* because there is a distinction between this case and the case where one person is compelled to make a payment to which another is liable, not, however, primarily, but only in consequence of a special agreement with the person compelled to make it. The remedy in the latter case is not on any applied *assumpsit*, but on the special agreement itself. Thus in *Spencer* v. *Parry*, 3 A. & E. 331, a tenant agreed to pay certain taxes, which were by statute payable by the landlord: the landlord having been compelled to pay these taxes in consequence of the tenant's default, brought an action of debt for money paid: it was objected that he ought to have sued upon the special agreement, and the court held the objection fatal: "The plaintiff's payment," said Lord Denman, "delivered the defendant *from no liability but what arose from the contract* between them; the tax remained due by his default, which would give a remedy on the agreement, *but it was paid to one who had no claim upon him, and therefore not to his use*." *Accord. Lubbock* v. *Tribe*, 3 M. & W. 607, decided on the authority of *Spencer* v. *Parry*. In *Lubbock* v. *Tribe*, the plaintiffs, as K.'s agents, received from the defendant a cheque for money due from him to K., but afterwards lost it; whereupon, at their request, the defendant promised to give them a new cheque on their giving an indemnity, which they did: no new cheque was given, and the plaintiffs having been obliged to pay the amount to K., brought an action *for money paid*, which was held not sustainable. "On the special agreement," said Parke, B., "I think an action might be maintained, but not for money paid, because the payment of the money does not exonerate the defendant from any liability at all. It is not money paid to his use, it is money paid to the plaintiffs' own use, who are bound to make good the amount to K."

Spencer v. *Parry*.

Lubbock v. *Tribe*.

Implied *assumpsit* against person ultimately liable by statute.

But in a previous case, in which the compulsory payment was made in discharge of a party, who, though not primarily liable, was *ultimately so*, not by any special agreement, but by the provisions of an Act of Parliament, it was decided, that the party compelled to make the payment might recover

on an implied *assumpsit*. In *Dawson* v. *Linton*, 5 B. & Ald. 521, goods of the plaintiff, an outgoing tenant, left by him on his farm, were distrained for a tax payable by the tenant, but which the Act gave him power to deduct from his rent: the court decided, that, as the tax must ultimately fall on the landlord, and as the plaintiff had been compelled to pay it in order to ransom his goods, he had a right to recover the amount from the landlord, as money paid to his use. It may, perhaps, be thought, that the payment in this case is liable to the concluding observation of the court in *Spencer* v. *Parry*, that "*it was made to one who had no claim upon the defendant, and therefore not to his use.*" But though, in *Dawson* v. *Linton*, there was no claim for the tax against the defendant personally, there was a claim against the land which was his property; nay, there was one contingency, *viz.*, that of there being no sufficient distress, in which the Act provided that the land might be seized *quousque* for the arrears due; and *Taylor* v. *Zamira* shows that a claim against a man's property is equivalent, for this purpose, to one against his person; but in *Spencer* v. *Parry* the defendant had quitted the premises, so that neither he nor his property could have been molested on account of the tax, at the time when the plaintiff paid it.

Distinction where liability incurred at request of defendant.

The doctrine laid down in *Spencer* v. *Parry* is obviously inapplicable to the case where a liability has been incurred at the request of the defendant, and, in consequence of incurring such liability, the plaintiff has been put to expense; because, in such a case, the payment has in truth been made in consequence of the request of the defendant, and it is immaterial whether it has relieved the defendant from a liability or not; *Brittain* v. *Lloyd*, 14 M. & W. 762; *per* Parke, B., in *Hutchinson* v. *Sydney*, 10 Exch. 438; *Risbourg* v. *Bruckner*, 3 C. B. N. S. 812; see also *Hawley* v. *Beverley*, 6 M. & Gr. 221.

What implied from parol demise.

It may be mentioned in connection with this subject that a parol demise implies a covenant for quiet enjoyment, but not for title; *Bandy* v. *Cartwright*, 8 Exch. 913; *Hall* v. *City of London Brewery*, 2 B. & S. 737; *Robinson* v. *Kilvert*, 41 Ch. D. 88, 96; see *Penfold* v. *Abbott*, 32 L. J. Q. B. 67; and *Baynes* v. *Lloyd*, (1895) 1 Q. B. 280.

Such payments by tenant pleaded as *payment*.

Here we must not omit to remark, that there is a peculiarity in the right of the tenant to recoup himself for monies paid in discharge of some burden upon the land, prior to his own interest therein, which distinguishes that from all other

cases of compulsory payment to the use of another. Such payments, when made by a tenant under compulsion, are considered as actual *payments* of so much of his rent, and may be pleaded by way of *payment*, as contra-distinguished from *set-off* (see *Taylor* v. *Zamira*, and *Sapsford* v. *Fletcher*, *supra*; *Johnson* v. *Jones*, 9 A. & E. 809); whereas, generally speaking, one who has been compelled to pay the demand to which another is liable, although he may recover the amount in *assumpsit*, or set it off in an action against himself, cannot appropriate it to the payment of a debt due by him to the person to whose use he paid it, without obtaining that person's consent. The fact is, that, in cases of landlord and tenant, the very relation in which the parties stand to each other creates an implied consent, upon the landlord's part, that the tenant shall appropriate such part of his rent as shall be necessary to indemnify him against prior charges, and that the money so appropriated shall be considered as paid on account of rent; but this implication is liable to be rebutted, for if the landlord were afterwards to repay the tenant the money paid by him in respect of the charge, he might recover the entire rent, *eo nomine*, without any deduction. This is well explained by Buller, J., in *Sapsford* v. *Fletcher*:—"There is a great difference between a payment and a set-off; the former may be pleaded to an avowry, though the latter cannot. That is a good payment which is paid as part of the rent itself in respect of the land, but a set-off supposes a different demand, arising in a different right. It was said, that if the tenant had paid the ground-rent, and the landlord had afterwards repaid him, the latter could not avow for the whole rent; and my answer is this, that the payment there never was considered by both as a payment, and, if not, the whole rent remains due. I consider this case as a lease from the defendant to the plaintiff, at the annual rent of 50*l.*, out of which 5*l.* per annum was to be paid to the ground landlord; and therefore a payment of that ground-rent is a payment of so much rent to the defendant, and may be pleaded in answer to the avowry for rent. Neither can we suppose, upon this record, that the defendant ever repaid the plaintiff this ground-rent, for if he had, he might have replied that fact." The landlord, therefore, generally speaking (for in some cases it is taken from him by statute), has the option of repaying the tenant the sum disbursed by him to discharge the prior claim upon the land, and may thus prevent the disbursement from

Sapsford v. *Fletcher*, *per* Buller, J.

being considered as a payment of so much of the rent: and the tenant may, in like manner, elect not to consider it as such, and may signify his election by bringing an action for the amount, or setting it off in an action brought by his landlord against him for any other debt. Indeed, in some cases he *must* do so; for if he owe no rent or not enough to cover the sums he has been forced to pay, he has no other means of reimbursing himself.

Statutory qualification as to deduction of *taxes*, by limitation in point of time.

It is, however, necessary to remark, that there are some cases which qualify the generality of the doctrine just laid down, by compelling the tenant to avail himself of his right to deduct within a given period, if at all. The property-tax, by 46 Geo. 3, c. 65, was directed to be paid by the occupier, who was required to deduct it out of the next rent. In *Denby* v. *Moore*, 1 B. & Ald. 123, the occupier paid the property-tax for about twelve years, and also paid the full rent during that time, and it was held that he could not recover back the amount of rent thus over-paid. This case, indeed, was decided upon grounds not much akin to the subject of this note, for the action was for *money had and received* to recover back the rent over-paid, not for *money paid* to the defendant's use on account of property-tax; and the court thought that, as the occupier had made the over-payments with full knowledge of the facts, he could not recover them back again; besides, the words of the Act were express, requiring the occupier to deduct the tax from the rent next due, and there were good reasons for insisting on his doing so. And therefore in *Stubbs* v. *Parsons*, 3 B. & Ald. 516, Bayley, J., said, "that he laid *Denby* v. *Moore* out of the question, that decision being on the express words of the Property Act to prevent frauds on the revenue." *Andrew* v. *Hancock*, 1 B. & B. 37, was, like *Sapsford* v. *Fletcher*, an action of replevin, and the defendant having avowed for six months' rent due the 29th September, 1818, the plaintiff pleaded in bar various payments of land-tax and paving rates made to prevent his goods from being distrained between 1812 and 1818, while he was tenant to the defendant, which payments he claimed to deduct from the rent avowed for. The plea was decided to be bad; principally, however, upon the express words of the Acts, by which, to use the words of Dallas, C.J., the tenant was not only *allowed*, but *required*, to deduct these payments out of the rents of the then current years. In *Stubbs* v. *Parsons*, *supra*, a similar question arose with respect to land-tax under the Land Tax

Act, 1797. That also was an action of replevin; *cognizance* for a quarter's rent due the 25th March, 1819. The plaintiff pleaded a tender as to part, and as to the residue, that before the 25th March, and before the said time when, &c., divers sums, amounting to the residue, had been from time to time assessed on the premises for land-tax, which he had been compelled to pay. On demurrer the plea was held bad, for not stating when the land-tax was assessed or paid; and it was consistent with the plea that it might have been due before the rent distrained for either accrued, or was accruing, or even before the commencement of the present landlord's title. "A payment of the land-tax," said Bayley J., "can only be deducted out of the rent which has then accrued, or is then accruing, due; for the law considers the payment of the land-tax as a payment of so much of the rent then due, or growing due, to the landlord; and if afterwards he pays the rent in full, he cannot at a subsequent time deduct that over-payment from the rent. *He may, indeed, recover it back as money paid to the landlord's use.*" "The occupier," said Holroyd, J., "has a lien on the next rent, given him by the legislature, for the land-tax paid by him; but if he parts with the rent without making the deduction, he loses his lien, and has only his remedy by action or set-off." The same rule applies to payments of property-tax under the Income Tax Act, 1842; *Cumming* v. *Bedborough*, 15 M. & W. 438; and of expenses under the Metropolitan Building Act, 1855; *Earle* v. *Maughan*, 14 C. B. N. S. 626.

How far limitation of time applicable to deductions of *rent*.

The next question is, whether the limitation in point of time, established by these cases with respect to deductions of land-tax, applies to deductions in respect of rent paid, under dread of distress, to the superior landlord, or in respect of arrears of a rent-charge. In order to solve this question we cannot have recourse, as in case of taxes, to the express words of the legislature; we must, therefore, resort to principles of common sense and general convenience. It seems not unreasonable, that if a tenant, having made such payments, fails to deduct at the next opportunity, he should be taken to have abandoned his right to do so, and to have elected to rely upon his right of action for money paid to the landlord's use; and, indeed, Park, J., in *Carter* v. *Carter*, 5 Bing. 409, appears to have considered this point decided by *Andrew* v. *Hancock*, to which he refers as a case of ground-rent. Yet it would be hard to preclude the tenant from deducting from any rent

not actually due or accruing at the time of his making the payments in respect of which he claims the right of deduction; for the arrears of rent-charge or head-rent may be extremely heavy, and may cover much more than the amount of the rent then due or accruing from him to his landlord. In order, therefore, to do full justice, he ought to be allowed, after making such a payment, to retain the rent for as many succeeding rent-days as may be necessary to place him *in statu quo*, for he cannot prescribe to the head landlord or incumbrancer when to insist on payment, and therefore ought not to suffer by their delay.

But it seems reasonable, that the tenant's right to deduct should only exist in respect of payments made by him of arrears which accrued due in the time of the landlord against whom he claims the deduction. Suppose, for instance, premises be let for 100*l.* a year, subject to a head-rent of 10*l.* a year, of which five years are in arrear when the mesne landlord assigns his reversion: upon the sixth year falling due the head landlord threatens to distrain, and the tenant is obliged to pay him 60*l.*: shall he deduct the whole of that sum from his current year's rent, or only the 10*l.* which fell due during his present landlord's time? It would be hard upon the assignee to adopt the former part of this alternative.

Right to deduct ground-rent not confined to tenants.

The right to deduct a payment in respect of ground-rent has not been confined to tenants, for in *Doe* v. *Hare*, 4 Tyr. 29, the plaintiff, having recovered in ejectment on a demise from the 5th June, 1830, brought an action for the mesne profits between that day and the 4th June, 1832, when the sheriff executed the *hab. fac. poss.* The defendant was allowed, in reduction of damages, a payment in respect of ground-rent which had become due the 24th June, 1830, and also two other payments of ground-rent, which fell due during his occupation. The principle of *Doe* v. *Hare* was acted on in *Barber* v. *Brown*, 1 C. B. N. S. 121. There the owner of the reversion expectant upon a term, out of which an underlease *pur autre vie* had been granted, having become tenant from year to year to the underlessees, and having, by mistake, after the dropping of the lives, continued to pay rent to the representatives of the underlessees, it was held, in an action brought by him against them to recover the amount so paid, that they were entitled to deduct payments of ground-rent, and also of rates and taxes.

Contract implied between lessee and assignees.

Another instance of the principle discussed in this note is furnished in the case of assignees of leases subject to covenants. Thus, where there have been several assignments, there is an implied contract on the part of each successive assignee to indemnify the original lessee in respect of breaches of the covenants committed during such assignee's occupation; *Moule* v. *Garrett*, L. R. 7 Ex. 101; and *per* Parke, B., *Penley* v. *Watts*, 7 M. & W. 608.

Between vendor and vendee of shares.

Upon a similar principle, in *Walker* v. *Bartlett*, 18 C. B. 845, it was held that the buyer of shares in a mining company had impliedly promised to indemnify the seller against calls made on him subsequently to the sale, to which he was liable by reason only of the buyer omitting to cause himself, or some one else, to be registered as owner of the shares. For the like reasons a transferor on the B. list of contributories to a company in liquidation, who has been made to pay calls, may recover the amount from his transferee on the A. list; *Nevill's Case*, 6 Ch. 43; *Roberts* v. *Crowe*, L. R. 7 C. P. 629; *Kellock* v. *Enthoven*, L. R. 9 Q. B. 241; for "this is a principle of law which applies in all cases where one who is only secondarily liable performs under compulsion of law an obligation for which another person is primarily liable;" *per* Willes, J., *Roberts* v. *Crowe*, *supra*.

For those cases, arising out of sales of shares, in which, admitting the original seller's right to an indemnity, as established by *Walker* v. *Bartlett*, *supra*, the question has been from whom, according to the custom of the Stock Exchange, such indemnity may be recovered, see *Grissell* v. *Bristowe*, L. R. 4 C. P. 36; *Maxted* v. *Paine*, L. R. 6 Ex. 132; *Castellan* v. *Hobson*, 10 Eq. 47; *Merry* v. *Nickalls*, 7 Ch. 733.

COGGS *v.* BERNARD (*a*).

TRINITY—2 *ANNÆ.*

[REPORTED, 2 LORD RAYMOND, 909.]

If a man undertakes to carry goods (*b*) safely and securely, he is responsible for any damage they may sustain in the carriage through his neglect, though he was not a common carrier, and was to have nothing for the carriage.

IN an action upon the case, the plaintiff declared, *quod cum Bernard*, the defendant, the 10th of *November*, 13 Will. 3. at &c., *assumpsisset*, *salvo et secure elevare* (*anglice*, to take up) several hogsheads of brandy then in a certain cellar of *D.*, *et salvo et secure deponere* (*anglice*, to lay them down again) in a certain other cellar in *Water-lane*: the said defendant and his servants and agents, *tam negligenter et improvide*, put them down again into the said other cellar, *quod per defectum curæ ipsius* the defendant, his servants and agents, one of the casks was staved, and a great quantity of brandy, *viz.*, so many gallons of brandy, was spilt. After not guilty pleaded, and a verdict for the plaintiff, there was a motion in arrest of judgment, for that it was not alleged in the declaration that the defendant was a common porter, nor averred that he had anything for his pains. And the case being thought to be a case of great consequence, it was this day argued *seriatim* by the whole court.

GOULD, J. I think this is a good declaration. The objection that has been made is, because there is not any consideration laid. But I think it is good either way; and that any man, that undertakes to carry goods, is liable to an action, be he a common carrier, or whatever he is, if through his neglect they are lost, or come to any damage; and if a *præmium* be laid to be given,

(*a*) S. C., Com. 133; 1 Salk. 26; 2 Salk. 735; 3 Salk. 11; Holt. 13, 131, 528; 3 Ld. Raym. 163. There is a report of this case, *tot. verb.*, in the *Hargrave* MSS., No. 66, and 182, therein said "to be transcribed from the MSS. Reports of *Herbert Jacob*, Esq., of the *Inner Temple*, written with his own hand."

(*b*) See Jones on Bailments, 60.

(Gould, J.)

then it is without question so. The reason of the action is, *the particular trust reposed in the defendant, to which he has concurred by his assumption*, and in the executing which he has miscarried by his neglect. But if a man undertakes to build a house, without anything to be had for his pains, an action will not lie for non-performance, because it is *nudum pactum*. So is the 3 Hen. 6, 36. So if goods are deposited with a friend, and are stolen from him, no action will lie; 29 Ass. 28. But there will be a difference in that case upon the evidence, how the matter appears: if they were stolen *by reason of a gross neglect in the bailee*, the trust *will not save* him from an action; *otherwise*, if there *be no* gross neglect. So is Doct. et Stud. 129, upon that difference. The same difference is, where he comes to goods by finding; Doct. et Stud. *ubi supra*; Ow. 141. But if a man takes upon him expressly to do such a fact safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him. If it be only a general bailment, the bailee will not be chargeable, without a gross neglect. So is Keilw. 160; 2 Hen. 7, 11; 22 Ass. 41; 1 R. 10; Bro., Action sur le case, 78. *Southcote's Case* is a hard case indeed, to oblige all men, that take goods to keep, to a special acceptance that they will keep them as safe as they would do their own, which is a thing no man living that is not a lawyer could think of; and indeed it appears by the report of that case in Cro. Eliz. 815, that it was adjudged by two judges only, *viz.*, Gawdy and Clench. But in 1 Vent. 121, there is a breach assigned upon a bond conditioned to give a true account, that the defendant had not accounted for 30*l.*; the defendant showed that he locked the money up in his master's warehouse, and it was stolen from thence, and that was held to be a good account. But when a man undertakes specially to do such a thing, it is not hard to charge him for his neglect, because he has the goods committed to his custody upon those terms.

Powys, J., agreed upon the neglect.

Powell, J. The doubt is, because it is not mentioned in the declaration that the defendant had anything for his pains, nor that he was a common porter, which of itself imports a hire and that he is to be paid for his pains. So that the question is, whether an action will lie against a man for doing the office of a

friend, when there is not any particular neglect shown. And I hold, an action will lie, as this case is. And in order to make it out, I shall first show that there are great authorities for me, and none against me; and then, secondly, I shall show the reason and *gist* of this action; and then, thirdly, I shall consider *Southcote's Case*.

1. Those authorities in the Register, 110 a, b, of the pipe of wine, and the cure of the horse, are in point; and there can be no answer given them, but that they are writs which are framed short. But a writ upon the case must mention everything that is material in the case; and nothing is to be added to it in the count, but the time and such other circumstances. But even that objection is answered by Rast. Entr. 13 c, where there is a declaration so general. The year-books are full in this point: 43 Edw. 3, 33 a, there is no particular act showed; there indeed the weight is laid more upon the neglect than the contract. But in 48 Edw. 3, 6, and 19 Hen. 6, 49, there the action is held to lie upon the undertaking, and that, without that, it would not lie; and therefore the undertaking is held to be the matter traversable, and a writ is quashed for want of laying a place of the undertaking. 2 Hen. 7, 11, 7 Hen. 4, 14, these cases are all in point, and the action adjudged to lie upon the undertaking.

2. Now to give the reason of these cases, the *gist of* these actions is the undertaking. The party's special *assumpsit* and undertaking obliges him so to do the thing, that the bailor come to no damage by his neglect. And the bailee in this case shall answer accidents, as if the goods are stolen; but not such accidents and casualties as happen by the act of God, as fire, tempest, &c. (*c*). So it is, 1 Jones, 179, Palm. 548; for the bailee is not bound upon any undertaking against the act of God. Justice Jones, in that case, puts the case of the 22 Ass., where the ferryman overladed the boat. That is no authority, I confess, in that case; for the action there is founded upon the ferryman's act, *viz.*, the overlading the boat. But it would not have lain, says he, without that act; because the ferryman, notwithstanding his undertaking, was not bound to answer for storms. But that act would charge him without any undertaking, because it was his own wrong to overlade the boat. But

(*c*) See the observations of the Court in *Taylor* v. *Caldwell*, 3 B. & S. 826.

(Powell, J.)

bailees are chargeable in case of other accidents, because they have a remedy against the wrong-doers: as in case the goods are stolen from him, an appeal of robbery will lie, wherein he may recover the goods; which cannot be had against enemies, in case they are plundered by them; and therefore in that case he shall not be answerable. But it is objected, that here is no consideration to ground the action upon. But as to this, the difference is, between being obliged to do the thing, and answering for things which he had taken into his custody upon such an undertaking. An action indeed will not lie for not doing the thing, for want of a sufficient consideration: but yet if the bailee will take the goods into his custody, he shall be answerable for them; for the taking the goods into his custody is his own act. And this action is founded upon the warranty, upon which I have been contented to trust you with the goods, which, without such a warranty, I would not have done. And a man may warrant a thing without any consideration. And therefore, when I have reposed a trust in you upon your undertaking, if I suffer, when I have so relied upon you, I shall have my action. Like the case of the Countess of Salop (*d*). An action will not lie against a tenant at will generally, if the house be burnt down. But if the action had been founded upon a special undertaking, as that, in consideration the lessor would let him live in the house, he promised to deliver up the house to him again in as good repair as it was then, the (*dd*) action would have lain upon that special undertaking. But there the action was laid generally.

3. *Southcote's* (*e*) *Case* is a strong authority; and the reason of it comes home to this, because the general bailment is there taken to be an undertaking to deliver the goods at all events, and so the judgment is founded upon the undertaking. But I cannot think that a general bailment is an undertaking to keep the goods safely at all events: that is hard. Coke reports the case upon that reason; but makes a difference where a man undertakes, specially, to keep goods as he will keep his own. Let us consider the reason of the case; for nothing is law that

(*d*) *The Countess of Shrewsbury's Case*, 5 Rep. 13 b.

(*dd*) See Com. 627; Burr. 1638.

(*e*) That notion in *Southcote's Case*, 4 Rep. 83 b, that a general bailment, and a bailment to be safely kept, is all one, was denied to be law by the whole court, *ex relatione m'ri Bunbury*.

is not reason. Upon consideration of the authorities there cited, I find no such difference. In 9 Edw. 4, 40 b, there is such an opinion by *Danby*. The case in 3 Hen. 7, 4, was of a special bailment, so that that case cannot go very far in the matter. 6 Hen. 7, 12, there is such an opinion, by the by. And this is all the foundation of *Southcote's Case*. But there are cases there cited which are stronger against it, as 10 Hen. 7, 26; 29 Ass. 28, the case of a pawn. My lord Coke would distinguish that case of a pawn from a bailment because the pawnee has a special property in the pawn; but that will make no difference, because he has a special property in the thing bailed to him to keep. 8 Edw. 2, Fitzh. Detinue, 59 (*f*), the case of goods bailed to a man, locked up in a chest, and stolen; and for the reason of that case, sure it would be hard that a man that takes goods into his custody to keep for a friend, purely out of kindness to his friend, should be chargeable at all events. But then it is answered to that, that the bailee might take them specially. There are many lawyers do not know that difference; or, however it may be with them, half mankind never heard of it. So, for these reasons, I think a general bailment is not, nor cannot be taken to be, a special undertaking to keep the goods bailed safely against all events. But if (*g*) a man does undertake specially to keep goods safely, that is a warranty, and will oblige the bailee to keep them safely against perils, where he has his remedy over, but not against such where he has no remedy over.

Holt, C.J. The case is shortly this. This defendant undertakes to remove goods from one cellar to another, and there lay them down safely; and he managed them so negligently, that for want of care in him some of the goods were spoiled. Upon not guilty pleaded, there has been a verdict for the plaintiff, and that upon full evidence, the cause being tried before me at Guildhall. There has been a motion in arrest of judgment, that the declaration is insufficient because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labour, so that the defendant is not chargeable by his trade, and a private person cannot be charged in an action without a reward.

(*f*) *Bonion's Case.* See Jones, 37. (*g*) See Jones, 44.

(Holt, C.J.)

I have had a great consideration of this case; and because some of the books make the action lie upon the reward, and some upon the promise, at first I made a great question whether this declaration was good. But upon consideration, as this declaration is, I think the action will well lie. In order to show the grounds upon which a man shall be charged with goods put into his custody, I must show the several sorts of bailments. And (*g*) there are six sorts of bailments. The first sort (*h*) of bailment is, a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor; and this I call a *depositum*, and it is that sort of bailment which is mentioned in *Southcote's Case*. The second sort is, when goods or chattels that are useful are lent to a friend *gratis*, to be used by him; and this is called *commodatum* (*i*), because the thing is to be restored in *specie*. The third sort is when goods are left with the bailee to be used by him for hire; this is called *locatio et conductio*, and the lender is called *locator*, and the borrower *conductor*. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin, *vadium*, and in English, a pawn or a pledge. The fifth sort is, when goods or chattels are delivered to be carried, or something is to be done about them, for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth sort is, when there is a delivery of goods or chattels to somebody who is to carry them, or do something about them, *gratis*, without any reward for such his work or carriage, which is this present case. I mention these things, not so much that they are all of them so necessary in order to maintain the proposition which is to be proved, as to clear the reason of the obligation which is upon persons in cases of trust.

1. *Depositum.*—As to the (*k*) first sort, where a man takes goods in his custody to keep for the use of the bailor, I shall consider for what things such a bailee is answerable. *He is not answerable if*

(*g*) See Jones, 35.
(*h*) Just. Inst. lib. 3, tit. 14, text 3.
(*i*) *Ibid.*, text 2.
(*k*) See Jones, 36.

they are stole without any fault in him, neither will a common neglect make him chargeable, but he *must be guilty of some gross neglect.* There is, I confess, a great authority against me; where it is held that a general delivery will charge the bailee to answer for the goods if they are stolen, unless the goods are specially accepted to keep them only as you will keep your own. But (*l*) my Lord Coke has improved the case in his report of it; for he will have it, that there is no difference between a special acceptance to keep safely, and an acceptance generally to keep. But there is no reason or justice, in such a case of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him without some default in him (*m*). For if he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him. But according to this doctrine the bailee must answer for the wrongs of other people, which he is not, nor cannot be, sufficiently armed against. If the law be so, there must be some just and honest reason for it, or else some universal settled rule of law upon which it is grounded; and therefore it is incumbent upon them that advance this doctrine to show an undisturbed rule and practice of the law according to this position. But to show that the tenor of the law was always otherwise, I shall give a history of the authorities in the books in this matter; and by them show, that there never was any such resolution given before *Southcote's Case*. The 29 Ass. 28 is the first case in the books upon that learning; and there the opinion is, that the bailee is not chargeable, if the goods are stole. As for 8 Edw. 2, Fitzh. Detinue 59: where goods are locked in a chest, and left with the bailee, and the owner took away the key, and the goods were stolen, it was held that the bailee should not answer for the goods: that case they say differs, because the bailor did not trust the bailee with them. But I cannot see the reason of that difference, nor why the bailee should not be charged with goods in a chest, as well as with goods out of a chest: for the bailee has as little power over them when they are out of a chest, as to any benefit he might have by them, as when they are in a chest; and he has as great power to defend them in one case as in the other. The case of 9 Edw. 4, 40 b, was but a

(*l*) See 1 L. Ray. 655. Jones, 41. (*m*) See Jones, 46, 62.

(Holt, C.J.)

debate at bar; for Danby was but a counsel then. Though he had been Chief Justice in the beginning of Edw. 4, yet he was removed, and restored again upon the restitution of Hen. 6, as appears by Dugdale's *Chronica Series*. So that what he said cannot be taken to be any authority, for he spoke only for his client; and Genny, for his client, said the contrary. The case in 3 Hen. 7, 4, is but a sudden opinion; and that by half the court; and yet, that is the only ground for this opinion of my Lord Coke, which besides he has improved. But the practice has been always at Guildhall, to disallow that to be a sufficient evidence to charge the bailee. And it was practised so before my time, all Chief Justice Pemberton's time, and ever since, against the opinion of that case. When I read *Southcote's Case* heretofore, I was not so discerning as my brother Powys tells us he was, to disallow that case at first; and came not to be of this opinion till I had well considered and digested that matter. Though I must confess, reason is strong against the case, to charge a man for doing such a friendly act for his friend; but so far is the law from being so unreasonable, that such a bailee is the least chargeable for neglect of any. For if he (*n*) keeps the goods bailed to him but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them; for the keeping them as he keeps his own is an argument of his honesty. *A fortiori*, he shall not be charged where they are stolen without any neglect in him. Agreeable to this is Bracton, lib. 3, c. 2, 99 b: '*Is apud quem res deponitur, re obligatur, et de eâ re, quam accepit, restituendâ tenetur, et etiam ad id, si quid in re depositâ dolo commiserit; culpæ autem nomine non tenetur, scilicet desidiæ vel negligentiæ, quia qui negligenti amico rem custodiendam tradit, sibi ipsi et propriæ fatuitati hoc debet imputare.*' As suppose the bailee is an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, and by reason thereof the goods happen to be stolen and his own; yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow (*o*). So that this sort of bailee is the least responsible for neglects, and

(*n*) Vinnius (by Heineccius, 1726), p. 605.

(*o*) But see *Doorman* v. *Jenkins*, 2 A. & E. 256, *post*, p. 183, *in nota*.

under the least obligation of any one, being bound to no other care of the bailed goods than he takes of his own. This Bracton I have cited is, I confess, an old author; but in this his doctrine is agreeable to reason, and to what the law is in other countries. The civil law is so, as you have it in Justinian's Inst. lib. 3, tit. 14. There the law goes further; for there it is said: "*Ex eo solo tenetur, si quid dolo commiserit: culpæ autem nomine, id est, desidiæ ac negligentiæ, non tenetur. Itaque securus est qui parum diligenter custoditam rem furto amiserit, quia qui negligenti amico rem custodiendam tradit, non ei, sed suæ facilitati, id imputare debet.*" So that such a bailee is not chargeable without an apparent gross neglect. And if there is such a *gross neglect*, it is looked upon as an *evidence of fraud*. Nay, suppose the bailee undertakes safely and securely to keep the goods, in express words; yet even that would not charge him with all sorts of neglects; for if such a promise were put into writing, it would not charge so far, even then. Hob. 34, a covenant, that the covenantee shall have, occupy, and enjoy certain lands, does not bind against the acts of wrong-doers. 3 Cro. 214, acc., 2 Cro. 425, acc., upon a promise for quiet enjoyment. And if a promise will not charge a man against wrong-doers, when put in writing, it is hard it should do it more so, when spoken. Doct. and Stud. 130 is in point, that though a bailee do promise to re-deliver goods safely, yet if he have nothing for the keeping of them, he will not be answerable for the acts of a wrong-doer. So that there is neither sufficient reason nor authority to support the opinion in *Southcote's Case*. If the bailee be guilty of gross negligence, he will be chargeable, but not for any ordinary neglect.

2. *Commodatum.*—As to the second sort of bailment, *viz.*, *commodatum*, or lending *gratis*, the borrower is bound to the strictest care and diligence to keep the goods, so as to restore them back again to the lender; because the bailee has a benefit by the use of them; so as if the bailee be guilty of the least neglect he will be answerable; as if a man should lend another a horse to go westward, or for a month; if the bailee go northward, or keep the horse above a month, if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to

(Holt, C.J.)

the trust he was lent to him under; and it may be, if the horse had been used no otherwise than he was lent, that accident would not have befallen him. This is mentioned in Bracton *ubi supra*: his words are: (*p*) "*Is autem cui res aliqua utenda datur, re obligatur, quæ commodata est, sed magna differentia est inter mutuum et commodatum; quia is qui rem mutuam accepit, ad ipsam restituendam tenetur, vel ejus pretium, si forte incendio, ruinâ, naufragio, aut latronum vel hostium incursu, consumpta fuerit, vel deperdita, subtracta vel ablata. Et qui rem utendam accepit, non sufficit ad rei custodiam, quod talem diligentiam adhibeat, qualem suis rebus propriis adhibere solet, si alius eam diligentius potuit custodire; ad vim autem majorem, vel casus fortuitos non tenetur quis, nisi culpa sua intervenerit. Ut si rem sibi commodatam domi, secum detulerit cum peregre profectus fuerit, et illam, incursu hostium vel prædonum, vel naufragio, amiserit, non est dubium quin ad rei restitutionem teneatur.*" I cite this author, though I confess he is an old one, because his opinion is reasonable, and very much to my present purpose, and there is no authority in the law to the contrary. But if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable; because the neglect gave the thieves occasion to steal the horse. Bracton says, the bailee must use the utmost care; but yet he shall not be chargeable, where there is such a force as he cannot resist.

3. *Locatio rei.*—As to the third sort of bailment, *scilicet locatio*, or lending for hire, in this case the bailee is also bound to take the utmost care, and to return the goods when the time of the hiring is expired. And here again I must recur to my old author, fol. 62 b, (*q*): "*Qui pro usu vestimentorum, auri vel argenti, vel alterius ornamenti, vel jumenti, mercedem dederit vel promiserit, talis ab eo desideratur custodia, qualem* (*r*) *diligentissimus paterfamilias suis rebus adhibet, quam si præstiterit, et rem aliquo casu*

(*p*) This is cited from Bracton, lib. 3, c. 2, 99, but is in effect the text of Just. Inst. lib. 3, tit. 14, text 2.

(*q*) Just. Inst. lib. 3, tit. 24, text 5.

(*r*) See Jones, 87; and *post*, p. 191.

amiserit, ad rem restituendam non tenebitur. Nec sufficit aliquem talem diligentiam adhibere, qualem suis rebus propriis adhiberit, nisi talem adhibuerit, de quâ superius dictum est.' From whence it appears that, if goods are let out for a reward, the hirer is bound to the (*s*) utmost diligence, such as the most diligent father of a family uses; and if he uses that, he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the (*t*) bailee shall not be answerable in this case, if the goods are stolen.

4. *Vadium.*—As to the fourth sort of bailment, *viz. vadium*, or a pawn, in this I shall consider two things; first, what property the pawnee has in the pawn or pledge; and secondly, for what neglects he shall make satisfaction. As to the first, he has a special property, for (*u*) the pawn is a securing to the pawnee, that he shall be repaid his debt, and to compel the pawnor to pay him. But if the pawn be such as it will be the worse for using, the (*x*) pawnee cannot use it, as clothes, &c.; but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she (*y*) might use them. But then she must do it at her peril; for whereas, if she keeps them locked up in her cabinet, if her cabinet should be broke open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and, as such, is not liable to be used. And to this effect is Ow. 123. But if the pawn be of such a nature, as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, &c., then (*z*) the pawnee may use the horse in a reasonable manner, or milk the cow, &c., in recompence for the meat. As to the second point, Bracton, 99 b, gives you the answer: '*Creditor, qui pignus accepit, re obligatur, et ad illam restituendam tenetur; et cum hujusmodi res in pignus data sit utriusque gratiâ, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris, quo magis*

(*s*) Comm. Vinn. in Just. Inst. lib. 3, tit. 25, text 5, n. 2, 3. See *post*, pp. 190, 191.

(*t*) Ld. Raym. 1087.

(*u*) S. P., 3 Salk. 268. Holt, 528. Salk. 522.

(*x*) S. P., 3 Salk. 268. Holt, 528. Salk. 522.

(*y*) *Ibid.* See Jones, 80, 81.

(*z*) *Ibid.* See Jones, 80, 81. Distress, being a sort of pledge, may not be used; *Smith* v. *Wright*, 6 H. & N. 821, 826.

(Holt, C.J.)

ei in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si præstiterit, et rem casu amiserit, securus esse possit, nec impedietur creditum petere' (*a*). In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence, and he will be indemnified in so doing, and, notwithstanding the loss, yet he shall resort to the pawnor for his debt. Agreeable to this is 29 Ass. 28, and *Southcote's Case* is. But, indeed, the reason given in *Southcote's Case* is, because the pawnee has a special property in the pawn. But that is not the reason of the case; and there is another reason given for it in the book of Assize, which is indeed the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods. But, indeed, if the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a wrong-doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong must be answerable for them at all events; for the detaining of them by him is the reason of the loss. Upon the same difference as the law is in relation to pawns, it will be found to stand in relation to goods found.

5. *Locatio operis faciendi.*—As to the fifth sort of bailment, *viz.* a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to *one that exercises a public employment*, or a delivery to *a private person*. First, if it be to a *person of the first sort*, and he is to have a *reward, he is bound to answer for the goods at all events*. And this is the case of the common carrier, common hoyman, master of a ship, &c.: which case of a master of a ship was first adjudged, 26 Car. 2, in the case of *Mors* v. *Slue*, Sir T. Raym. 220, 1 Vent. 190, 238. The law charges this person, thus entrusted, to carry goods against all events, but acts of God, and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is

(*a*) This is also the effect of Just. Inst. lib. 3, tit. 14, text 4, *De pignore*.

chargeable. And this is a politic establishment, contrived by the policy of the law (*b*), for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point. The second sort are bailees, factors, and such like. And though a baily is to have a reward for his management, yet he is only to do the best he can. And if he be robbed, &c., it is a good account. And the reason of his being a servant is not the thing; for he is at a distance from his master, and acts at discretion, receiving rents and selling corn, &c. And yet if he receives his master's money, and keeps it locked up with reasonable care, he shall not be answerable for it, though it be stolen. But yet this servant is not a domestic servant, nor under his master's immediate care. But the true reason of the case is, it would be unreasonable to charge him with a trust, further than the nature of the thing puts it in his power to perform it (*c*). But it is allowed in the other cases, by reason of the necessity of the thing. The same law of a factor.

6. *Mandatum.*—As to the sixth sort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet that by his ill management the goods are spoiled. Secondly, it is to be understood, that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets, and had pierced the cask of brandy; in this case the defendant had not been answerable for it, because he was to have nothing for his pains. Then the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In Bracton, lib. 3. 100, it is called *mandatum*. It is an obligation which arises

(*b*) Just. Inst. lib. 4, tit. 5, text 3. See Vinn. Comm. in Just. Inst. lib. 3, tit. 27 text 11, n. 2.

(*c*) See *per* Bowen, L.J., *The Moorcock*, 14 P. D p. 70.

(Holt, C.J.)

ex mandato. It is what we call in English an acting by commission. And if a man acts by commission for another *gratis*, and in the executing his commission behaves himself negligently, he is answerable. Vinnius, in his commentaries upon Justinian, lib. 3. tit. 27. 684 (*d*), defines *mandatum* to be *contractus quo aliquid gratuito gerendum committitur et accipitur.* This undertaking obliges the undertaker to a diligent management. Bracton, *ubi supra*, says, '*Contrahitur etiam obligatio, non solum scripto et verbis, sed et consensu, sicut in contractibus bonæ fidei, ut in emptionibus, venditionibus, locationibus, conductionibus, societatibus et mandatis.*' I do not find this word in any other author of our law, besides in this place in Bracton, which is a full authority, if it be not thought too old. But it is supported by good reason and authority.

The reasons are, first, because in such a case a neglect is a deceit to the bailor. For when he entrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily will be a good ground for an action; 1 Roll. Abr. 10; 2 Hen. 7, 11; a strong case to this matter. There the case was an action against a man who had undertaken to keep an hundred sheep, for letting them be drowned by his default. And the reason of the judgment is given, because, "when the party has taken upon him to keep the sheep, and after suffers them to perish in his default, inasmuch as he has taken and executed his bargain, and has them in his custody, and, after, he does not look to them, an action lies; for here is his own act, *viz.* his agreement and promise, and that after broke of his side, that shall give a sufficient cause of action."

But, secondly, it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but *nudum pactum.* But to this I answer, that the *owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management.* Indeed, if the agreement had been executory, to carry these brandies from the one place to

(*d*) This is the same as lib. 3 tit. 26, of modern editions of the Institutes.

the other such a day, the (*e*) defendant had not been bound to carry them. But this is a different case, for *assumpsit* does not only signify a future agreement, but, in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man (*f*) will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing. The 19 Hen. 6, 49, and the other cases cited by my brothers, show that this is the difference. But in the 11 Hen. 4, 33, this difference is clearly put, and that is the only case concerning this matter which has not been cited by my brothers. There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie. But there the question was put to the court —what if he had built the house unskilfully?—and it is agreed in that case an action would have lain. There has been a question made, If I deliver goods to A., and in consideration thereof he promise to re-deliver them, if an action will lie for not re-delivering them; and, in Yelv. 4, judgment was given that the action would lie. But that judgment was afterwards reversed; and, according to that reversal, there was judgment afterwards entered for the defendant in the like case; Yelv. 128. But those cases were grumbled at; and the reversal of that judgment in Yelv. 4 was said by the judges to be a bad resolution, and the contrary to that reversal was afterwards most solemnly adjudged, in 2 Cro. 667, Tr. 21 Jac. 1 (*g*), in the King's Bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration in that case, but the having the money in his possession, and being trusted with it, and yet that was held to be a good consideration. And so a bare being trusted with another man's goods must be taken to be a sufficient consideration, if the bailee once enter upon a trust, and take the goods into his possession. The declaration in the case of *Mors* v. *Slue* (*h*), was drawn by the greatest drawer in *England* in that time; and in that declaration, as it was always in all such cases, it was

(*e*) See Jones, 56, 57, 61.
(*f*) Just. Inst. lib. 3, tit. 26, text 11.
(*g*) *Wheatley* v. *Low*, Cro. Jac. 668. See Jones, 50, 51.
(*h*) Sir T. Raym. 220; 1 Vent. 190, 238.

(Holt, C.J.)

thought most prudent to put in, that a reward was to be paid for the carriage. And so it has been usual to put it in the writ, where the suit is by original. I have said thus much in this case, because it is of great consequence that the law should be settled in this point; but I do not know whether I may have settled it, or may not rather have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle.

And judgment was given for the plaintiff.

Doctrine of principal case.

The case of *Coggs* v. *Bernard* is one of the most celebrated ever decided in Westminster Hall, and justly so, since the elaborate judgment of Lord Holt contains the first well-ordered exposition of the English law of bailments. It is the case generally cited for the proposition that "if a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it;" *per* Willes, J., *Skelton* v. *L. & N. W. R. Co.*, L. R. 2 C. P. 631, 636. The point directly involved, *viz.* that if a man undertake to carry goods safely, he is responsible for damage sustained by them in the carriage through his neglect, though he was not a common carrier, and was to have nothing for the carriage, is now clear law, and forms part of a general proposition in the law of principal and agent, which

Confidence a sufficient consideration.

may be stated thus: *The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it*; see *Shillibeer* v. *Glynn*, 2 M. & W. 143; *Whitehead* v. *Greetham*, 2 Bing. 464. And this proposition includes cases stronger than that reported in the text. For there Bernard had undertaken to lay the goods down *safely*, whereby he introduced a special term into his contract; for it will be seen from the judgments,

Distinction between undertaking *to keep*, *to keep safely*, and *to insure*.

particularly Lord Holt's, that notwithstanding what was said by Lord Coke in *Southcote's Case*, there is a difference between the effect of a gratuitous undertaking to *keep* or *carry* goods, and of a gratuitous undertaking to *keep* or *carry* them *safely*.

The distinction ought, however, to be observed between actual insurance of the safety of the goods, and a contract to take due care for their safety. The latter seems to include an obligation to carry safely; *Collett* v. *L. & N. W. R. Co.*, 16 Q. B. 984; see *Blake* v. *G. W. R. Co.*, 7 H. & N. 987.

Under the rule just laid down, a gratuitous and voluntary agent who has given no special undertaking, though the degree of his responsibility is greatly inferior to that of a hired agent, is bound not to be guilty of *gross negligence*. Thus in *Wilkinson* v. *Coverdale*, 1 Esp. 74, the defendant undertook *gratuitously* to get a fire policy renewed for the plaintiff, but, in doing so, neglected formalities, the omission of which rendered the policy inoperative. Upon its being doubted at *Nisi Prius* whether an action would lie under these circumstances, Erskine cited a MS. note of *Wallace* v. *Telfair* (2 T. R. 188, n.), wherein Buller, J., ruled, under similar circumstances, that, though there was no consideration for one party's undertaking to procure an insurance for another, yet, where a party voluntarily undertook to do it, and proceeded to carry his undertaking into effect by getting a policy underwritten, but did it so *negligently or unskilfully* that the party could derive no benefit from it, in that case he was liable to an action; in which distinction Lord Kenyon acquiesced. So in *Beauchamp* v. *Powley*, 1 M. & Rob. 38, where the defendant, a stage-coachman, received a parcel to carry *gratis*, and it was lost upon the road, Lord Tenterden directed the jury to consider whether there was *great negligence* on the defendant's part, and the jury, thinking that there was, found a verdict against him. So too, in *Doorman* v. *Jenkins*, 2 A. & E. 256, in *assumpsit* against the defendant, as bailee of money entrusted to him to keep *without reward*, it was proved that he had given this account of its loss, *viz.* that he was a coffee-house keeper, and had placed the money in his cash-box in the tap-room, which had a bar in it, and was open on Sunday, though the other parts of his house were not, and out of which the cash-box was stolen upon a Sunday. Lord Denman told the jury that it did not follow, from the defendant's having lost his own money at the same time as the plaintiff's, that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own; and he added, that that fact afforded no answer to the action, if they believed that the loss occurred from *gross negligence*. The jury having found a verdict for the plaintiff, the court refused to set it aside.

Gratuitous agent liable for gross negligence only.

Doorman v. *Jenkins.*

In *Giblin* v. *M'Mullen*, L. R. 2 P. C. 317, a customer deposited with his bank a strong box containing securities, himself retaining the key. The bank received nothing for keeping the box. It was placed in the strong room where

Giblin v. *M'Mullen.*

Liability of gratuitous bailee or agent.

the securities of the bank were kept, and to which their cashier had access. The cashier stole some debentures from the box and absconded. The customer having obtained a verdict in an action against the bank, a rule was made absolute for a non-suit in the Colonial Court on the ground that there was no evidence of gross negligence, for which alone the bank as gratuitous bailees could be held liable. This decision was upheld by the J.C. on appeal.

It is clear, from the above decisions, that a gratuitous bailee or other agent is chargeable when he has been guilty of *gross negligence*; and it is equally clear, both from the words of the judges in several of the above-cited cases, and also from express decisions, that for no other kind of negligence is he liable, except in the single case which shall by-and-by be specified. In *Doorman* v. *Jenkins*, *supra*, Patteson, J., said: "It is agreed on all hands that the defendant is not liable, unless he has been guilty of *gross negligence*." "The counsel," said Taunton, J., "properly admitted, that as this bailment was for the benefit of the bailor, and no remuneration was given to the bailee, the action could not be maintainable except in the case of *gross negligence*."

Shiells v. *Blackburne*.

In *Shiells* v. *Blackburne*, 1 H. Bl. 158, the defendant, having received orders from his correspondent in Madeira to send some cut leather thither, employed G. to execute the order. G. accordingly prepared it, and sent it, along with a case of leather of the same description belonging to himself, to the defendant, who, to save the expense of two entries, *voluntarily and without compensation*, by agreement with G., made one entry of both cases, but entered them by mistake as wrought leather, instead of dressed leather. In consequence of this mistake, both the cases were seized. An action having been brought by the assignees of G., who had become bankrupt, against the defendant, to recover compensation for the loss, the general issue was pleaded, and there was a verdict for the plaintiff. But the court set it aside, and granted a new trial, upon the ground that the defendant was not guilty either of *gross negligence* or fraud. This case was much remarked upon in *Doorman* v. *Jenkins*, which it resembled in the circumstance that the bailee in each case lost property of his own along with that entrusted to him. "*Shiells* v. *Blackburne*," said Taunton, J., "created at first some degree of doubt in our minds. It was said that the court in that case treated the question as a matter of law, and set aside the verdict, because the thing charged, *viz.*

the false description of the leather in the entry, did not amount to *gross negligence*, and therefore the jury had mistaken the law. I do not view the case in that light. The jury there found that in fact the defendant had been guilty of negligence, but the court thought they had drawn a wrong conclusion as to that fact." In *Dartnall* v. *Howard*, 4 B. & C. 345, the declaration stated, that in consideration that the plaintiff, at the defendants' request, would employ them to lay out 1,400*l.* in purchasing an annuity, the defendants promised to perform their duty in the premises, and that they did not perform it, but, on the contrary, laid out the money in the purchase of an annuity on the personal security of two insolvent persons. The court, after verdict, arrested the judgment upon the ground that the defendants appeared to be *gratuitous* agents, and it was not averred that they had acted either with negligence or dishonesty. See also *Bourne* v. *Diggles*, 2 Chit. 311; *Moore* v. *Mourgue*, Cowp. 480; and *O'Hanlon* v. *Murray*, 12 Ir. C. L. R. 161.

Dartnall v. *Howard.*

From the two classes of cases just enumerated, it is plain that an unpaid agent is liable for *gross negligence*, and equally plain that he is liable for nothing less. From the latter of these propositions there is, however, as has been already stated, one exception, and it is contained in the following words of Lord Loughborough in *Shiells* v. *Blackburne, supra*: "I agree with Sir William Jones, that where a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, then the bailee is only liable for *gross negligence*; but if a man *gratuitously* undertakes to do a thing to the best of his skill, *where his situation or profession is such as to imply skill*, an omission of that skill is imputable to him as *gross negligence*. If, in this case, a ship-broker, or a clerk in the custom-house, had undertaken to enter the goods, a wrong entry would in *them* be *gross negligence*, because *their* situation and employment necessarily imply a competent degree of knowledge in making such entries." It perhaps may be more correct to call this a distinction engrafted on the general doctrine, than an exception from it; since it does not render any unpaid agent liable for less than *gross negligence*; but renders that *gross negligence* in some agents, which would not be so in others; see *Wyld* v. *Pickford*, 8 M. & W. 443; *Harmer* v. *Cornelius*, 5 C. B. N. S. 246; and *Wilson* v. *Brett*, 11 M. & W. 113, where it was laid down that an unpaid agent is bound to use *such skill as he is shown to possess*, and is guilty of culpable

Supposed exception, where skill implied.

Explained.

Gross negligence, what.

negligence if he do not, and Rolfe, B., said that there is no difference between negligence and *gross* negligence, that it is the same thing, with the addition of a vituperative epithet. See *Hinton* v. *Dibbin*, 2 Q. B., p. 661, *per* Lord Denman. In *Austin* v. *M. S. & L. R. Co.*, 10 C. B. 454, it was said, the phrase *gross negligence* is "more correctly used in describing the sort of negligence for which a gratuitous bailee is responsible." See *Pothier, Contrat de Dépôt*, cap. 2, art. 1, s. 72. "There is a certain degree of negligence," said Pollock, C.B., in *Beal* v. *S. Devon R. Co.*, 5 H. & N. 881, "to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them." The distinction may be between simple negligence, and negligence in spite of the better skill or knowledge which the bailee actually had, or undertook to have. "In the case of a carrier or other agent holding himself out for the careful and skilful performance of a particular duty, gross negligence includes the want of that reasonable care, skill, and expedition, which may properly be expected from persons so holding themselves out and their servants. The authorities are numerous, and the language of the judgments various, but for all practical purposes the rule may be stated to be, that the failure to exercise reasonable care, skill, and

Relative to degree of care expected.

diligence is gross negligence. What is reasonable varies in the case of a gratuitous bailee and that of a bailee for hire. From the former is reasonably expected such care and diligence as persons ordinarily use in their own affairs, and such skill as he has. From the latter is reasonably expected care and diligence, such as are exercised in the ordinary and proper course of similar business, and such skill as he ought to have, namely, the skill usual and requisite in the business for which he receives payment;" *Beal* v. *S. Devon R. Co.*, 3 H. & C. 337. See also *per* Willes, J., *Grill* v. *Gen. Iron Screw Colliery*, L. R. 1 C. P. 600, 612; *Moffatt* v. *Bateman*, L. R. 3 P. C. 115.

In *Giblin* v. *McMullin*, *supra*, p. 183, Lord Chelmsford took exception to the proposition that gross negligence is only negligence with a vituperative epithet, saying that from the time of Lord Holt's judgment in the principal case this term had been used without objection as a short and convenient mode of describing the degree of responsibility which attaches upon a gratuitous bailee. See, however, Campbell's Law of Negligence, p. 11; and *Oppenheim* v. *White Lion*

Hotel Co., L. R. 6 C. P., p. 521, *per* Willes, J.; *Cashill* v. *Wright*, 6 E. & B. 891, *per* Erle, J.

In *Giblin* v. *McMullen*, *supra*, and the parallel American case therein referred to, it was considered that the bank were gratuitous bailees of the securities deposited with them, but this assumption is perhaps open to question, for as, in some cases, the carrier has been held liable *as bailee for reward* of goods warehoused by him after *the transit was complete*, the warehousing being accessory to the contract of carriage; see *Cairns* v. *Robins*, 8 M. & W. 258; so it might be argued that the keeping of securities deposited by his customers is accessory to the general business of a banker, so as to make him a bailee for reward in respect of them. In *Re United Service Co.*, 6 Ch. 212, the Lords Justices, affirming a decision of Lord Romilly, distinguished *Giblin* v. *McMullen*, and held that the bank were bailees for reward of railway certificates deposited with them by a customer, on which they collected the dividends, charging a small commission for so doing.

The case of *Coggs* v. *Bernard* derives most of its celebrity from the elaborate dissertation upon the general law of *Bailments* delivered by Lord Holt in pronouncing judgment. His lordship, as we have seen, distributes all *Bailments* into the following six classes, *viz.*:— Division of Bailments.

I. *Depositum*; or a naked bailment of goods, to be kept for the use of the bailor.

II. *Commodatum.* Where goods or chattels that are useful are lent to the bailee *gratis*, to be used by him.

III. *Locatio rei.* Where goods are lent to the bailee, to be used by him for *hire.*

IV. *Vadium.* Pawn.

V. *Locatio operis faciendi.* Where goods are delivered to be carried, or something is to be done about them, for a reward to be paid to the bailee.

VI. *Mandatum.* A delivery of goods to somebody, who is to carry them, or do something about them, *gratis.*

Sir William Jones, in his *Treatise on Bailments*, objects to this division; "for," says he, "in truth his *fifth* sort is no more than a branch of the *third*, and he might with equal reason have added a *seventh*, since the *fifth* is capable of another subdivision." The *fifth* of the classes enumerated by Lord Holt is, as we have seen, *Locatio operis faciendi*, i.e. *where goods are delivered to be carried, or something is to* Sir W. Jones's objection considered.

Distinction between *locatio rei* and *locatio operis faciendi.*

be done about them, for reward to be paid to the bailee. And this, with due submission to so great an authority as Sir W. Jones, cannot be reasonably treated as a branch of the *third*, which is *Locatio rei*, i.e., *where goods are lent to the bailee, to be used by him for hire*; for there exists between them this essential difference, *viz.*, that in cases falling under the *third class*, or *locatio rei*, the *reward* is paid *by* the bailee *to* the bailor; whereas in cases falling under the *fifth class*, or *locatio operis faciendi*, the *reward* is always paid *by* the bailor *to* the bailee. It is true that in Latin both classes are described by the word *locatio*, which probably gave rise to Sir W. Jones's opinion that both ought to be included under the same head; but then in the *third class*, *locatio rei*, the word *locatio* is used to describe a mode of bailment, *viz.*, by *the hiring of the thing bailed*; whereas in the *fifth* class, *locatio operis faciendi*, the same word *locatio* is used, not to describe any mode of bailment, but to signify *the hiring of the man's labour who is to work upon the thing bailed*; for, as to the thing bailed, that is not hired at all, as it is in cases falling within the third class. If, indeed, Lord Holt had been enumerating the different sorts of *hirings*, not of *bailments*, he would no doubt, like the civilians, have classified both *locatio rei* and *locatio operis* under the word *hiring*, since in one case goods are hired, and in the other labour. But he was making a classification not of *hirings*, but of bailments; and since in cases of *locatio rei* there is a hiring of the thing bailed, and in cases of *locatio operis* no hiring of the thing bailed, it was impossible to place, with any degree of propriety, two sorts of bailment under the same class, one of which *is*, and the other of which *is not*, a bailment by way of hiring. As to the objection that Lord Holt's *fifth* class of bailments is capable of another sub-division, there is no doubt but that it may be split, not only, as Sir W. Jones suggests, into *locatio operis faciendi*, where work is to be done upon the goods, and *locatio operis mercium vehendarum*, where they are to be carried, but into as many different sub-divisions as there are different modes of employing labour upon goods; and, in point of fact, the civilians, in their division of hirings, enumerated another class, *viz.*, *locatio custodiæ*, or the hiring of care to be bestowed in guarding a thing bailed, which is omitted by Sir W. Jones. For these reasons, it is submitted that Lord Holt's classification is the correct one, and it remains to make a few remarks on each of the six classes enumerated by him.

I. *Depositum.*—With respect to *Depositum*, which is a bailment without reward, in order that the bailee may keep the goods for the bailor, the law respecting the bailee's responsibility may be summed up in the words in which Lord Holt concludes his observations on that head of bailment, *viz.* "if the bailee be guilty of *gross negligence*, he will be chargeable, but not for any ordinary neglect." An important case respecting *deposit* has been already cited in this note, *viz.*, *Doorman* v. *Jenkins*, *ante*, p. 183, where, as has been stated, the question whether there had been *gross negligence* was left to the jury. There are some expressions in this part of Lord Holt's judgment, from which a superficial reader might infer that his lordship thought that a depositary would always be secure, provided that he kept the goods deposited with as much care as his own; but, on looking attentively at the whole context, it appears that he considered the bailee's keeping the goods bailed as he keeps his own, rather as an argument against the supposition that *gross negligence* has been committed, than as any substantive ground of discharge. "The keeping them," says his lordship, "as he kept his own, is an *argument* of his honesty;" and consequently an *argument* against the supposition of *gross negligence*, for Lord Holt considered *gross negligence* almost the same thing with dishonesty. "If," says he, "there be such *gross neglect*, it is looked upon as *evidence of fraud*." And it is quite clear, especially from *Doorman* v. *Jenkins*, that *gross negligence* may be committed by a depositary, although he may have kept the property entrusted to him with as much care as his own; and that if it be, his negligence of his own goods is no defence; see *Giblin* v. *McMullen*, *ante*, p. 183, where the same doctrine was applied; and also *Rooth* v. *Wilson*, 1 B. & Ald. 59. On the other hand, it is also clear that a depositary is not liable for any thing short of *gross negligence*; and though Lord Coke in *Southcote's Case*, 4 Rep. 83 b, 1 Inst. 89 a, b, expressed an opinion that a depositary is responsible if the goods are stolen from him, *unless he accepts them specially to keep as his own*, that doctrine was completely overthrown by Lord Holt in the principal case. How far a depositary may add to his responsibility by inserting special terms in his promise to his bailor, is a point not by any means clearly settled; see *Kettle* v. *Bromsall*, Willes, 118; and the observations of Sir W. Jones on *Southcote's Case* (Jones on Bailments, 42, 3), and of Powell, J., in the principal case.

I. *Depositum.*

Responsibility of bailee.

If bailee keep goods as his own,

gross negligence not necessarily rebutted.

Acceptance on special terms.

May not use deposit.

A depositary has no right to use the thing entrusted to him; Bac. Abr. *Bailment, D.*; *Clark* v. *Gilbert*, 2 B. N. C. 343. Where a man finds goods belonging to another, he

Responsibility of finder.

seems bound, after he has taken them into his possession, to the same degree of care with a depositary; see *Isaac* v. *Clarke*, 2 Bulst. 306, 312; 1 Rolle, 59, 126; Doct. & St. Di. 2, c. 28; but see also Bac. Abr., *Bailment, D.*; and 27 Hen. 8, fol. 13, pl. 35. He is guilty of larceny if he appropriates the goods to his own use, having intended so to do when he took possession of them, and having then known, or had reasonable grounds for believing, that the owner could be discovered; see *R.* v. *Christopher*, 28 L. J. M. C. 35; *R.* v. *Moore*, 30 Id. 77; *R.* v. *Glyde*, L. R. 1 C. C. R. 139. Where goods are sent voluntarily, and without request, by one person to another, no duty is cast on the recipient with respect to them; *Howard* v. *Harris*, C. & E. 253.

II. *Commodatum.*

II. *Commodatum* or *Lending gratis.*—As to *Commodatum* or *loan*, the responsibility of the bailee is much more strictly

Responsibility of bailee.

enforced in this class of bailments; and with justice, for the *loan* to him is for his own advantage,—not, as in the case of deposit, for that of the bailor. Besides, he may justly be considered as representing himself to the bailor to be a person of competent skill to take care of the thing lent; see *Wilson* v. *Brett*, 11 M. & W. 115, *per* Parke, B. He is,

Bound to great diligence.

therefore, bound to use great diligence in the protection of the thing bailed, and will be responsible even for *slight negligence*; nor must he on any account deviate from the

Liable for slight negligence.

conditions of the loan. Thus in *Bringloe* v. *Morrice*, 1 Mod. 210, 3 Salk. 271, the loan of a horse to the defendant to ride was held not to warrant him in allowing his servants to do so. But where a horse was for sale, and the vendor's agent let A. have the horse for the purpose of trying it, A. was held justified in putting a competent person upon the horse to try it, an authority to do so being implied; *Camoys* v. *Scurr*, 9 C. & P. 383. If, whilst the goods are in the custody of the bailee, they are, without any negligence on his part, injured by the negligence of a stranger, the bailee is not liable to the bailor; *Claridge* v. *S. Staffordshire Tramway Co.*, (1892) 1 Q. B. 422; see *ante*, p. 179.

III. *Locatio rei.*

III. *Locatio rei* or *Lending for Hire.*—This is where goods are lent to the bailee *for hire*. In such case, Lord Holt

Bailee bound to ordinary diligence.

tells us that the bailee is bound to use *the utmost care*. This expression, as Sir W. Jones has remarked, appears too strong, for it would place a hirer who pays for the use of the

goods on the same footing as a borrower; and indeed Lord Holt himself qualifies it, by citing, immediately after, a passage of Bracton, in which the care required is described to be "talis qualis *diligentissimus paterfamilias* suis rebus adhibet." Sir William has, in an able criticism upon this passage, shown that it was copied verbatim from Justinian, in whose work he further proves that it must have been used to signify, not *extreme*, but *ordinary* diligence. Accordingly, in *Dean* v. *Keate*, 3 Camp. 4, the diligence required from the hirer of a horse was such as a prudent man would have exercised towards his own, and therefore, having himself prescribed to it, instead of calling in a veterinary surgeon, he was held responsible. See the notes to that case, and *Davey* v. *Chamberlain*, 4 Esp. 229; see also *Reading* v. *Menham*, 1 M. & Rob. 234; and *Longman* v. *Galini*, Abbott on Shipp., 13th ed., 465, n. This species of bailment is determined by a wrongful sale of the goods, and the owner may at once maintain an action of trover against even a *bonâ fide* purchaser; *Cooper* v. *Willomatt*, 1 C. B. 672; see *Fenn* v. *Bittleston*, 7 Exch. 152. So a buyer of sheep on credit, who left them for his own purposes in the vendor's hands, recovered, in trover, against the vendor, who without default on the buyer's part wrongfully resold them before the credit expired; *Chinery* v. *Viall*, 5 H. & N. 288. No doubt in such case the unpaid vendor's liability for the conversion is the same to whatever class of bailee he may be considered as belonging.

The hirer of a horse and carriage is liable for injuries done to them through the negligence of his coachman though acting in breach of his duty to his master; *Coupé Co.* v. *Maddick*, (1891) 2 Q. B. 413.

IV. *Vadium* or *Pawn.*—The pawnee is bound to use *ordinary diligence* in the care and safeguard of the pawn, but he is not bound to use more; and, therefore, if it be lost notwithstanding such diligence, he may still resort to the pawnor for his debt; see Lord Holt's judgment in the text, p. 178; *Vere* v. *Smith*, 1 Vent. 121; *Anon.*, 2 Salk. 522; *Syred* v. *Carruthers*, E. B. & E. 469. So, too, if several things be pledged for the same debt, and one be lost without default in the pawnee, the residue are liable to the whole debt; *Ratcliffe* v. *Davies*, Yel. 178; Bac. Abr. *Bailment*, *B.* If the pawnor make default in payment at the stipulated time, the pawnee has a right to sell the pledge, and this he may do of his own accord, without any

IV. *Pawn.*
Bailee bound to ordinary diligence.

Pawnee's right of sale.

previous application to a court of equity; see *Pothonier* v. *Dawson*, Holt, 385; *Tucker* v. *Wilson*, 1 P. Wms. 261; *Lockwood* v. *Ewer*, 9 Mod. 278, 2 Atk. 303; *Pigot* v. *Chubley*, 15 C. B. N. S. 701; *Martin* v. *Read*, 11 Id. 730, *per* Williams and Willes, JJ.; *Burdick* v. *Sewell*, 13 Q. B. D. 174, *per* Bowen, L.J.; *France* v. *Clark*, 26 Ch. D. 257; or he may sue the pawnor for his debt, retaining the pawn, for it is a mere collateral security; Bac. Abr., *Bailm. B.*; *Anon.*, 12 Mod. 564. It has been said that, if there is no stipulated time for the payment of the debt, but the pledge is for an indefinite period, the pawnee has a right, upon request, to insist upon a prompt fulfilment of the engagement; and if the pawnor neglects or refuses to comply, the pawnee may, upon due demand and notice to the pawnor, require the pawn to be sold; Story on Bailments, 6th ed., s. 309, p. 281, citing 2 Kent, Comm., pp. 581, 582; see *Re Morritt*, 18 Q. B. D. 222. It seems that, according to the civil law, in cases where the time of payment was fixed, an express agreement for the sale (or distress) of the pawn on default was not necessary to entitle the pawnee to sell immediately on default; *Machcldeii Systema Juris Romani*, lib. 1, cap. 6, s. 317, p. 325; and the authorities there cited; *Warnkœnig Comm.*, vol. 1, p. 516; and *Œuvres de Pothier*, par *Bugnet*, vol. 5, 392: vol. 9, 484. If he think proper to sell, the surplus of the produce, after satisfying the debt, belongs to the pawnor; while, on the other hand, if the pawn sell for less than the amount of the debt, the deficiency continues chargeable on the pawnor; *South Sea Co.* v. *Duncombe*, 2 Str. 919; *Jones* v. *Marshall*, 24 Q. B. D. 269. The pawnee cannot get an order for foreclosure; *Carter* v. *Wake*, 4 Ch. D. 605; see *General Credit Co.* v. *Glegg*, 22 Id. 549.

Distinction between pawn, lien, and mortgage.

From all this it will be seen that a *pawn* differs, on the one hand, from a *lien*, which conveys no right to sell whatever, but only a right to retain until the debt in respect of which the lien was created has been satisfied; see *Thames Ironworks Co.* v. *Patent Derrick Co.*, 1 J. & H. 93; *Mulliner* v. *Florence*, 3 Q. B. D. 484; and which passes no property; see *per* Lord Esher, *Yungmann* v. *Briesemann*, 67 L. T. 642; and on the other hand, from a *mortgage*, which conveys the entire property of the thing mortgaged to the mortgagee conditionally, so that when the condition is broken the property remains absolutely in the mortgagee; *Carter* v. *Wake*, 4 Ch. D. 605; whereas a *pawn*

never conveys the general property to the pawnee, but only a special property in the thing pawned; and the effect of a default in payment of the debt by the pawnor is, not to vest the entire property of the thing pledged in the pawnee, but to give him a power to dispose of it, accounting for the surplus; and if he neglects to use this power, the general property of the thing pawned continues in the pawnor, who has a right at any time to redeem it; Com. Dig., *Mortgage, B.*; *Walter* v. *Smith*, 5 B. & Ald. 439; *Kemp* v. *Westbrook*, 1 Ves. sen. 278; *Demandray* v. *Metcalf*, Prec. Cha. 420, 2 Vern. 691; *Vanderzee* v. *Willis*, 3 Bro. 21; *Ratcliffe* v. *Davies*, Yelv. 178; *R.* v. *Morrison*, 28 L. J. M. C. 210; *Maugham* v. *Sharpe*, 17 C. B. N. S. 443; *per* Willes, J., *Halliday* v. *Holgate*, L. R. 3 Ex. p. 302; *per* Jessel, M.R., *Carter* v. *Wake*, 4 Ch. D. p. 606; *Re Morritt*, 18 Q. B. D. 222; *Sewell* v. *Burdick*, 10 App. Cas. 74.

Clark v. *Gilbert.*

There is a passage in the judgment in *Clark* v. *Gilbert*, 2 B. N. C. 343, 356, which, at first sight, seems opposed to the doctrine above laid down as to the sale of a pledge, but which, on consideration of the nature of the article pledged in that case, will be found quite consistent with the proposition that the simple pledge of a mere chattel gives a right of sale on default. In that case a lease was pledged to a solicitor for the amount of his bill of costs. The client became bankrupt, and the solicitor, with the concurrence of the assignees, sold the lease, and received the amount of his bill out of the proceeds. The commission was superseded for default of the petitioning creditor's debt, and a fresh commission issued, under which the plaintiffs were appointed assignees. They were held entitled to recover from the solicitor the sums which he had received. Tindal, C.J., in delivering judgment said, "It appears that they were part of the proceeds arising from the sale of a lease belonging to the bankrupt. Now, that lease at the time of such sale was in the possession of the defendant, as a pledge or security for the payment of his demand against the bankrupt, being either in his possession as solicitor, under a claim upon it for his lien which the law gives him, or having been expressly deposited with him as a security for his demand according to the evidence of Stevens. *In either case the right and power of the defendant over the lease was precisely the same*; he had the right to retain the lease in his possession until his demand was paid, and so far by means of the possession

of the lease to enforce payment of his demand, but he had that right only; he had no right to sell the lease and to pay himself his demand out of the proceeds. So long as the lease remained in his possession, neither the bankrupt nor his assignee could retake it without either payment of the demand, or a tender and refusal, which is equivalent to payment. But if instead of keeping the thing pledged he sells it, or enables any other person to sell it, by concurring in the sale, he is guilty of a direct conversion, and makes himself liable for the value of the lease in an action of trover."

Suggested limitation of doctrine of *Clark* v. *Gilbert.*

It is conceived that the above passage is not to be considered as propounding generally that a chattel pledged cannot be sold in default of payment, and that it must be confined to the case, under discussion, of a pledge of a lease or other title deed, which gives the pledgee an equitable mortgage upon the land with a certain known remedy by sale under the decree of a court of equity, a remedy inconsistent with his parting with the possession of the deed only, for which, without the land, but little could be obtained, whilst great damage could be inflicted on the pledgor by putting his title deed in peril; see *Shillito* v. *Hobson*, 30 Ch. D. 396.

Pawnee after payment must return pawn.

Pawnor may assign his interest at law.

Secus, of mortgagor.

After the debt has been discharged or tendered, it of course becomes the pawnee's duty to return the pawn; see *the text*, p. 178; *Isaac* v. *Clarke*, 2 Bulst. 306; *Anon.*, 2 Salk. 522, B. N. P. 72. And if the pawnor had, as he might have done, assigned his property in the pledge, subject to the pawnee's rights and special property, the assignee would, even before the Judicature Act, have had, it was said, the same right as the pawnor, both in law and equity; *Kemp* v. *Westbrook*, 1 Ves. sen. 278; *Franklin* v. *Neate*, 13 M. & W. 481; whereas it is clear that the assignee of the equity of redemption in a thing mortgaged could have had no rights *at law*.

Pledge of chattel.

Mortgage of chattel.

A mere pledge of chattels personal is therefore not, properly speaking, a mortgage, and though in writing, need not bear a mortgage stamp; *Harris* v. *Birch*, 9 M. & W. 592. There *may*, however, be a *mortgage*, properly speaking, of chattels, which will be subject to the same incidents as any other mortgage; and such mortgage may be made without deed; *Flory* v. *Denny*, 7 Exch. 581. As to the effect of a mortgage of a ship, see *Kitchen* v. *Irvine*, 28 L. J. Q. B. 46.

Position of pawnee after payment.

If the pawnee, after payment or tender, insist upon retaining the goods pledged, he is a wrong-doer, and becomes

liable to an action, and chargeable with any damage which may afterwards happen to the pledge, whether with or without his default; see *the text*, Lord Holt's judgment, p. 178; *Anon.*, 2 Salk. 522; Com. Dig., *Mortg. B.*; *Faugmann* v. *Briesemann*, 67 L. T. 642. It is competent for a pawnee to set up the right of a third person to the thing pledged, subject of course to the burden of proof; *Cheesman* v. *Exall*, 6 Exch. 341. So may a bailee of any class; *Biddle* v. *Bond*, 6 B. & S. 225; *Sheridan* v. *New Quay Co.*, 4 C. B. N. S. 618; provided he can show that he is acting on behalf of and with the authority of the third person; *Rogers* v. *Lambert* (No. 2), (1891) 1 Q. B. 318; *Rogers* v. *Lambert* (No. 1), 24 Q. B. D. 573; see also the notes to *The Duchess of Kingston's Case*, *post*, vol. ii. *Jus tertii.*

A *pawn* being a sort of bailment, transfer of the possession, actual or constructive, (*Meyerstein* v. *Barber*, L. R. 2 C. P. 51, *per* Willes, J.; *Young* v. *Lambert*, L. R. 3 P. C. 142), of the chattel pledged is of the essence of it; and if the pawnee part with the possession, he loses the benefit of his security; *Ryall* v. *Rolle*, 1 Atk. 164, approved of in *Reeves* v. *Capper*, 5 B. N. C. 140, 141; that is to say, if such parting with possession amount to a total renunciation of the contract of pledge; for otherwise the pawnee, though he has repledged or even sold the pawn, retains the right to be recouped his original advance; *Johnson* v. *Stear*, 15 C. B. N. S. 331; *Donald* v. *Suckling*, L. R. 1 Q. B. 585; *Halliday* v. *Holgate*, L. R. 3 Ex. 299; and accordingly, in estimating the damages in an action of conversion at the suit of the pawnor against a pawnee who had sold the pawn before the day for payment had arrived, the court held, *dissentiente* Williams, J., that the pawnee might deduct the amount of his original advance; *Johnson* v. *Stear*, *supra*; a right which does not exist for a defendant sued for the conversion of a chattel on which he had merely a lien; see *Mulliner* v. *Florence*, 3 Q. B. D. 484, where the cases above cited were discussed. Moreover, unless such sale or repledge is so inconsistent with the contract of pawn as to amount to a renunciation of it, it does not revest in the pawnor the general property in the pledge, so as to enable him to maintain an action of detinue or conversion; *Donald* v. *Suckling* and *Halliday* v. *Holgate*, *supra*; see the comments of Blackburn, J., in the former case, upon the *form of action* in *Johnson* v. *Stear*. The proper remedy of the pawnor is by an action upon the case for the injury done to his legal right. The Parting with possession by pawnee.

pledgee, by asserting that he is absolute owner of the goods pledged, does not lose his special property in the pledge, or his right to a tender of the amount due to him; *Yungmann* v. *Briesemann*, 67 L. T. 642.

Halliday v. *Holgate, per* Willes, J.

The law upon this subject is thus summarised by Willes, J., in delivering the judgment of the Exch. Cham. in *Halliday* v. *Holgate*: "There are three kinds of security: the first a simple lien; the second a mortgage passing the property out and out; the third a security intermediate between a lien and a mortgage, viz., a pledge, where by contract a deposit of goods is made a security for a debt, and the right to the property vests in the pledgee so far as is necessary to secure the debt. It is true the pledgor has such a property in the article pledged as he can convey to a third person, but he has no right to the goods without paying off the debt, and until the debt is paid off the pledgor has no present interest. If the pledgee deals with it in a manner other than is allowed by law for the payment of his debt, then, in so far as by disposing of the reversionary interest of the pledgor he causes to the pledgor any difficulty in obtaining possession of the pledge on payment of the sum due, and thereby does him any real damage, he commits a legal wrong against the pledgor. But it is a contradiction in fact, and would be to call a thing that which it is not, to say that the pledgee consents by his act" (*i.e.*, a sale, without demand and without notice, upon the bankruptcy of the pledgor, of scrip certificates pledged with him) "to revest in the pledgor the immediate interest or right in the pledge, which by the bargain is out of the pledgor and in the pledgee. Therefore for any such wrong an action of trover or of detinue, each of which assumes an immediate right to possession in the plaintiff, is not maintainable, for that right clearly is not in the plaintiff."

If the pawnee, after the pawn has taken place, redeliver the chattel to the pawnor for some purpose consistent with the continuance of the contract of pledge, the possession of it by the pawnor is looked upon as the possession of the pawnee, and the security remains; *Reeves* v. *Capper*, 5 B. N. C. 140; *Martin* v. *Reed*, 11 C. B. N. S. 730, where the goods were left on the pawnor's premises; and *North Western Bank* v. *Poynter*, (1895) A. C. 56, where they were redelivered to the pawnor to sell as the pawnee's agent.

Pawnbrokers' Act, 35 & 36 Vict. *c.* 93.

The law as to pawnbrokers is governed by the Pawnbrokers' Act, 1872, which repeals former enactments

Ss. 5 and 6 define who is a pawnbroker. The Act applies only to loans not exceeding 10*l.*, leaving larger loans subject to the ordinary law, (see *Pennell* v. *Attenborough*, 4 Q. B. 868, decided upon the old law), and contains provisions guarding against the facility of putting away stolen goods. Pledges may be redeemed within twelve months from the day of pawning, exclusive of that day, and seven days of grace are allowed in addition. Pledges for 10*s.* or less become the absolute property of the pawnbroker if not redeemed within that time; but by s. 18, pledges for larger amounts remain, as at common law, redeemable until sale; *Walter* v. *Smith*, 5 B. & Ald. 439; which must be by public auction. In cases, however, where the loan is above 40*s.* the pledge may be made upon the terms of a special contract. The Act does not affect the right of the pawnbroker to recover the deficit if the pledge on sale realises less than the amount lent on it; *Jones* v. *Marshall*, 24 Q. B. D. 269.

S. 25, which provides for the delivery back of the pledge to the holder of the pawn-ticket, does not protect the pawnbroker against a person claiming by title paramount to that of the pawnor; *Singer Co.* v. *Clarke*, 5 Ex. D. 37.

Under the former enactments it was held that a pawnbroker was not liable for damage to pledges by fire, unless the fire took place through his default, neglect, or wilful misbehaviour; *Syred* v. *Carruthers*, E. B. & E. 469; but by s. 27 of the present Act, an absolute liability is imposed upon the pawnbroker to make good, subject to certain deductions, the value, to be ascertained as therein directed, of pledges damaged or destroyed by fire; and he is empowered to insure to the extent of such value. By s. 28, courts of summary jurisdiction may award a reasonable satisfaction to owners of pledges in respect of depreciation arising by the default, neglect, or wilful misbehaviour of the pawnbroker. In a case decided under the former law, where the goods were stolen in a burglary on the pawnbroker's premises, it was considered that he had been guilty of neglect in leaving the premises without any one in them for twenty-four hours; *Shackell* v. *West*, 2 E. & E. 326. A duplicate pawn-ticket is a subject of larceny; *R.* v. *Morrison*, 28 L. J. M. C. 210. It has been held that a pawnbroker's interest in redeemable pledges is seizable in execution; *Rollason* v. *Rollason*, 34 Ch. D. 495.

V. *Locatio operis faciendi.*—In this case, goods are en- V. *Locati*

operis faciendi.

trusted by the bailor to the bailee, to be safely kept, or to be carried, or to have some work done upon them, for hire to be paid to the bailee. Such is the bailment of goods to a warehouseman or wharfinger to be taken care of, of cloth to a tailor to be made into a garment, of jewels to a goldsmith to be set, of a seal to a stone-cutter to be engraved, &c. In such cases the rule is, that the bailee is bound not only to perform his contract with regard to the work to be done, but also to use *ordinary* diligence in the care and preservation of he property entrusted to him; see *Best* v. *Yates*, 1 Vent. 268. Thus, if a watch be left with a watchmaker for repairs, he must use *ordinary* care about its safeguard; and if he use less, and the watch be lost, he is chargeable with its value; *Clarke* v. *Earnshaw*, 1 Gow. 30. So a wharfinger who takes upon him the mooring and stationing of a vessel at his wharf is liable for accidents occasioned by his negligent mooring; *Wood* v. *Curling*, 15 M. & W. 626, 16 Id. 628; or, apparently, by the unfitness of the berth to which he invites the vessel to come; *The Moorcock*, 14 P. D. 64; *The Calliope*, (1891) A. C. 11; at all events, if he has omitted to take reasonable steps to ascertain whether the bottom is in a fit state for the vessel to lie there; Id. If cattle be agisted, and the agister leave the gates of his field open, he uses less than *ordinary* diligence; and if the cattle stray out and are lost, he must make good the loss; *Broadwater* v. *Blot*, Holt, N. P. 547; *per* Byles, J., *Marfell* v. *S. Wales R. Co.*, 8 C. B. N. S. 523, 537; see *Smith* v. *Cook*, 1 Q. B. D. 79; *Halestrap* v. *Gregory*, (1895) 1 Q. B. 561. A restaurant keeper is bound to take reasonable care of a customer's coat if his servant has taken charge of it; *Ultzen* v. *Nicols*, (1894) 1 Q. B. 92.

Bailee bound to ordinary diligence.

Liability of agister.

Duty of bailee where unexpected danger.

If an uncommon or unexpected danger arise, the bailee must use efforts proportioned to the emergency to ward it off. In *Leck* v. *Maestaer*, 1 Camp. 138, 10 R. R. 660 (see the note to the latter report), the defendant was the proprietor of a dry dock, the gates of which were burst open by an uncommonly high tide, and the plaintiff's ship, which was lying there, was forced against another ship and injured. With a sufficient number of hands the gates might have been shored up in time so as to bear the pressure of the water; and, though the defendant offered to prove that they were in a perfectly sound state, Lord Ellenborough held that it was his duty to have had a sufficient number of men

in the dock to take measures of precaution when the danger was approaching, and that he was clearly answerable for the effects of the deficiency. So a warehouseman, who is a bailee of this description, does not use ordinary diligence about the goods entrusted to him, if he have not his tackle in proper order to crane them into the warehouse, whereby they fall and are injured; *Thomas* v. *Day*, 4 Esp. 262. But he is not liable for loss by a mere accident, not resulting from his negligence; *Garside* v. *Trent Nav. Co.*, 4 T. R. 581; see *Hyde* v. *Trent Nav. Co.*, 5 Id. 389; *Re Webb*, 8 Taunt. 443; *Vere* v. *Smith*, 1 Vent. 121; *Searle* v. *Laverick*, L. R. 9 Q. B. 122. Yet, in case of a loss, the onus is on the bailee to prove that it occurred through no want of ordinary care on his part; *Mackenzie* v. *Cox*, 9 C. & P. 632; *Reeve* v. *Palmer*, 5 C. B. N. S. 84, where an attorney was held liable in detinue for losing his client's deed, it not being shown how the loss occurred.

Warehouseman.

Not liable for accidents.

But onus of proving diligence on bailee.

There are, however, two cases in which the liability of bailees falling within this class is extended very much beyond the limit above pointed out, *viz.*, where the bailee is an *inn-keeper* or a *common carrier*. The extent of the inn-keeper's liability has already been discussed in the notes to *Calye's Case*, *ante*, p. 115, the leading authority on that subject. A few words shall be now devoted to that of the carrier.

Two exceptions to limited liability of this class of bailee.

Innkeeper.

Common carrier.

Common Carriers.—A common carrier is a person who undertakes to transport from place to place, for hire, the goods of such persons as think fit to employ him. Such is a proprietor of waggons, barges, lighters, merchant-ships, or other instruments for the public conveyance of goods; see *the text*, p. 178; *Forward* v. *Pittard*, 1 T. R. 27; *Mors* v. *Slue*, 2 Lev. 69, 1 Vent. 190, 238, commented on in the text by Lord Holt, p. 181; *Rich* v. *Kneeland*, Cro. Jac. 330; *Maving* v. *Todd*, 1 Stark. 72; *Brook* v. *Pickwick*, 4 Bing. 218; *Ingate* v. *Christie*, 3 C. & K. 61; though one of the termini be beyond the seas; *Benett* v. *P. and O. Steamboat Co.*, 6 C. B. 775; *Crouch* v. *L. & N. W. R. Co.*, 14 Id. 255; *Pinciani* v. *L. & S. W. R. Co.*, 18 Id. 226; and though the termini be not fixed; and, in the case of a bargeowner, though a barge be let to only one person for each voyage; *Liver Alkali Co.* v. *Johnson*, L. R. 7 Ex. 267; see *Hill* v. *Scott*, (1895) 2 Q. B. 371; but see *Scaife* v. *Farrant*, L. R. 10 Ex. 358, and the remarks of Cockburn, C.J., in his elaborate review of this branch of the law in *Nugent* v. *Smith*, 1 C. P. D. 423. A carman, however, who undertakes casual jobs, and does not

Who is a common carrier.

ply from one fixed terminus to another, is not a common carrier; *Brind* v. *Dale*, 2 M. & Rob. 80. The question whether the liability of a common carrier has been undertaken in any particular case is one of fact; *Tamvaco* v. *Timothy*, C. & E. 1, *per* Cave, J.

Carriers of passengers not.

A person who conveys *only* passengers is not a common carrier; *Aston* v. *Heaven*, 2 Esp. 533; *Christie* v. *Griggs*, 2 Camp. 79; *Sharpe* v. *Grey*, 9 Bing. 457. So railway companies are not common carriers of *passengers*; *Blake* v. *G. W. R. Co.*, 7 H. & N. 987; *Readhead* v. *Mid. R. Co.*, L. R. 4 Q. B. 379; *Wright* v. *Mid. R. Co.*, L. R. 8 Ex. 437; but see *Bretherton* v. *Wood*, 3 B. & B. 54; and

Nor cab-owners as to luggage.

Carpue v. *L. & B. R. Co.*, 5 Q. B. 747. Nor is a cab proprietor as to luggage taken with the passengers; *Ross* v. *Hill*, 2 C. B. 877; *Powles* v. *Hider*, 6 E. & B. 207.

Railway companies.

Railway companies, though not common carriers of passengers, are common carriers of goods, including, it seems, live animals; *McManus* v. *L. & Y. R. Co.*, 4 H. & N. 327; *Kendall* v. *L. & S. W. R. Co.*, L. R. 7 Ex. 373; unless exempt by some special provision; *Palmer* v. *Grand Junction Canal Co.*, 4 M. & W. 749; *Pickford* v. *Grand Junction R. Co.*, 10 Id. 399; *Parker* v. *G. W. R. Co.*, 7 Scott, N. R. 835. That is to say, they are common carriers of goods which they are specially bound by statute to carry, or profess to carry, or actually carry for persons generally, but not of goods which they have not professed to carry, and are not in the habit of carrying, or only carry under special circumstances, or subject to express stipulations, limiting their liability in respect of them; *Johnson* v. *Mid. R. Co.*, 4 Ex. 367; *York, N. & B. R. Co.* v. *Crisp*, 14 C. B. 527; *Crouch* v. *L. & N. W. R. Co.*, Id. 255; *Hughes* v. *G. W. R. Co.*, Id. 637; *Slim* v. *G. N. R. Co.*, Id. 647; *Aldridge* v. *G. W. R. Co.*, 15 C. B. N. S. 582; *Harrison* v. *L. B. & S. C. R. Co.*, 2 B. & S. 152; cf. *Richardson* v. *N. E. R. Co.*, L. R. 7 C. P. 75; *Rumsey* v. *N. E. R. Co.*, 14 C. B. N. S. 641; and *Stewart* v. *L. & N. W. R. Co.*, 3 H. & C. 135; cases of excursion trains, of which the last may be treated as overruled (see *per* Brett, L.J., *Cohen* v. *S. E. R. Co.*, 2 Ex. D. 253). As to goods deposited in cloak-rooms provided by railway companies, see *Singer Co.* v. *L. & S. W. R. Co.*, (1894) 1 Q. B. 833.

Their liability for passengers' luggage.

Notwithstanding some dicta to the contrary (see *per* Pollock, C.B., *Stewart* v. *L. & N. W. R. Co.*, *supra*; and *per* Willes, J., *Talley* v. *G. W. R. Co.*, L. R. 6 C. P., p. 51),

Common Carriers.

it seems that, subject to statutory exemptions, they are common carriers of passengers' personal luggage, which under their several acts of parliament they are bound to carry free of charge, whether it is carried in the luggage van or in the carriage with the passenger; *G. W. R. Co.* v. *Bunch*, 13 App. Cas. 31. Their liability as common carriers may, however, be modified "to the extent that, if loss happens by reason of want of care by the passenger himself who has taken within his own immediate control the goods which are lost, their contract as insurers does not apply to loss occasioned by the passenger's own default;" *G. W. R. Co.* v. *Bunch, supra, per* Lord Halsbury; *Talley* v. *G. W. R. Co.*, L. R. 6 C. P. 44. In the former case the reasoning in *Bergheim* v. *G. E. R. Co.*, 3 C. P. D. 221, was disapproved. Unless, however, it has been so modified, the general liability continues; *Richards* v. *L. B. & S. C. R. Co.*, 7 C. B. 839; *Butcher* v. *S. W. R. Co.*, 16 Id. 13; *Mid. R. Co.* v. *Bromley*, 17 Id. 372; *Le Conteur* v. *L. & S. W. R. Co.*, L. R. 1 Q. B. 54. In *Richards* v. *L. B. & S. C. R. Co.*, *supra*, the company were held responsible for the loss of a dressing-case accompanying the person of the passenger and lost in the course of being put into a cab at the station of arrival; and in *G. W. R.* v. *Bunch*, *supra*, where a bag was handed to a porter to be placed in the railway carriage, within a reasonable time before the departure of the train, the company were held liable for its loss. If, however, the passenger leave his luggage with a porter under such circumstances as to constitute the porter his agent, the company is not liable; *Hodkinson* v. *L. & N. W. R. Co.*, 14 Q. B. D. 228; *Welch* v. *L. & N. W. R. Co.*, 34 W. R. 166. The liability of the company continues until a reasonable time has elapsed, after the arrival of the luggage at its destination, for the passenger to claim it; *Forth* v. *N. E. R. Co.*, 36 W. R. 467.

Railway companies liable for personal luggage only;

Where a railway company, bound by statute to carry passengers' wearing apparel without extra charge, refused to carry a bundle of the plaintiff's clothing otherwise than at his risk, they were held liable for such refusal; *Munster* v. *S. E. R. Co.*, 4 C. B. N. S. 676. They are not, however, responsible as common carriers for luggage other than the personal luggage of the passengers, and not packed so as to make its nature obvious; *G. N. R. Co.* v. *Shepherd*, 8 Ex. 30; *Cahill* v. *L. & N. W. R. Co.*, 10 C. B. N. S. 154, 13 Id. 818; *Belfast & Ballymena R. Co.* v. *Keys*, 9 H. L. C.

COMMON CARRIERS.

556; *Phelps* v. *L. & N. W. R. Co.*, 19 C. B. N. S. 321. As to what is personal luggage, see the last case, and *Hudston* v. *Mid. R. Co.*, L. R. 4 Q. B. 366.

what is personal luggage;

for servant's luggage when ticket taken by master;

It has been decided that a servant travelling under a ticket taken and paid for by his master can sue the railway company for the loss of his own personal luggage through their negligence, the company's liability being in such case independent of contract; *Marshall* v. *York, N. & B. R. Co.*, 11 C. B. 655; see *Martin* v. *G. I. P. R. Co.*, L. R. 3 Ex. 9; *Foulkes* v. *Metr. D. R. Co.*, 5 C. P. D. 157; and *post*, p. 223. On the other hand, it has been held that a master cannot sue for the loss of his personal luggage through the company's negligence, where his servant took it with him as his own; *Becher* v. *G. E. R. Co.*, L. R. 5 Q. B. 241; but see *Meux* v. *G. E. R. Co.*, (1895) 2 Q. B. 387. In *Alton* v. *Mid. R. Co.*, 19 C. B. N. S. 213, a master was held not to be entitled to maintain an action for the loss of the services of his servant who had been injured through the company's negligence while he was their passenger; but this case perhaps turned upon the precise form of the declaration; see *per* Smith, L.J., *Taylor* v. *M. S. & L. R. Co.*, (1895) 1 Q. B. 134. See also 1 Wms. Saund. (ed., 1871) 474. It has been held that an infant *en ventre sa mère* has no remedy for personal injuries sustained through a railway company's negligence while his mother was a passenger; *Walker* v. *G. N. R. Co.*, 28 L. R. Ir. 69. The liabilities of railway and canal companies as carriers of *goods* must now be considered in connection with the Traffic Act, 1854, stated in a subsequent part of this note.

not for master's luggage taken by servant.

Not liable to master for injury to servant; *quære.*

Not liable to infant *en ventre sa mère.*

Duties of common carrier.

The extraordinary liabilities of a carrier were imposed upon him in consequence of the public nature of his employment, which rendered his good conduct a matter of importance to the whole community. He is bound to convey the goods of any person offering to pay his hire, unless his carriage be already full, or the risk sought to be imposed upon him extraordinary, or unless the goods be of a sort which he cannot convey, or is not in the habit of conveying, and does not profess to convey; *Jackson* v. *Rogers*, 2 Show. 327; *Riley* v. *Horne*, 5 Bing. 217; *Lane* v. *Cotton*, 1 Ld. Ray. 646; *Edwards* v. *Sherratt*, 1 East, 604; *Batson* v. *Donovan*, 4 B. & Ald. 21; *Johnson* v. *Mid. R. Co.*, 4 Exch. 367, *per* Parke, B. And in a declaration against him for refusing to carry, it is enough to aver readiness and willingness to pay the hire without a formal tender; *Pickford* v. *Grand Junction R. Co.*, 8 M. & W. 373; *Wyld* v.

COMMON CARRIERS

Hire must be reasonable.

Pickford, Id. 443. The hire charged must be no more than a reasonable remuneration to the carrier, though at common law there is no liability to carry at equal rates for all customers; *Baxendale* v. *E. Counties R. Co.*, 4 C. B. N. S. 63, 78, 83, better reported in 27 L. J. C. P. 145, where it is pointed out that charging less to one than another is evidence, though not conclusive, that the greater charge is unreasonable; and see the opinion of Blackburn, J., in *Sutton* v. *G. W. R. Co.*, L. R. 4 H. L. 226.

Equality clauses.

8 & 9 Vict. c. 20.

But under the "equality clauses" in special acts, and s. 90 of the Railway Clauses Consolidation Act, 1845, railway companies are bound to charge equally to all persons in respect of all goods; *Pickford* v. *Grand Junction R. Co.*, 10 M. & W. 399; *Baxendale* v. *L. & S. W. R. Co.*, L. R. 1 Ex. 137; *L. & N. W. R. Co.* v. *Evershed*, 3 App. Cas. 1029; and money exacted in excess, in disregard of such equality clauses, can be recovered back as money had and received; *Sutton* v. *G. W. R. Co.*, *supra*. By the Railway and Canal Traffic Act, 1854, ss. 2, 3, and 6, the Court of Common Pleas, or any judge of that court, was empowered to restrain by injunction any railway or canal company from giving undue or unreasonable preference to any particular person or description of traffic; see *Re Caterham R. Co.*, 1 C. B. N. S. 410; *Palmer* v. *L. B. & S. C. R. Co.*, L. R. 6 C. P. 194; but the effect of s. 6 is to deprive the party grieved of any remedy *by action* for breach of the provisions of s. 2; *M. S. & L. R. Co.* v. *Denaby Co.*, 14 Q. B. D. 209, 11 App. Cas. 97; *Rhymney R. Co.* v. *Rhymney Iron Co.*, 25 Q. B. D. 146; *Murray* v. *G. & S. W. R. Co.*, 11 Court of Sess. Cases, 4th series, 205; though some doubts were expressed on this point by Lord Halsbury, 11 App. Cas. 97, and Bramwell, L.J., in *Evershed's Case*, 3 Q. B. D. 135, appeared to assume that such a right existed. Nor does the breach afford any ground of defence or counter-claim to an action for the charges; *L. & Y. R. Co.* v. *Greenwood*, 21 Q. B. D. 215.

Jurisdiction of Court of Common Pleas under 17 & 18 Vict. c. 31.

Now vested in Railway Commission under 51 & 52 Vict. c. 25.

The jurisdiction conferred by s. 3 is now vested in the commissioners appointed under the Railway and Canal Traffic Act, 1888.

Where carrier receives parcel without question.

As a general rule, "if anything is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions as may be necessary; if he ask no questions, and there be no fraud to give the case a false complexion, on the delivery of the parcel, he is bound to carry the parcel

COMMON CARRIERS.

as it is;" *per* Parke, B., *Walker* v. *Jackson*, 10 M. & W. 169, where it was held that the uncommunicated fact, that a carriage contained a box of jewellery and watches, did not exonerate the owners of a ferry over which it was carried from liability for injuries to the contents of the box alleged to have been partly occasioned by the weight. But a railway company is not liable for the loss of merchandise delivered to them by a passenger as his personal luggage to be carried free, without notice that the parcel contains merchandise; *Cahill* v. *L. & N. W. R. Co.*, 10 C. B. N. S. 154, 13 Id. 818; *Belfast & Ballymena R. Co.* v. *Keys*, 9 H. L. C. 556. In *Crouch* v. *L. & N. W. R. Co.*, 7 Exch. 705, *Same* v. *Same*, 14 C. B. 255, it was considered that a carrier has no general right to refuse to carry a parcel upon the ground of a refusal of information as to its contents, there being nothing to show that such information was necessary.

No general right to refuse parcel for want of information.

Extent of his liability at common law.

While the goods are in the carrier's custody, he is bound to take the utmost care of them; and, unlike other bailees falling under the same class, he is, at common law, responsible for every injury sustained by them occasioned by any means whatever, except only the act of God, or the King's enemies; 1 Inst. 89; *Dale* v. *Hall*, 1 Wils. 281; *Corington* v. *Willan*, Gow. 115; see *Davis* v. *Garrett*, 6 Bing. 716; *Bourne* v. *Gatliff*, 3 Scott, N. R. 1, 11 Cl. & Fin. 45; *Bristol & Exeter R. Co.* v. *Collins*, 7 H. L. C. 194; *Oakley* v. *Portsmouth Co.*, 11 Exch. 618; *Briddon* v. *G. N. R. Co.*, 28 L. J. Ex. 51; subject however to the further qualification, that he is not responsible for damages arising from the natural deterioration or inherent vice of the thing carried. In such cases his position and immunities are those of an insurer; see *per* Willes, J., in *Blower* v. *G. W. R. Co.*, L. R. 7 C. P. 662. Thus, where the owner of some salt cake, knowing it to be a substance likely to destroy goods with which it might come in contact, shipped it in bulk on board the defendant's ship, without informing him of its destructive nature, it was held that the defendant was not liable to him for an injury to the article, caused by its having corroded some casks, near to which it had been stowed. In such cases, the shipper is liable to the shipowner for damage caused by the destructive article; see *Hutchinson* v. *Guion*, 5 C. B. N. S. 149; *Brass* v. *Maitland*, 6 E. & B. 470; *Alston* v. *Herring*, 11 Exch. 822; *Hearne* v. *Garton*, 28 L. J. M. C. 216; and the Merchant Shipping Act, 1894, s. 446; and to the carrier's servant for injury to him; *Farrant* v. *Barnes*, 11 C. B.

Not responsible for effects of natural deterioration or inherent vice.

N. S. 553. It seems, however, that there is no warranty by the shipper that the goods are not unfit to be carried by reason of concealed defects, at all events where the ship-owner has had an opportunity of inspecting them; *Acatos* v. *Burns*, 3 Ex. D. 282. In *Blower* v. *G. W. R. Co.*, *supra*, the defendants were held not responsible for the loss of a horse which happened, without any negligence on their part, through the inherent vice of the animal itself; see also *Kendall* v. *L. & S. W. R. Co.*, L. R. 7 Ex. 373. Probably on the same principle, in *Barbour* v. *S. E. R. Co.*, 34 L. T. 67, the defendants were held not responsible for damage to furniture arising solely from improper packing. As to what is meant by the act of God, see *Nugent* v. *Smith*, 1 C. P. D. 423; *Nitro-Phosphate Co.* v. *L. & St. K. Dock Co.*, 9 Ch. D. 503.

COMMON CARRIERS.

Meaning of act of God.

However, when the increase of personal property throughout the kingdom, and the frequency with which articles of great value and small bulk were transmitted from one place to another, began to render this degree of liability intolerably dangerous, carriers, on their part, began to insist that their employers should, in such cases, either diminish it, by entering into special contracts to that effect upon depositing their goods for conveyance, or should pay a rate of remuneration proportionable to the risk undertaken. To this end, they posted up and distributed written or printed notices, to the effect that they would not be accountable for property of more than a specified value, unless the owner had insured and paid an additional premium for it. If this notice was not communicated to the employer, it was of course ineffectual; *Kerr* v. *Willan*, 6 M. & S. 150; see, as to a bye-law not communicated, *G. W. R. Co.* v. *Goodman*, 12 C. B. 313. But if it could be brought home to his knowledge, it was looked upon as incorporated into his agreement with the carrier, and he became bound by its contents; *Mayhew* v. *Eames*, 3 B. & C. 601; *Rowley* v. *Horne*, 3 Bing. 2; *Nicholson* v. *Willan*, 5 East, 507.

How far (before Carriers Act) liability limited by notices.

Still the carrier, notwithstanding his protection by the notice, was bound to avoid gross negligence; and if the property was lost or injured by such negligence, he was responsible; *Smith* v. *Horne*, 2 Moo. 18; *Wyld* v. *Pickford*, 8 M. & W. 443; *Butt* v. *G. W. R. Co.*, 11 C. B. 140; *Hinton* v. *Dibbin*, 2 Q. B. 646; and *per* Lord Wensleydale and Blackburn, J., in *Peek* v. *N. Staffordshire R. Co.*, 32 L. J. Q. B. 246, 250, 273; unless, indeed, the employer had

Carrier was nevertheless liable for gross negligence.

CARRIERS ACT.

lulled his vigilance by an undue concealment of the nature of the trust imposed on him, for such conduct would have exonerated the carrier, even had he given no notice; *Batson* v. *Donovan*, 4 B. & Ald. 21; *Miles* v. *Cattle*, 6 Bing. 743; see 4 Burr. 2301; B. N. P. 71.

Many questions having arisen upon the construction of these notices, and whether they had come to the customer's knowledge, the legislature stepped in, and by several enactments regulated the responsibility of carriers by land and water. The Carriers Act, 1830, enacts (s. 1) that no common carrier by *land* for hire shall be liable for loss of or injury to any articles of the following description, contained in any parcel or package, when their value exceeds 10*l.*, unless at the time of delivery their value and nature were declared and the increased charge, or an engagement to pay the same, was accepted: viz., gold or silver coin: gold or silver in a manufactured or unmanufactured state: jewellery: watches: clocks: timepieces (*Le Conteur* v. *L. & S. W. R. Co.*, L. R. 1 Q. B. 54): trinkets (*Bernstein* v. *Baxendale*, 6 C. B. N. S. 251): bills, banknotes, orders, notes, or securities for the payment of money (*Stoessiger* v. *S. E. R. Co.*, 3 E. & B. 549; *McCall* v. *Taylor*, 19 C. B. N. S. 301): stamps: maps (*Wyld* v. *Pickford*, 8 M. & W. 443): writings: title-deeds: paintings (*Woodward* v. *L. & N. W. R. Co.*, 3 Ex. D. 121): engravings (*Boys* v. *Pink*, 8 C. & P. 361): pictures (*Henderson* v. *L. & N. W. R. Co.*, L. R. 5 Ex. 90): gold or silver plate, or plated articles: glass (*Owen* v. *Burnett*, 4 Tyr. 133; *Bernstein* v. *Baxendale*, *supra*; *Glover* v. *L. & S. W. R. Co.*, L. R. 3 Q. B. 25): china: silks, manufactured or not, wrought up with other materials or not (*Hart* v. *Baxendale*, 6 Ex. 769; *Bernstein* v. *Baxendale*, *supra*; *Brunt* v. *Mid. R. Co.*, 2 H. & C. 889; *Flowers* v. *S. E. R. Co.*, 16 L. T. 329): furs (*Mayhew* v. *Nelson*, 6 C. & P. 59): or lace (*Treadwin* v. *G. E. R. Co.*, L. R. 3 C. P. 308); except machine-made lace, which is excepted by the Act of 1865, 28 & 29 Vict. c. 94. The provision that the increased charge, or an engagement to pay the same, must have been accepted must be read subject to s. 2, below.

The Carriers Act, 11 G. 4 & 1 W. 4, c. 68.

S. 1. Customer required to declare value and nature of certain articles.

LOSS

"Loss" means loss by the carrier, and includes temporary loss by him; *Millen* v. *Brasch*, 10 Q. B. D. 142; and he is not liable for any consequences flowing from the loss, as distinguished from the loss itself; *Piancini* v. *L. & S. W. R. Co.*, 18 C. B. 226; *Millen* v. *Brasch*, *supra*; but he is liable

for non-delivery of the goods, if they are not lost, or when they are found after temporary loss; see *Miller* v. *Brasch*, where *Hearn* v. *L. & S. W. R. Co.*, 10 Exch. 793, was explained. The carrier is protected though the loss or injury happens after the goods have been negligently carried beyond their destination; *Morritt* v. *N. E. R. Co.*, 1 Q. B. D. 302. An uncovered wagon, with its contents, may be a "package;" *Whaite* v. *L. & Y. R. Co.*, L. R. 9 Ex. 67. The carrier has an insurable interest in goods the value of which has not been declared in accordance with the Act; *L. & N. W. R. Co.* v. *Glyn*, 28 L. J. Q. B. 188.

Carriers Act.

Injury.

Package.

By s. 2, when any such parcel is delivered, and its value and contents are declared, the carrier may demand and take an increased charge, to be notified by a notice affixed in his receiving office, and customers are to be bound by such notice, without further proof that it came to their knowledge. This section limits the carrier's right to the increased charge to cases where he has both affixed the notice *and* demanded the charge; *Behrens* v. *G. N. R. Co.*, 6 H. & N. 366. The Act applies to the case of a delivery to the carrier or his servant, whether at his receiving office or elsewhere; *Hart* v. *Baxendale*, 6 Exch. 769; see *Stephens* v. *L. & S. W. R. Co.*, 18 Q. B. D. 121.

S. 2. Carrier's right to increased charge.

How limited.

By s. 3, carriers who omit to affix the notice, or to give, if required, a receipt for the parcel, are precluded from the benefit of the Act, so far as the right to an extra charge is concerned; but are still protected from liability, unless the declaration as to the nature and value of the goods is made, as required by s. 1; *Hart* v. *Baxendale*, 6 Exch. 769.

S. 3. Effect of carrier not affixing notice, or not giving receipt on demand.

S. 4 prevents a common carrier from limiting his liability, for articles not within the Act, by any *public notice* or declaration. This, it will be observed, does not prevent him from limiting his liability by a *special contract*; and special contracts are still allowed between carriers and their customers, subject in the case of railway and canal companies to the provisions of the Railway and Canal Traffic Acts, stated below. S. 6 expressly provides that nothing in the Act shall annul or affect any special contract between a carrier and his customers for the conveyance of goods; but this section refers only to contracts, whereby the carrier renounces the protection given to him by s. 1; *Baxendale* v. *G. E. R. Co.*, L. R. 4 Q. B. 244, 254; *Shaw* v. *G. W. R. Co.*, (1894) 1 Q. B. 373, 379. It was held in *Baxendale* v. *G. E. R. Co.*, *supra*, that a special contract does not deprive

S. 4. Carrier's liability cannot be limited by public notice.

S. 6.

CARRIERS ACT.

the carrier of the protection of s. 1, unless the terms of the contract necessarily exclude it.

Special contracts still allowed.

How inferred.

In cases not affected by the Railway and Canal Traffic Acts, a special contract limiting the carrier's liability may be inferred, where the carrier gave specific notice of his terms to his customer and the customer subsequently sent goods to be carried without objecting to those terms; *Walker* v. *York & N. Mid. R. Co.*, 2 E. & B. 750. It may also be inferred, where the carrier, on taking the goods, gave to his customer a ticket stating or referring to his terms and the customer did not dissent; *Stewart* v. *L. & N. W. R. Co.*, 3 H. & C. 135; *Van Toll* v. *S. E. R. Co.*, 12 C. B. N. S. 75; *Zunz* v. *S. E. R. Co.*, L. R. 4 Q. B. 539; cases where the courts applied the rule that a customer must be presumed to know what he has reasonable means of knowing, whether he avails himself of those means or not; see also *Chippendale* v. *L. & Y. R. Co.*, 21 L. J. Q. B. 22, where the carriers were held to be protected by the special contract, although the truck was defective. To the same effect were *G. N. R. Co.* v. *Morville*, 21 L. J. Q. B. 319; *Austin* v. *M. L. & S. R. Co.*, 10 C. B. 454; see also *Austin* v. *M. L. & S. R. Co.*, 16 Q. B. 600; *Shaw* v. *York & N. Mid. R. Co.*, 13 Q. B. 347; *Carr* v. *L. & Y. R. Co.*, 7 Exch. 707, where the injury was by collision; *Fowles* v. *G. W. R. Co.*, Id. 699, where the loss occurred beyond the railway terminus; *Wyld* v. *Pickford*, 8 M. & W. 443; and *Scaife* v. *Farrant*, L. R. 10 Ex. 358.

Whether notice brought to customer's knowledge.

Upon the question whether the carrier's special terms were so brought to the customer's knowledge as to render them part of the contract, see *Henderson* v. *Stephenson*, L. R. 2 H. L. Sc. 470; *Harris* v. *G. W. R. Co.*, 1 Q. B. D. 515; *Parker* v. *S. E. R. Co.*, 2 C. P. D. 416. In *Henderson* v. *Stephenson*, *supra*, a passenger was held not bound by conditions as to his luggage, printed on the back of his ticket, but not referred to on the front, and of which he was not in fact aware. In *Harris* v. *G. W. R. Co.*, *supra*, the company were held entitled to the benefit of conditions as to luggage deposited at their cloak-room, printed on the back of a receipt note and referred to on the front; the plaintiff was aware that there were some conditions, but did not know what they were. In *Parker* v. *S. E. R. Co.*, *supra*, it was laid down in the C. A. that if the customer did not know that there was print on the ticket, he is not bound thereby: if he knew that there was such print, and knew

Parker v. *S. E. R. Co.*

CARRIERS ACT.

that it contained conditions, he is bound: and though he did not know or believe that the print contained conditions, he is nevertheless bound, if he had reasonable notice that the print contained conditions. This view was approved of in *Richardson* v. *Rowntree*, (1894) A. C. 217. See also *Burke* v. *S. E. R. Co.*, 5 C. P. D. 1, and *Watkins* v. *Rymill*, 10 Q. B. D. 178, where the cases were elaborately examined.

S. 8.

Felony of carriers' servants.

By s. 8, the Act is not to protect carriers from their liability to answer for loss or injury to any goods arising from the felonious acts of their own servants, or to protect the servant from answering for his own neglect or misconduct. Every person actually engaged in the performance of the contract of carriage and delivery is a servant of the carrier within the meaning of this section, though not strictly so within the decision in *Quarman* v. *Burnett*, 6 M. & W. 499, and the series of cases where it has been followed; *Machu* v. *L. & S. W. R. Co.*, 2 Exch. 415; *Doolan* v. *Mid. R. Co.*, 2 App. Cas. 792; *Stephens* v. *L. & S. W. R. Co.*, 18 Q. B. D. 121, where a servant of the proprietor of a receiving office was held to be a servant of the company within the Act. It is to be observed that felony of the carrier's servant, without gross negligence on the part of the employer, was not a ground of liability in cases within the carrier's notice or special contract; *Butt* v. *G. W. R. Co.*, 11 C. B. 140; *G. W. R. Co.* v. *Rimell*, 18 Id. 575; and that s. 8 "cannot be construed as a general enactment that common carriers by land are in all cases to be liable for theft by their servants;" *Shaw* v. *G. W. R. Co.*, (1894) 1 Q. B. 373, 395, where it was held that a special contract against liability for loss by theft of the carrier's servants is valid at common law. The case of *Butt* v. *G. W. R. Co.*, *supra*, has been frequently misunderstood. It was not a case within the Act. The plea alleged a non-compliance with the conditions of the notice; the plaintiff new assigned that the loss was caused by the felony of the defendants' servants; and on special demurrer to this new assignment, the plaintiff was allowed to amend by replying a loss by felony through the defendants' gross negligence. Willes, J., is erroneously reported to have said, in *Metcalfe* v. *L. & B. R. Co.*, 4 C. B. N. S. 309, 310, that the demurrer in *Butt* v. *G. W. R. Co.* was on the ground "that carriers are not answerable at common law for the felonious acts of their servants," and in S. C., 27 L. J. C. P. 207, that the plea was "an excuse under the Carriers Act." See *Shaw*

CARRIERS ACT.

v. *G. W. R. Co.*, (1894) 1 Q. B. 381. As to evidence of a felony by the carrier's servants, see *G. W. R. Co.* v. *Rimell*, 18 C. B. 575; *Keys* v. *Belfast R. Co.*, 9 H. L. C. 556; *Vaughton* v. *L. N. W. R. Co.*, L. R. 9 Ex. 93; *McQueen* v. *G. W. R. Co.*, L. R. 10 Q. B. 569; *Turner* v. *G. W. R. Co.*, 34 L. T. 22; *Way* v. *G. E. R. Co.*, 1 Q. B. D. 692.

Contracts of carriage by land and water.

Where the contract is for conveyance by land and water, and the goods are lost by land, the Act applies; *Le Conteur* v. *L. & S. W. R. Co.*, L. R. 1 Q. B. 54; *Baxendale* v. *G. E. R. Co.*, Id. 244; see also the Railways Regulation Act, 1868, *post*, p. 220.

In a case within the Carriers Act, the carrier is not liable for a loss by his servant of the articles mentioned in the Act, even though occasioned by *gross negligence not amounting to a misfeasance*; *Hinton* v. *Dibbin*, 2 Q. B. 646; see *Morritt* v. *N. E. R. Co.*, 1 Q. B. D. 302, 309. *Owen* v. *Burnett*, 4 Tyr. 133, *contra*, is not law.

Circumstances which led to Railway and Canal Traffic Acts.

The monopoly enjoyed by railway companies led in some cases to their restricting their liability by special contracts with customers who could not afford time or expense to litigate the right to refuse to carry except upon the terms of such contracts. Moreover, in a series of decisions from *Shaw* v. *Y. & N. Mid. R. Co.*, 13 Q. B. 347, to *Carr* v. *L. & Y. R. Co.*, 7 Exch. 707, and *Walker* v. *York & N. Mid. R. Co.*, 2 E. & B. 750, the courts relaxed the rule of the older cases (see *supra*, p. 205), and held customers bound by special contracts the terms of which were large enough to exclude the carrier's liability for gross negligence, misconduct, or even fraud (see *per* Blackburn, J., *Peek* v. *N. Staffordshire R. Co.*, 32 L. J. Q. B., p. 246, and *per* Wright, J., *Shaw* v. *G. W. R. Co.*, (1894) 1 Q. B., p. 382); which is still the rule acted upon in the case of passengers, or where the Railway and Canal Traffic Acts, noticed *infra*, do not apply; see *McCawley* v. *Furness R. Co.*, L. R. 8 Q. B. 57; *Zunz* v. *S. E. R. Co.*, 4 Id. 539; *Gallin* v. *L. & N. W. R. Co.*, 10 Id. 212; and compare *The Duero*, L. R. 2 A. & E. 393; see, however, *P. & O. Steam Nav. Co.* v. *Shand*, 3 Moo. P. C. N. S. 272, *per* Sir W. Erle; *Martin* v. *G. Ind. Pen. R. Co.*, L. R. 3 Ex. 9.

17 & 18 Vict. c. 31.

26 & 27 Vict. c. 92.

51 & 52 Vict. c. 25.

It was to correct these matters that the Railway and Canal Traffic Act of 1854 was passed, which was extended, by the Railway Clauses Act, 1863, s. 31, and the Railway and Canal Traffic Act, 1888, s. 28, to traffic carried on by railway companies' vessels, and was explained and amended

as to "through traffic," first by the Regulation of Railways Act, 1873, s. 11, and then by the Railway and Canal Traffic Act, 1888, s. 25, which repealed s. 11 of the Act of 1873. The Acts of 1873 and 1888 have been amended by Acts of 1892 and 1894.

36 & 37 Vict. c. 48.

55 & 56 Vict. c. 44; 57 & 58 Vict. c. 54.

The Act of 1854, by the first six sections, provides for enforcing against railway and canal companies, at the instance of persons aggrieved, the duty of making arrangements for receiving and forwarding traffic of every description without delay and without partiality. "Traffic" includes "not only passengers and their luggage, and goods, animals, and other things conveyed by any railway company or canal company, or railway and canal company, but also carriages, waggons, trucks, boats, and vehicles of every description adapted for running or passing on the railway or canal of any such company" (s. 1); see *Dickson* v. *G. N. R. Co.*, 18 Q. B. D. 176. These sections have been explained and amended by the above-mentioned Acts of 1873 and 1888; and under the latter Act the powers of enforcing the duty imposed upon the companies is vested in the Railway and Canal Commissioners.

Railway and Canal Traffic Act, 1854.

Equality clauses.

S. 1. "Traffic."

S. 7 of the Act of 1854 enacts, that every such company "shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void." The section, however, contains the following provisoes: 1. That the section shall not be construed to prevent such companies "from making such *conditions* with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things as shall be adjudged, by the court or judge before whom any question relating thereto shall be tried, to be *just and reasonable*." 2. That "no greater damages shall be recovered for the loss of or for any injury done to any of such animals, beyond the sums hereinafter mentioned:" *viz.*, for any horse, 50*l.*, for any neat cattle, per head, 15*l.*, for any sheep or pigs, per head, 2*l.*; unless the person delivering the same to the company shall at the time of delivery, "have declared them to be respectively of higher value than as above mentioned;"

S. 7. Company to be liable for neglect or default in the carriage of goods, —notwithstanding notices.

Saving of right to make just and reasonable conditions.

Limitation of liability in certain cases, unless the value declared and extra charge paid.

Railway and Canal Traffic Act.

in which case the company may "demand and receive by way of compensation for the increased risk and care thereby occasioned a reasonable per-centage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge; and such per-centage or increased rate of charge shall be notified in the manner prescribed in" the Carriers Act, 1830, and shall be binding upon the company in the manner therein mentioned. 3. That "the proof of the value of such animals, articles, goods, and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury." 4. That "no *special contract* between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid shall be binding upon or affect any such party unless the same be *signed* by him or by the person delivering such animals, articles, goods, or things respectively for carriage." 5. That the section shall not "alter or affect the rights, privileges, or liabilities of any such company under" the Carriers Act, 1830, with respect to articles of the descriptions mentioned in that Act.

Onus of proof of value.

No special contract to be binding unless signed.

Saving of Carriers Act.

Construction of section.

Neglect or default.

This section extends only to loss or injury occasioned by negligence, or default in the nature of negligence, on the part of the company or of their servants while acting within the scope of their employment, and does not therefore affect a special contract against loss by theft by the company's servants without such negligence or default; *Shaw* v. *G. W. R. Co.*, (1894) 1 Q. B. 373. It extends to *all* animals, notwithstanding proviso 2, and by that proviso the amount of damages recoverable where there is no declaration is limited only in cases of the animals which it specifies, *viz.*, horses, neat cattle, sheep, and pigs; and therefore the full value of a dog, killed through negligence, was held to be recoverable, though there was no declaration; *Harrison* v. *L. & B. R. Co.*, 2 B. & S. 122, reversed in error, Id. 152, but on another point. If animals within the said proviso are injured during the course of their being received, and before the declaration has been made, only the limited damages are recoverable; *Hodgman* v. *W. Mid. R. Co.*, 5 B. & S. 173, 6 Id. 560 (as to the remarks of Cockburn, C.J., at the end of his judgment in this case, see *Hart* v. *Baxendale* 6 Exch. 769). The declaration of value, even though not part of the contract of carriage, will form the basis on

Animals.

Declaration.

which damages will be assessed; *M'Cance* v. *L. & N.W. R. Co.*, 7 H. & N. 477; but to entitle the company to rely on it, it must be formally made, and therefore in *Robinson* v. *L. & S. W. R. Co.*, 19 C. B. N. S. 51, the company was held liable for refusing to carry, uninsured, a horse, whose value they had casually learnt to be above 50*l*. "Injury" includes, in the case of animals, injury caused by want of food or water through negligence in delivery; *Allday* v. *G. W. R. Co.*, 34 L. J. Q. B. 5. "Articles" include passengers' luggage carried without extra charge; *Cohen* v. *S. E. R. Co.*, 2 Ex. D. 253; but the luggage must be received for the purposes of carriage; *Van Toll* v. *S. E. R. Co.*, 12 C. B. N. S. 75, where it was merely deposited in a cloak-room at the end of the passenger's journey.

Railway and Canal Traffic Act.

Injury.

Passengers' luggage.

It is now settled that the effect of s. 7 is that, in order to exempt a railway company from liability for loss or injury of goods through their servants' negligence or default, there must be a special contract, both signed and reasonable; *Peek* v. *N. Staffordshire R. Co.*, E. B. & E. 986, 10 H. L. C. 478; *Doolan* v. *Mid. R. Co.*, 2 App. Cas. 792, 805; *M. S. & L. R. Co.* v. *Brown*, 8 Id. 703, 710; *Dickson* v. *G. N. R. Co.*, 18 Q. B. D. 176, 185. It was for some time uncertain whether, on the one hand, a special contract, which had been signed, was valid under the section, although not just and reasonable, and whether, on the other, a notice or condition, which was just and reasonable, was valid, although not signed. In *Wise* v. *G. W. R. Co.*, 1 H. & N. 63, a special contract which was signed was held to be valid without reference to the question of its reasonableness; see also *Partington* v. *S. Wales R. Co.*, Id. 392, *per* Martin and Bramwell, BB.; and *Beal* v. *S. Devon R. Co.*, 5 Id. 875, 3 H. & C. 337. But in *Simons* v. *G. W. R. Co.*, 18 C. B. 805, a contract was held to be void on the ground of unreasonableness, although it was signed; and in *McManus* v. *L. & Y. R. Co.*, 2 H. & N. 693, a signed contract was considered to be reasonable, and therefore binding. In *Peek* v. *N. Staffordshire R. Co.*, E. B. & E. 958, a condition which was held to be reasonable was, nevertheless, held to be void because it was unsigned (Erle, J., *diss.*). The two last-mentioned cases were taken up to the Exch. Cham., and in *McManus* v. *L. & Y. R. Co.*, 4 H. & N. 327, the court of error, reversing the judgment below held (Erle, J., *diss.*), that the special contract which the plaintiff had signed was void because it was unreasonable. "In effect,"

Contract must be reasonable and signed.

McManus v. *L. & Y. R. Co.*

RAILWAY AND CANAL TRAFFIC ACT.

said Williams, J., in delivering the judgment of the majority of the court of error, "before the statute, every case in which a special limited liability was substituted for the general common law obligation of the carrier, whether by notice acquiesced in, or document signed by the customer, was one of special contract, and the statute is to be construed with reference to that state of the law."

Peek v. *N. Staffordshire R. Co.*

According to this view the words "special contract" and "conditions," as used in the Act, are synonymous terms; consequently, when *Peek* v. *N. Staffordshire R. Co.*, E. B. & E. 986, subsequently came before the Exch. Cham., it was considered to be a settled point, that the Act does require that conditions should be signed. That was an action against the company as common carriers, for negligently carrying three marble chimney-pieces. 4th plea: Special contract exempting them from responsibility for injury to marbles unless insured, and no insurance of the marbles. 5th plea: Condition to the same effect, alleging it to be reasonable. Issues thereon: verdict for defendants on both pleas. The plaintiff had had notice of such condition, and in a letter to the defendants had requested them "to forward the three cases of marble not insured," which they did. On a special case in the Exch. Cham. it was held, reversing the decision of the Q. B., that the defendants were entitled to have the verdict entered for them upon the 4th plea, on the ground that the plaintiff's letter, coupled with the forwarding of the goods in pursuance of it, and some other correspondence, constituted a special contract signed within the meaning of the 4th proviso to s. 7. This decision was in its turn reversed by the H. L., 10 H. L. C. 473, 32 L. J. Q. B. 241, on the ground that the condition was not just and reasonable, and that there was no special contract signed, their lordships being, however, divided as to whether the condition being reasonable must also be embodied in a signed contract. Lords Westbury and Wensleydale adopted the interpretation of Jervis, C.J., in *Simons* v. *G. W. R. Co.*, and of Williams, J., in *McManus* v. *L. & Y. R. Co.*, and held that it must: that, in fact, "condition," and "special contract," in the section are synonymous; while Lords Cranworth and Chelmsford held that they were two different things, and that a condition being reasonable need not be signed. Some of the many observations of Lord Westbury may be cited here.

"I think," he said, "the true construction of s. 7 of

the Act may be expressed in a few words. I take it to be equivalent to a simple enactment, that no general notice given by a railway company shall be valid in law, for the purpose of limiting the common law liability of the company as carriers. Such common law liability may be limited by such conditions as the court or judge shall determine to be just and reasonable; but with this proviso, that any such condition so limiting the liability of the company, shall be embodied in a special contract in writing between the company and the owner, or person delivering the goods to the company, and which contract in writing shall be signed by such owner or person. . . . The words," of the Act "expressly state that any condition, having for its object to relieve a company from liability occasioned by the neglect or default of such company, shall be null and void. Now, if the present condition were embodied in a contract between the company and the owner of the goods delivered to be carried by that company, the necessary effect of such a contract would be, that it would exempt the company from responsibility for injury, however caused; including, therefore, gross negligence, and even fraud or dishonesty on the part of the servants of the company. For the condition is expressed without any limitation or exception." Therefore, his lordship considered the condition unreasonable, and he held that it was not embodied in a special contract in writing, because the words "not insured" did not refer "to the written condition, or afford any ground upon which the written condition can be regarded as incorporated" in the contract. The letter, said Lord Cranworth, "shows that the person sending the goods, chose to send them with the incidents attaching by law to the sending of the marbles uninsured; but it does not show that he agreed to a stipulation by the company that they were to be absolved from responsibility by reason of their being so sent; still less, that he so agreed by reason of their not being insured according to their value." The construction placed by Lord Westbury upon the section has been accepted as the correct one in later cases in the H. L.; see *Doolan* v. *Mid. R. Co.*, 2 App. Cas. 792, 805; *M. S. & L. R. Co.* v. *Brown*, 8 Id. 703, 710; and *G. W. R. Co.* v. *McCarthy*, 12 Id. 218, 232.

Railway and Canal Traffic Act.

Peek v. *N. Staffordshire R. Co.*

Per Lord Westbury.

The condition held in *McManus* v. *L. & Y. R. Co.* to be unreasonable, was that "the company would not be responsible for any injury, *howsoever caused*, to live stock of any

What are reasonable conditions.

RAILWAY AND CANAL TRAFFIC ACT.

description;" the court, thinking that this condition, if held to be valid, would protect the company from liability in respect of their own gross negligence or misconduct; see *Gregory* v. *W. Mid. R. Co.*, 2 H. & C. 944; *Rooth* v. *N. E. R. Co.*, L. R. 2 Ex. 173; *Ashendon* v. *L. B. & S. C. R. Co.*, 5 Ex. D. 190. Similarly, in *Allday* v. *G. W. R. Co.*, 5 B. & S. 903, a condition against liability for *delay, however caused*, was adjudged unreasonable. In *Beal* v. *S. Devon R. Co.*, 3 H. & C. 337, the condition provided, in the case of *fish*, that the company "should not be responsible under any circumstances for loss of market, or for other loss or injury from any cause whatever, *other than gross negligence or fraud*," and this condition was held (Martin, B., *diss.*) to be valid; see *Lord* v. *Mid. R. Co.*, L. R. 2 C. P. 339. In *Simons* v. *G. W. R. Co.*, 18 C. B. 805, a condition was held to be unreasonable which absolved the company from responsibility for loss or detention of goods by reason of insufficient or *improper package*; and so in *Cutler* v. *N. London R. Co.*, 19 Q. B. D. 64, was a condition absolving them from all responsibility for passengers' luggage unless it bore the owner's name and address. In *Harrison* v. *L. B. & S. C. R. Co.*, 2 B. & S. 122, the court upheld a condition against liability for loss or damage to horses or dogs above certain values, unless the value was declared and extra charges paid according to the value, the company to be liable only for the declared value. But this case was treated in *Ashendon* v. *L. B. & S. C. R. Co.*, 5 Ex. D. 190, as overruled by *Peek* v. *N. Staff. R. Co.*, *supra*; see also *Robinson* v. *G. W. R. Co.*, 35 L. J. C. P. 123. Conditions protecting the company against claims for loss unless made within seven days from the time when the goods ought to have been delivered, and against liability for the loss of goods untruly declared by the sender, were held binding in *Lewis* v. *G. W. R. Co.*, 5 H. & N. 867. In *Aldridge* v. *G. W. R. Co.*, 15 C. B. N. S. 582, a condition against liability for injury beyond the limits of the company's railway, was held reasonable. It seems to have been assumed that the Act applies to such a condition; but it has since been decided that it does not apply to contracts which exempt companies from liability for loss or detention beyond the limits of their own lines; *Zunz* v. *S. E. R. Co.*, L. R. 4 Q. B. 539. As to unreasonableness of part of the contract avoiding only that part, see *M'Cance* v. *L. & N. W. R. Co.*, 7 H. & N. 477, and *per* Kelly, C.B., *Rooth* v. *N. E. R. Co.*, L. R. 2 Ex. 173, 178.

In *Simons* v. *G. W. R. Co.*, *supra*, a condition was held to be valid because confined to goods carried at the lower of two alternative rates. And conditions, so confined, were upheld, on the ground that there was a reasonable alternative rate, in *Lewis* v. *G. W. R. Co.*, 3 Q. B. D. 195; *M. S. & L. R. Co.* v. *Brown*, 8 App. Cas. 703; *G. W. R. Co.* v. *McCarthy*, 12 Id. 218; see also *Foreman* v. *G. W. R. Co.*, 38 L. T. 851; *Sheridan* v. *M. G. W. R. Co.*, 24 L. R. Ir. 140; *Nevin* v. *G. S. & W. R. Co.*, 30 Id. 125.

Railway and Canal Traffic Act. Alternative rates.

In *Dickson* v. *G. N. R. Co.*, 18 Q. B. D. 176, where a valuable dog had been injured through the negligence of the company's servants, a condition disclaiming liability for loss or damage to dogs beyond 2*l.*, unless a higher value was declared and 5 per cent. paid upon the excess of value beyond 2*l.*, was held by the C. A. to be unreasonable, Lord Esher, and Lopes, L.J., considering that the higher or insurance rate was so excessive as practically to offer no alternative, and that in the absence of an alternative rate the condition was unreasonable. The court pointed out that the burden of showing that the contract was reasonable was thrown by the Act upon the defendants, and agreed in considering the extra charge unreasonably high.

Dickson v. *G. N. R. Co.*

In a very instructive judgment, Lopes, L.J., traced the history of the carrier's liability prior to the Traffic Act, and explained the circumstances which led to its enactment, pointing out that before that Act railway companies were common carriers only of such goods as they professed to carry for persons generally, or were bound to carry as such. He then proceeded: "Two important matters are aimed at and hit by the Railway and Canal Traffic Act, 1854. It provides that railway companies shall afford all reasonable facilities for receiving, forwarding, and delivering traffic without delay and without partiality ('traffic,' by the interpretation clause, including animals), and gives a remedy, if facilities are withheld, on application to the Court of Common Pleas, a jurisdiction now transferred to the Railway Commissioners. Since the passing of that Act, railway companies cannot, in my opinion, absolutely refuse to carry traffic which they have facilities for carrying, even if they did not profess to carry and did not generally carry such traffic, but would be compellable to carry it, not as common carriers, but with the liability of ordinary bailees, and subject to reasonable conditions limiting that liability. Applying that principle to the present case, I am of opinion

Railway and Canal Traffic Act. *Dickson* v. *G. N. R. Co.*

that the defendants were not common carriers of dogs, and were not bound to carry them at their own risk, but could not refuse to carry them on reasonable terms and subject to reasonable conditions."

The question whether the condition or contract is reasonable must be determined by the court or judge, and not by the jury, though the jury may be asked to find as to facts material to that question; see *Dickson* v. *G. N. R. Co.*, 18 Q. B. D. 181; *G. W. R. Co.* v. *McCarthy*, 12 App. Cas. 229, 233; *Sheridan* v. *M. G. W. R. Co.*, 24 L. R. Ir. 146.

Meaning of owner's risk.

For the meaning of the expression "owner's risk" in such conditions, see *D'Arc* v. *L. & N. W. R. Co.*, L. R. 9 C. P. 325; *Mitchell* v. *L. & Y. R. Co.*, L. R. 10 Q. B. 256. And

Wilful misconduct.

as to what amounts to wilful misconduct, where the condition protects the company from liability for loss or damage except so caused, *Webb* v. *G. W. R. Co.*, 26 W. R. 111; *Lewis* v. *G. W. R. Co.*, 3 Q. B. D. 195; *Hoare* v. *G. W. R. Co.*, 25 W. R. 631; *Nevin* v. *G. S. & W. R. Co.*, 30 L. R. Ir. 125; *Stevens* v. *G. W. R. Co.*, 52 L. T. 324. As to what

Detention.

is detention on a condition protecting against it, see *Gordon* v. *G. W. R. Co.*, 8 Q. B. D. 44.

Signed contract.

The signature to the special contract may be made by an agent of the party sending the goods; see *Peek* v. *N. Staff. R. Co.*, E. B. & E. 986. But the provision that the special contract must be signed applies only where the company is seeking to exempt itself from liability; and where the customer is *setting up* the contract, it is no answer to say that he has not signed it; *Baxendale* v. *G. E. R. Co.*, L. R. 4 Q. B. 244.

Carriers by water.

With respect to carriers by water, besides the exemptions for which they stipulate in their charter-parties and bills of lading, the latter always containing a clause discharging them from liability for loss occasioned by "the act of God, the King's enemies (from which they are indeed discharged at common law), fire, and all or every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever," they were further protected by 26 Geo. 3, c. 86, from liability for loss or damage by reason of

Loss by fire.

fire on board the ship (see *Morewood* v. *Pollock*, 1 E. & B. 743; *Schmidt* v. *R. Mail Co.*, 45 L. J. Q. B. 646), and

Loss of gold, &c.

also from liability for loss or damage to any gold, silver, diamonds, watches, jewels, or precious stones, sustained, without their own actual fault or privity, by any robbery, embezzlement, making away with or secreting thereof, unless the owner

or shipper had, at the time of shipment, declared in writing the true nature and value thereof. See now the Merchant Shipping Act, 1894, s. 502, which is to the same effect. The declaration must state the value in money; *Williams* v. *African Co.*, 1 H. & N. 300; see *Gibbs* v. *Potter*, 10 M. & W. 70.

The 6 Geo. 4, c. 125, exempted them from liability for damage arising from want of a licensed pilot, unless incurred by their own refusal or neglect to take one on board; and from liability for loss incurred through the default of a licensed pilot. Now, by the Merchant Shipping Act, 1894, s. 633, "an owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law." But although the pilot was in fault, this section does not free the owner from liability, if there was any default on the part of the master or crew which conduced to the loss or damage; *e.g.*, neglect to keep a proper look-out; *The Iona*, L. R. 1 P. C. 426; *Clyde Nav. Co.* v. *Barclay*, 1 App. Cas. 790; *The Indus*, 12 P. D. 46; *The Schwan*, (1892) P. 419, 438.

Compulsory pilotage. 57 & 58 Vict. c. 60, s. 633.

Where their common law liability remained, its extent was from time to time narrowed by the following Acts, viz., 7 Geo. 2, c. 15, which exempted them from making good losses incurred by misconduct of the master and mariners, without their privity, to a greater extent than the value of the ship and freight: 26 Geo. 3, c. 86, which extended the above enactment to all cases of loss by robbery, without their privity, by whomsoever committed: and 53 Geo. 3, c. 159, which extended it to all cases of loss or damage occasioned without their fault or privity; but this Act did not extend to vessels used solely in rivers or inland navigations, nor to any ship not duly registered according to law; nor did any of those Acts extend to lighters and gabberts; *Hunter* v. *M'Gown*, 1 Bligh, 573. It should also be observed that the benefit of these three Acts extended only to owners, not to masters, and that the last contained an express clause against relieving a master who was also a part owner; see *Wilson* v. *Dickson*, 2 B. & Ald. 2; *Atkinson* v. *Stevens*, 7 Exch. 567. The Act now in force upon this subject is the Merchant Shipping Act, 1894, part 8, ss. 503 to 509.

Limitation of liability.

56 & 57 Vict. c. 60.

A condition in a bill of lading that the shipowner shall not be accountable for leakage or breakage has been held not to

Conditions in bills of lading.

CARRIERS BY WATER.

discharge him from liability for gross negligence; *Phillips* v. *Clark*, 2 C. B. N. S. 156; nor for damage to adjacent goods caused by the leakage; *Thripp* v. *Youle*, 2 C. P. D. 432; see also *Wilton* v. *Atlantic R. Mail Co.*, 10 C. B. N. S. 453; 31 & 32 Vict. c. 119, s. 14, *post*; *Lloyd* v. *Gen. Iron Screw Colliery*, 33 L. J. Ex. 269; *Czech* v. *Gen. St. Nav. Co.*, L. R. 3 C. P. 15; *Leuw* v. *Dudgeon*, Id. 17 n.; *Grill* v. *Gen. Iron Screw Colliery*, 1 Id. 600, 3 Id. 476; *Chartered Bank of India* v. *Netherlands Co.*, 10 Q. B. D. 521; but such a condition has the effect of shifting the onus of proof, and makes it incumbent upon the consignor to give affirmative evidence of negligence; *Czech* v. *Gen. St. Nav. Co.*, *supra*; see *The Glendarroch*, (1894) P. 226. In *The Duero*, L. R. 2 A. & E. 393, a condition in a bill of lading excluding liability for negligence or default of master or mariner or others performing their duties was upheld; see *Norman* v. *Binnington*, 25 Q. B. D. 475.

Implied warranty of seaworthiness.

Irrespective of the common law liability of common carriers, there is in every contract of affreightment, where the agreement does not exclude it, a warranty that the ship is seaworthy; *Kopitoff* v. *Wilson*, 1 Q. B. D. 377; *Gilroy* v. *Price*, (1893) A. C. 56; *Thin* v. *Richards*, (1892) 2 Q. B. 141; *Hedley* v. *Pinkney's Co.*, (1894) A. C. 222. Whether such warranty extends to latent defects, *quære*; that it does not in contracts by land has been decided in *Readhead* v. *Mid. R. Co.*, L. R. 4 Q. B. 381, though it does extend to everything except latent defects; *Francis* v. *Cockerell*, 5 Id. 501.

Liability of private carriers at sea.

For the distinction between the common law liability of common carriers by water, and those who are not common carriers, see *Nugent* v. *Smith*, 1 C. P. D. 423. In that case, Cockburn, C.J., in an historical review of the authorities, questioned the position taken by Brett, J., in the court below, that no such distinction exists.

Liability of carriers by land and water.

Railways Regulation Act, 1868, 31 & 32 Vict. c. 119. S. 14.

The liability of carriers by land and water is further modified by the Railways Regulation Act, 1868, s. 14, which enacts that "where a company, by through booking, contracts to carry any animals, luggage, or goods from place to place—partly by railway and partly by sea—or partly by canal and partly by sea: a condition exempting the company from liability for any loss or damage which may arise during the carriage of such animals, luggage, or goods by sea, from the act of God, the King's enemies, fire, accidents from machinery, boilers and steam, and all and every other dangers and accidents of the seas, rivers, and navigation,

of whatever nature and kind soever, shall, if published in a conspicuous manner in the office where such through booking is effected, and if printed in a legible manner on the receipt or freight note which the company gives for such animals, luggage, or goods, be valid as part of the contract between the consignor of such animals, luggage, or goods, and the company, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition. For the purposes of this section the word 'company' includes the owners, lessees, or managers of any canal or other inland navigation."

CARRIERS' LIABILITIES.

S. 16 incorporates the Railway and Canal Traffic Act, so that conditions affecting such traffic, to be binding, must be reasonable and signed; see *Cohen* v. *S. E. R. Co.*, 2 Ex. D. 253, where it was so held, following *Moore* v. *Mid. R. Co.*, Ir. R. 9 C. L. 20, and not *Doolan* v. *Mid. R. Co.*, 10 Id. 37, which overruled the former case (Whiteside, C.J., *diss.*), but was subsequently reversed, 2 App. Cas. 792. The Railways Regulation Act, 1871, s. 12, provides that where a railway company, under a contract for carrying persons, animals, or goods by sea, procures the same to be carried in a vessel not belonging to the railway company, their liability is to be the same as though the vessel belonged to the company; see *Moore* v. *Mid. R. Co.*, *supra*.

S. 16.

Railways Regulation Act, 1871, 34 & 35 Vict. c. 78, s. 12.

Where goods consigned to a vendee are lost through the default of the carrier, the consignee is the proper person to sue, for the consignor was his agent to retain the carrier; *Dawes* v. *Peck*, 8 T. R. 330; *Dutton* v. *Solomonson*, 3 B. & P. 582; *King* v. *Meredith*, 2 Camp. 639; *Brown* v. *Hodgson*, Id. 36; *L. & N. W. R. Co.* v. *Bartlett*, 7 H. & N. 400. It is otherwise where the goods were sent merely for approval; *Swain* v. *Shepherd*, 1 M. & Rob. 224; or the consignee is the agent of the consignor; *Sargent* v. *Morris*, 3 B. & Ald. 277; or the carrier has contracted to be liable to the consignor in consideration of the latter's becoming responsible for the price of the carriage; *Moore* v. *Wilson*, 1 T. R. 659; *Davis* v. *James*, 5 Burr. 2680; or where the property in the goods has not yet passed to the vendee, as, for instance, when there is no evidence of a contract sufficient to satisfy the Statute of Frauds, and the carrier is not of the vendee's selection; *Coats* v. *Chaplin*, 3 Q. B. 483; *Norman* v. *Phillips*, 14 M. & W. 277; *Coombs* v. *Bristol & E. R. Co.*, 3 H. & N. 510; or, to speak generally, where the carrier is employed by the consignor, and the goods are at

Whether consignor or consignee should sue.

CARRIERS' LIABILITIES.

his risk; *Dunlop* v. *Lambert*, 6 Cl. & F. 600; see *Freeman* v. *Birch*, 3 Q. B. 492, n.; *Cork Distilleries Co.* v. *G. S. & W. R. Co.*, L. R. 7 H. L. 277–8; and see *G. W. R. Co.* v. *Bagge*, 15 Q. B. D. 625, where the consignor had agreed with the consignee to pay the carriage.

Telegrams.

It has been held here, contrary to the view taken in America, that there is no analogy between a person to whom a telegram is sent and a consignee of goods so as to make the former the proper person to sue the telegraph company; *Playford* v. *U. K. Telegraph Co.*, L. R. 4 Q. B. 706. And an action will not lie at the suit of the consignee against the telegraph company for delivering a telegram purporting to come from a person who has not in fact sent one in such terms; for there is no consideration moving from the consignee to the company from which a contract on their part that they have authority to deliver the telegram in question may be inferred; *Dickson* v. *Reuter's Co.*, 3 C. P. D. 1; and for the like reason they are not liable as for a breach of duty.

Evidence of loss.

In the case of an action brought against a carrier, it is sufficient *primâ facie* evidence of a loss by his negligence to show that the goods never reached the consignee, or a short delivery; *Hawkes* v. *Smith*, Car. & M. 72, Rolfe, B. But where they are bailed to a booking-office keeper to be delivered to a carrier, the plaintiff must show by direct evidence, that they were not delivered to one; *Gilbart* v. *Dale*, 5 A. & E. 543; *Griffiths* v. *Lee*, 1 C. & P. 110; *Mid. R. Co.* v. *Bromley*, 17 C. B. 372.

Pleading.

With regard to the mode of pleading in an action against a carrier, formerly the practice was to set out the custom of the realm. That was discontinued because, the custom of the realm being the law of the realm, the courts take notice of it. Afterwards the practice became to state the defendants to be *common carriers for hire, totidem verbis*. If the defendant pleaded an acceptance of the goods on the special terms of a carrier's notice, the plaintiff, if he meant to rely upon *gross negligence* as rendering the defendant liable notwithstanding the notice, must have replied or new assigned such negligence; *Wyld* v. *Pickford*, 8 M. & W. 443; *Butt* v. *G. W. R. Co.*, 11 C. B. 140. Since the Judicature Act it has been usual simply to state the delivery to the carrier as a carrier for hire and the loss or short delivery (see Allen's Forms, 131 *et seq.*).

If goods have been carried under a special contract, the

declaration ought in general to be upon such contract, and should not allege a receipt by the defendants as common carriers; see *White* v. *G. W. R. Co.*, 2 C. B. N. S. 7, and *Phillips* v. *Edwards*, 4 H. & N. 813. In *Simons* v. *G. W. R. Co.*, 2 C. B. N. S. 620, the defendants were held liable as common carriers, their servants having taken advantage of the plaintiff and induced him by a misrepresentation to sign a special contract.

Whether tort or contract.

There have been cases in which the question was whether an action against a carrier was "an action founded on contract" or "an action founded on tort," within the meaning of enactments in respect of costs in actions which could have been brought in a county court; see now the County Courts Act, 1888, s. 116. An action against a carrier for the loss through his negligence of goods delivered to him for carriage is "founded on contract;" *Bayliss* v. *Lintott*, L. R. 8 C. P. 345; and that is so, even in the case of a "common carrier:" *Fleming* v. *M. S. & L. R. Co.*, 4 Q. B. D. 81. It was held in *Tattan* v. *G. W. R. Co.*, 2 E. & E. 844, that an action against a common carrier based upon the custom of the realm was not an "action of contract" within the 19 & 20 Vict. c. 108, s. 30, now repealed; but it seems that that decision is not an authority upon the present enactment; see *Fleming* v. *M. S. & L. R. Co.*, *supra*. An action against a carrier for wrongfully refusing to re-deliver goods to an unpaid vendor who has stopped them in transitu is "founded on tort," because the stoppage determines the contract of carriage; *Pontifex* v. *Mid. R. Co.*, 3 Q. B. D. 23. So is an action by a passenger against a railway company for personal injuries caused by their servant's negligence; *Taylor* v. *M. S. & L. R. Co.*, (1895) 1 Q. B. 134, as explained in *Kelly* v. *Metr. R. Co.*, Id. 944.

Carrier's duty to deliver.

It is the duty of a carrier not only to carry safely, but also, if no time be stipulated, to carry within a reasonable time; *Raphael* v. *Pickford*, 5 M. & Gr. 551; *G. N. R. Co.* v. *Taylor*, L. R. 1 C. P. 385. He is not liable for mis-delivery, if in making such delivery he has followed the usual course of business; *McKean* v. *McIvor*, L. R. 6 Ex. 36.

When his liability ceases.

Questions have arisen as to the time during which the liability of the carrier continues, and there is sometimes considerable difficulty in determining the point at which he ceases to hold the goods in his capacity of carrier, though retaining control or possession of them. It is for the jury (when there is no written contract) to determine

CARRIERS' LIABILITIES.

the extent of the agreed transit; as, for instance, in the case of goods carried across a ferry, it is for the jury to determine, from evidence of the practice at the ferry, whether the owners of the ferry have undertaken to carry goods up a slip, or only to land them on the shore; see *Walker* v. *Jackson*, 10 M. & W. 161. For what constitutes a delivery of cattle, see *Rooth* v. *N. E. R. Co.*, L. R. 2 Ex. 173; *Shepherd* v. *Bristol & E. R. Co.*, 3 Id. 189.

Liability of carriers for loss or injury beyond their own line.

Where goods are delivered at the office of a railway company to be carried from one terminus to another, it may be inferred by the jury that this company is answerable for the whole transit, though in part on the line of another company; *Muschamp* v. *L. & P. J. R. Co.*, 8 M. & W. 421; *Bristol & E. R. Co.* v. *Collins*, 7 H. L. C. 149; *Mytton* v. *Mid. R. Co.*, 4 H. & N. 615; and as to passengers, see *Blake* v. *G. W. R. Co.*, 7 H. & N. 987; *Buxton* v. *N. E. R. Co.*, L. R. 3 Q. B. 549; *Thomas* v. *Rhymney R. Co.*, 6 Id. 266; *Hall* v. *N. E. R. Co.*, 10 Id. 437; *John* v. *Bacon*, L. R. 5 C. P. 437; and compare *Wright* v. *Mid. R. Co.*, L. R. 8 Ex. 137. A railway company may, however, protect itself by a condition from liability for the loss of goods beyond its own line, inasmuch as the Railway and Canal Traffic Act only extends to the traffic on the company's own lines or those worked by it, and such a condition is therefore binding, though unsigned, if the customer had the means of knowing it; *Zunz* v. *S. E. R. Co.*, L. R. 4 Q. B. 539. The company which actually carries the passenger is responsible for negligence, if it can be inferred that the contract was really made with it, though the ticket may have been issued by another company; and if it cannot be inferred that the contract was made with it, still, having received the passenger for carriage, it is liable for misfeasance, though not for nonfeasance; *Foulkes* v. *Met. Dist. R. Co.*, 5 C. P. D. 157.

Duties at end of transit.

When the goods have arrived at the end of the transit, it seems that the carrier is bound to keep them a reasonable time at his own risk for the owner, and that, during the period for which he keeps them under an obligation to do so, springing out of his receipt of them as a carrier, he is subject to the same liability as during their transit; see *Hyde* v. *Trent Nav. Co.*, 5 T. R. 389; *Shepherd* v. *B. & E. R. Co.*, L. R. 3 Ex. 189. After that period his extraordinary liability as a common carrier is, it seems, at an end, and he remains liable only to the same extent as ordinary depositees; see *per* Lord Abinger, *Cairns* v. *Robins*,

CARRIERS' LIABILITIES.

8 M. & W. 258; *Heugh* v. *L. & N. W. R. Co.*, L. R. 5 Ex. 51; *Chapman* v. *G. W. R. Co.*, 5 Q. B. D. 278. In the case of luggage which a passenger has not kept under his own control, the liability of a railway company does not cease until he has had reasonable time to take possession of it; *Patscheider* v. *G. W. R. Co.*, 3 Ex. D. 153; *Firth* v. *N. E. R. Co.*, 36 W. R. 467. In *Hodkinson* v. *L. & N. W. R. Co.*, 14 Q. B. D. 228, where the passenger had taken possession of her luggage, but had re-delivered it to a porter for safe custody, the company were held to be freed from liability.

Whilst the goods are in his possession, the carrier is bound to take proper means for their preservation, and it was even held to be within the scope of the duty of a railway company employed to carry quicks, to plant them, or allow them to be planted, in their own land for that purpose; *Giles* v. *Taff Vale R. Co.*, 2 E. & B. 822.

Where consignee refuses to take delivery.

If the goods are tendered to the consignee, and he refuses to receive them, it is not, as a matter of law, the duty of the carrier to give the consignor notice of the refusal, but he is bound to do what under the circumstances may be reasonable. In *Hudson* v. *Baxendale*, 2 H. & N. 575, the defendants, on the refusal by the consignee to receive a puncheon of gin, which the plaintiff had employed them to carry to him, put it into a warehouse, and left it there for two months, without giving notice to the plaintiff. At the end of this period it was found that part of its contents was gone. The jury found that the defendants had acted in a reasonable manner, and gave a verdict in their favour, which was upheld. In *G. W. R. Co.* v. *Crouch*, 3 H. & N. 183, the carriers took a parcel, the very next morning after a refusal to receive it, back from Plymouth to London, and they were held to be liable for so doing, the jury having found that the parcel was sent back before the expiration of a reasonable time. And see *Heugh* v. *L. & N. W. R. Co.*, L. R. 5 Ex. 51. In *G. N. R. Co.* v. *Swaffield*, L. R. 9 Ex. 132, the defendant, who had refused to take delivery of a horse, which he had consigned, addressed to himself at a station on the plaintiffs' line, was held liable to repay to the plaintiffs the expenses of keeping the horse at livery.

Land carriers' liability in respect of goods warehoused.

In *Cairns* v. *Robins*, 8 M. & W. 258, goods were sent by a carrier, who delivered them to his customer, accompanied by a printed bill, which stated that "any goods that shall have remained three months in the warehouse without being

claimed, or on account of non-payment of the charges thereon, will be sold to defray the carriage and other charges thereon, or the general lien, as the case may be, together with warehouse-rent and expenses." The customer sent them back to the carrier's warehouse to await his orders. They remained there more than a year, and then were lost. The customer brought an action treating the carrier as a bailee for reward, and a verdict found for the plaintiff was upheld by the Court of Exch. on the ground, as stated by Alderson, B., that "there was evidence from whence the jury might reasonably find that, in consideration that the parties whose goods were carried would pay a certain sum, the defendants would not only carry them, but would warehouse them for three months, the compensation so paid being a compensation not only for carrying, but for warehouse-rent also."

Delivery by carrier by sea.

In *Bourne* v. *Gatliff*, 5 Scott, 667, 3 Scott, N. R. 1, 8 Id. 604, 11 Cl. & F. 45, the duty of a carrier by sea was much considered. It was there held by the Courts of C. P. and Exch. Cham., and by the H. L., that in the absence of any course of dealing or usage of the port to justify him, a carrier by sea under a bill of lading of goods to be delivered "at the port of London, (all and every the dangers of the sea, &c., excepted,) unto G. or assigns, on paying for the said goods, freight," &c., was not entitled immediately on the arrival of the vessel, and without notice to the owner, to land the goods; and that, having so landed them on a wharf where, before coming to the hands of the owner, they were destroyed by accidental fire, the carrier was responsible for their loss. In the same case, upon a plea to the second count, a question arose as to the liability of a carrier by sea, who, for an additional hire, undertakes, after the arrival of the goods, to take care of them at the wharf where they are landed, and to convey them within a reasonable time to the place of business of the customer. The Court of C. P. held that he was liable for a loss of the goods by accidental fire whilst on the wharf, there being no ground for supposing him to be clothed with one degree of responsibility whilst taking care of the goods at the wharf, and another and different degree whilst carrying the goods from the wharf, inasmuch as both those duties formed part of the same express contract, and were paid for by the same reward; and that court referred to *Hyde* v. *Trent Nav. Co.*, 5 T. R. 389, as an authority for their judgment. In the

His liability for goods on wharf.

Exch. Cham., that part of the judgment was reversed on the ground that the second count did not state an employment of the defendants as common carriers, a point not noticed in the C. P., and the principle acted upon by that court is therefore, perhaps, untouched by the reversal. On the other hand, a shipowner cannot after the demurrage days keep the goods for an unlimited time and then sue for damages; *Erichsen* v. *Barkworth*, 3 H. & N. 894, 900, *per* Crompton, J.; and see *Mors le Blanch* v. *Wilson*, L. R. 8 C. P. 227.

VI. *Mandatum.*

VI. *Mandatum.*—The sixth and last class of bailments is (according to Lord Holt) *mandatum*, or a delivery of goods to somebody who is to carry them, or to do something about them, *gratis*. And this might have been classed under the same head with *depositum*. For as the *keeping*, *carrying*, and *working upon* goods *for hire* are all included, both by Lord Holt and Sir W. Jones, under the same head, there seems no good reason why the *keeping*, *carrying*, and *working upon* them *gratuitously* should not have been so likewise. Certain it is that the liabilities of the *depositary* and of the *mandatary* are precisely the same; both (in the absence, at least, of a contract in special terms) are bound to *slight diligence*, and to slight diligence only, and liable for nothing short of *gross negligence*, the reason in each case being the same, namely, that neither is to receive any reward for his services. Accordingly, whenever the extent of a mandatary's liability is discussed we find the cases respecting that of depositaries cited, and relied upon, and so *vice versâ*. The cases of *Beauchamp* v. *Powley*, 1 M. & Rob. 38, *Shiells* v. *Blackburne*, 1 H. Bl. 158, and *Dartnall* v. *Howard*, 4 B. & C. 345, the facts of which are respectively stated at the commencement of this note, were decisions on the responsibility of mandataries, and from those, as well as from the general principle, it appears that such bailees are liable for *gross negligence*, and for that only. See also *Moffatt* v. *Bateman*, L. R. 3 P. C. 115.

Mandatary bound to slight diligence only.

A gratuitous agent is, however, bound to use such skill as he possesses; for instance, a person who rides a horse gratuitously at the owner's request for the purpose of showing him for sale, if proved to be a person skilled in the management of horses, is held equally liable with a borrower for injury sustained by the horse whilst ridden by him; *Wilson* v. *Brett*, 11 M. & W. 113. And this, as before

Gratuitous agent bound to use such skill as he possesses.

pointed out, is not a real exception to the rule that gratuitous bailees are liable for gross negligence only, since, in the case of a skilled person, that may well be considered gross negligence, which, in an ordinary unskilled person, would be only a slight want of care.

As to what amounts to such an undertaking of a gratuitous office or employment as will impose a liability to fulfil its duties, see *Elsee* v. *Gatward*, 5 T. R. 143 ; *Balfe* v. *West*, 13 C. B. 466 ; *Fish* v. *Kelly*, 17 C. B. N. S. 194.

Higher division of bailees into three classes.

From the above cursory view of the law of bailments, it will be seen that, besides the six classes enumerated by Lord Holt, bailees may be distributed into three general classes, varying from one another in their degrees of responsibility. The *first* of these is, where the bailment is for the benefit of the bailor alone : this includes the cases of *mandates* and *deposits*, and in this the bailee is liable only for *gross negligence*. The *second* is, where the bailment is for the benefit of the bailee alone : this comprises *loans*, and in this class the bailee is bound to *the very strictest diligence*. The *third* is, where the bailment is for the benefit both of bailor and bailee ; this includes *locatio rei*, *vadium*, and *locatio operis*, and in this class an *ordinary and average degree of diligence* is sufficient to exempt the bailee from responsibility.

1. For benefit of bailor only.

2. For benefit of bailee only.

3. For benefit of both.

Bailee when liable in conversion.

A bailee dealing negligently with goods intrusted to him does not thereby necessarily lose his character of bailee so as to be liable as for a conversion ; see *Heald* v. *Carey*, 11 C. B. 977. *Contra*, if he commits an active wrong which determines the bailment, *Clark* v. *Gilbert*, 2 B. N. C. 356 ; *Cooper* v. *Willomatt*, 1 C. B. 672. See *Austin* v. *Manchester R. Co.*, 10 C. B. 454 ; *Fenn* v. *Bittleston*, 7 Exch. 152 ; *Chinery* v. *Viall*, 5 H. & N. 288 ; *Johnston* v. *Stear*, 15 C. B. N. S. 330 ; *Mulliner* v. *Florence*, 3 Q. B. D. 484. Replevin will not lie at the suit of the bailor against a person to whom the bailee has delivered the goods ; *Mennie* v. *Blake*, 6 E. & B. 842.

Duty of lender to disclose defects.

In *Blakemore* v. *Bristol & Exeter R. Co.*, 8 E. & B. 1035, Coleridge, J., delivering the judgment of the court, made some valuable remarks on the duty of the gratuitous lender of a chattel to disclose defects in it of which he is aware. " It is surprising," said the learned judge, " how little in the way of decision in our courts is to be found in our books upon the obligations which the mere lender of a chattel for use contracts towards the borrower. Pothier,

in his *Traité du Prêt à Usage*, to be found in the 4th vol. of his works by Dupin, pt. 3, pp. 37 to 42, enters into the subject at some length; and Story also treats of it, *Bailment*, s. 275. The principles which these two writers draw mainly from the Roman law, may be the more safely relied on as engrafted into the common law, considering that the whole of this branch of our law is so mainly built on the Roman, as the judgment in *Coggs* v. *Bernard* demonstrates. It may, however, we think, be safely laid down that the duties of the borrower and lender are in some degree correlative. The lender must be taken to lend for the purpose of a beneficial use by the borrower; the borrower, therefore, is not responsible for reasonable wear and tear; but he is for negligence, for misuse, for gross want of skill in the use; above all, for anything which may be qualified as legal fraud. So, on the other hand, as the lender lends for beneficial use, he must be responsible for defects in the chattel, with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured. *Adjuvari quippe nos, non decipi, beneficio oportet*, is the maxim which Story borrows from the Digest; and Pothier is express to the same effect, citing, as Story does also, the instance, *Qui sciens vasa vitiosa commodavit, si ibi infusum vinum, vel oleum, corruptum, effusumve est, condemnandus eo nomine est.* This is so consonant to reason and justice, that it cannot but be part of our law. Would it not be monstrous to hold that, if the owner of a horse, knowing it to be vicious and unmanageable, should lend it to one who is ignorant of its bad qualities, and conceal them from him, and the rider, using ordinary care and skill, is thrown from it and injured, he should not be responsible? The principle laid down in *Coggs* v. *Bernard*, and followed out by Lord Kenyon and Buller, J., and by Lord Tenterden, in the *nisi prius* cases cited in the note, 1 Sm. L. C. 162 (4th ed.), that a gratuitous agent or bailee may be responsible for gross negligence or great want of skill, gets rid of the objection that might be urged from want of consideration to the lender. By the necessarily implied purpose of the loan, a duty is contracted towards the borrower not to conceal from him those defects known to the lender which may make the loan perilous or unprofitable to him." See also *McCarthy* v. *Young*, 6 H. & N. 329. As to the analogous duty upon the sender of goods by a carrier to communicate their dangerous

Analogous duty of consignor

and letter.

nature, see *Farrant* v. *Barnes*, 31 L. J. C. P. 137; and as to the duty of the letter in contracts of hiring to supply a thing reasonably fit for the purpose for which it is intended, see *Sutton* v. *Temple*, 12 M. & W. 60; *Fowler* v. *Lock*, L. R. 7 C. P. 272, 10 Id. 90; *Stanton* v. *Richardson*, 9 Id. 390; and compare *Readhead* v. *Mid. R. Co.*, L. R. 4 Q. B. 379; *Francis* v. *Cockerell*, 5 Id. 184, 501; *Hyman* v. *Nye*, 6 Q. B. D. 685; *Robertson* v. *Amazon Co.*, 7 Id. 598. See also notes to *Chandelor* v. *Lopus*, *post*, vol. ii.

Bailee when criminally liable. 24 & 25 Vict. c. 96, s. 3.

By the Larceny Act, 1861, s. 3, any person who, being a bailee of any property, fraudulently takes or converts it to his own use or the use of any person other than the owner, is to be deemed guilty of larceny, although he do not break bulk or otherwise determine the bailment. A person who has received money from another, and is only bound to return the amount, not the identical coins, is not a bailee within this section; *R.* v. *Hassall*, 30 L. J. M. C. 175. It was doubted (before the passing of the Married Women's Property Act, 1882, s. 1), whether a *feme covert* could be so; *R.* v. *Robson*, 31 L. J. M. C. 22; but it is now decided that an infant may be; *R.* v. *Macdonald*, 15 Q. B. D. 323; see further as to who is a bailee within the section, *R.* v. *Bunkall*, 33 L. J. M. C. 75; *R.* v. *Ashwell*, 16 Q. B. D. 190.

Bailee's right to damages for injury to the goods.

It has been held that a bailee of goods cannot recover as damages against a third party who injures the goods the amount of such injury when the bailee is himself not liable therefor to the bailor; *Claridge* v. *S. Staffordshire Tramways Co.*, (1892) 1 Q. B. 422. In America, the contrary was expressly decided in *Woodman* v. *Nottingham*, 49 New Hampshire R. 387; see Sedgwick's Leading Cases on the Measure of Damages, 685.

ASHBY *v.* WHITE ET ALIOS.

TRINITY.—2 *ANNÆ.*

[REPORTED, 2 LORD RAYMOND, 938 ; 3 ID. 320.]

A man who has a right to vote at an election for members of Parliament may maintain an action against the returning officer for refusing to admit his vote, though his right was never determined in parliament, and though the persons for whom he offered to vote were elected (*a*).

BUCKINGHAMSHIRE, *to wit.* Matthias Ashby complains of William White, Richard Talbois, William Bell, and Richard Heydon, being in the custody of the marshal of the Marshalsea of the lord the king, before the king himself, for that, *to wit*, That whereas, on the 26th day of November, in the 12th year of the reign of the lord the now king, a certain writ of the said lord the now king, issued out of the Court of Chancery of him the said lord the now king, at Westminster, in the county of Middlesex, directed to the then sheriff of Buckinghamshire aforesaid, reciting that the said lord the king, by the advice and assent of his council, for certain arduous and urgent businesses concerning him the said lord the king, the state, and the defence of his realm of England, and of the church of England, has ordained his certain parliament to be holden at his city of Westminster, on the 6th day of February, then next coming, and there with the prelates, nobles, and peers of his said kingdom, to have discourse and treaty, the said lord the now king commanded the then sheriff of Buckinghamshire, by the said writ firmly enjoining, that, having made proclamation in his next said county court after the receipt of the same

(*a*) S. C., 1 Salk. 19 ; 3 Salk. 17 ; Holt. 524 ; 6 Mod. 45 ; see 1 Bro. Parl. Cas. 62 ; 8 St. Tr. 89. Somewhat similar to this action is that of *Perring* v. *Harris*, 2 Moo. & Rob. 5, against an overseer for maliciously omitting a parishioner's name from the rate, *per quod* she was unable to obtain a beer licence. So, against a sheriff for delaying to execute a writ, *per quod* the plaintiff incurred unnecessary costs ; *Mason* v. *Paynter*, 1 Q. B. 974. So, against an officer of customs, for refusing to sign a bill of entry, without payment of an excessive duty ; *Barry* v. *Arnaud*, 10 A. & E. 646. As to an action against a clergyman for refusing to solemnize a marriage, see *Davis* v. *Black*, 1 Q. B. 900.

(Declaration.)

writ to be holden, of the day and place aforesaid, two knights, girded with swords, the most fitting and discreet of the county aforesaid, and of every city of that county two citizens, and of every borough two burgesses of the more discreet and most sufficient, should be freely and indifferently chosen by those whom such proclamation should concern, according to the form of the statute thereupon made and provided, and the names of the said knights, citizens, and burgesses, so to be chosen, to be inserted in certain indentures thereof, to be made between him, the then sheriff, and those who should be concerned at such election (although such person to be chosen should be present or absent), and should cause them to come at the said day and place; so that they the said knights, citizens, and burgesses, might severally have full and sufficient power for themselves and the commonalty of the county, cities, and boroughs aforesaid, to do and consent to those things which should then happen to be ordained there of the common council of the said realm of him the said lord the now king (by God's assistance), upon the businesses aforesaid; so that for want of such power, or because of an improvident election of the knights, citizens, and burgesses aforesaid, the said businesses might not in anywise remain undone; and should certify, without delay, that election made in the full county of him the then sheriff, distinctly and openly, under his seal, and the seals of those who should be concerned at that election, to the said lord the now king, in his Chancery, at the said day and place; sending to him the said lord the king the counter part of the indenture aforesaid, sewed to the same writ, together with that writ; which said writ, afterwards, and before the 6th day of February in the writ aforesaid mentioned, *to wit*, on the 29th day of December, in the twelfth year abovesaid, at the borough of Aylesbury, in the said county of Bucks, was delivered to one Robert Weedon, Esq., then sheriff of the same county of Bucks, to be executed in form of law; by virtue of which said writ, the aforesaid Robert Weedon, being then and there sheriff of the county of Bucks aforesaid, as before is set forth, afterwards and before the aforesaid 6th day of February, *to wit*, on the 30th day of December, in the 12th year abovesaid, at the Borough of Aylesbury aforesaid, in the

said county of Bucks, made his certain precept in writing, under the seal of him the said Robert Weedon, of his office of Sheriff of the County of Bucks aforesaid, directed to the constables of the borough of Aylesbury aforesaid, reciting the day and place of the parliament aforesaid to be holden, thereby requiring them and giving to them in command, that having made proclamation within the borough aforesaid of the day and place in the same precept recited, they should cause to be freely and indifferently chosen two burgesses of that borough, of the more discreet and most sufficient, by those whom such proclamation should concern, according to the form of the statutes in such cases made and provided, and the names of the said burgesses so elected (although they should be present or absent) to be inserted in certain indentures between the said sheriff and those who should have interest in such election; and that they should cause them to come at the day and place in the same precept recited, so that the said burgesses might have full and sufficient power for themselves and the commonalty of the borough aforesaid, to do and consent to those things which should then happen to be ordained there of the common council of the said realm (by God's assistance) upon the business aforesaid; so that for want of such power, or because of an improvident election of the burgesses aforesaid, the said businesses might not remain undone; and that they should, without delay, certify the election to him the said then sheriff, sending to the same sheriff the counterpart of the indenture aforesaid annexed to the said precept, that he the said sheriff might certify the same to the said lord the king in his Chancery at the day and place aforesaid; which said precept afterwards and before the said 6th day of February, *to wit*, on the same 30th day of December in the year abovesaid, at the borough of Aylesbury aforesaid, in the said county of Bucks, was delivered to them, the said William White, Richard Talbois, William Bell, and Richard Heydon, then, and until after the return of the same writ, being constables of the borough of Aylesbury aforesaid, to be executed in form of law; to which said William White, Richard Talbois, William Bell, and Richard Heydon, by reason of their office of constables of the borough aforesaid, the execution of that precept of right did then and there belong; by virtue of which said precept, and by force of

(Declaration.)

the writ aforesaid, they the said burgesses of the borough of Aylesbury, being in that behalf duly forewarned, afterwards and before the 6th day of February, *to wit*, on the 6th day of January in the 12th year abovesaid, at the borough of Aylesbury aforesaid, before them, the said William White, Richard Talbois, William Bell, and Richard Heydon, the constables aforesaid, were assembled to elect two burgesses for the borough, according to the exigency of the writ and precept aforesaid, and during that assembly, to that intention, and before such two burgesses, by virtue of the writ and precept aforesaid, were elected, *to wit*, on the day and year last abovesaid, at the borough of Aylesbury aforesaid, in the county aforesaid, he, the said Matthias Ashby, then and there, being a burgess and an inhabitant of the borough aforesaid, and not receiving alms there or anywhere else, then or before, but being duly qualified and entitled to give his vote for the choosing of two burgesses for the borough aforesaid, according to the exigency of the writ and precept aforesaid, before them, the said William White, Richard Talbois, William Bell, and Richard Heydon, the four constables of that borough, to whom then and there it did duly belong to take and allow the vote of him, the said Matthias Ashby, of and in the premises, was ready and offered to give his vote for choosing Thomas Lee, bart., and Simon Mayne, esq., two burgesses for that parliament, by virtue and according to the exigency of the writ and precept aforesaid; and the vote of him, the said Matthias, then and there of right ought to have been admitted; and the aforesaid William White, Richard Talbois, William Bell, and Richard Heydon, so being then and there constables of the borough aforesaid, were then and there requested to receive and allow the vote of him, the said Matthias Ashby, in the premises; nevertheless they, the said William White, Richard Talbois, William Bell, and Richard Heydon, being then and there constables of the borough aforesaid, well knowing the premises, but contriving, *and fraudulently and maliciously intending, to damnify him, the said Matthias Ashby, in this behalf*, and wholly to hinder and disappoint him of his privilege of and in the premises, did then and there hinder him, the said Matthias Ashby, to give his vote in that behalf, and did then and there absolutely refuse to permit

him, the said Matthias Ashby, to give his vote for choosing two burgesses for that borough to the parliament aforesaid, and did not receive, nor did they allow the vote of him, the said Matthias Ashby, for that election: and two burgesses of that borough were elected for the parliament aforesaid (he, the said Matthias Ashby, being excluded, as before is set forth) without any vote of him, the said Matthias Ashby, then and there, by virtue of the writ and precept aforesaid, to the enervation of the aforesaid privilege of him, the said Matthias Ashby, of and in the premises aforesaid: whereupon the said Matthias Ashby saith that he is injured, and has sustained damage to the value of 200*l.*, and thereupon he brings suit, &c. Not guilty. Verdict for the plaintiff.

Note.—Judgment was arrested in B. R. by three judges against Holt, C. J. But on the 14th of January, 1703, this judgment was reversed in the House of Lords, and judgment given for the plaintiff by fifty lords against sixteen.

After a verdict for the plaintiff on not guilty pleaded, it was moved in arrest of judgment by Serjeant Whitaker that this action was not maintainable. And for the difficulty, it was ordered to stand in the paper, and was argued, Trin. 1 Q. Anne, by Mr. Weld and Mr. Montague for the defendants, and this term judgment was given against the plaintiff, by the opinion of Powell, Powys, and Gould, justices; Holt, Chief Justice, being of opinion for the plaintiff.

Gould, J.—I am of opinion, that judgment ought to be given in this case for the defendants, and I cannot by any means be reconciled to give my judgment for the plaintiff, for there are no footsteps to warrant such an opinion, but only a single case. I am of opinion, that this action is not maintainable for these four reasons: first, because the defendants are judges of the thing, and act herein as judges; secondly, because it is a parliamentary matter, with which we have nothing to do; thirdly, the plaintiff's privilege of voting is not a matter of property or profit, so that the hindrance of it is merely *damnum sine injuriâ*; fourthly, it relates to the public, and is a popular offence.

As to the first, the king's writ constitutes the defendant a judge in this case, and gives him power to allow or disallow the plaintiff's vote. For this reason it is, that no action lies

(Gould, J.)

against a sheriff for taking insufficient bail, because he is the judge of their sufficiency. So is the case of *Metcalfe* v. *Hodgson*, Hutt. 120, and their sufficiency is not traversable, 1 Lev. 86, *Bentley* v. *Hore*. Upon the same reason the resolution of the court is founded in the case of *Hammond* v. *Howell*, Mod. 218, that no (*b*) action lies against a man for what he does as a judge. 9 Hen. 6, fo. 60, pl. 9.

2. This is a parliamentary matter, and the parliament is to judge whether the plaintiff had a right of electing or not, for it may be a dispute whether the right of election be in a select number or in the populace; and this is proper for the parliament to determine, and not for us; and if we should take upon us to determine that he has a right to vote, and the parliament be of opinion that he has none, an inconvenience would follow from contrary judgments. So in 2 Vent. 37, *Onslow's Case*, it is adjudged that no (*c*) action lies for a double return of members to serve in parliament. The resolution of the King's Bench in the case of *Barnardiston* v. *Soame*, 2 Lev. 114, was given on this particular reason, that there had been a determination before in parliament in favour of the plaintiff; and Hale said, "we pursue the judgment of the parliament, but the plaintiff would have been too early, if he had come before;" and yet that judgment was reversed.

3. It is not any matter of profit, either *in præsenti* or *in futuro*. To raise an action upon the case, both damage and injury must concur, as in the case of 19 Hen. 6, 44, cited Hob. 267. If a man forge a bond in another's name, no action upon the case lies, till the bond be put in suit against the party; so here, it may be, this refusal of the plaintiff's vote may be no injury to him, according as the parliament shall decide the matter; for they may adjudge that he had no right to vote, whereby it will appear, the plaintiff was mistaken in his opinion as to his right of election, and consequently has sustained no injury by the defendants' denying to take his vote.

4. It is a matter which relates to the public, and is a kind of popular offence, and therefore no action is given to the party; for by the same reason one man may bring an action, a hundred

(*b*) See 1 L. Ray. 454. (*c*) 1 Wils. 127, *contra*.

may, and so actions infinite for one default: which the law will not allow, as is agreed in *William's Case*, 5 Co. 73 a, and *Boulston's Case*, Id. 104 b. Perhaps, in this case, after the parliament have adjudged the plaintiff has a right of voting, an information may lie against the sheriff for his refusal to receive it. So the case of *Ford* v. *Hoskins*, Cro. Jac. 368, 2 Brownl. 194. Such an action as this was never brought before, and therefore shall be taken not to lie, though that be not a conclusive reason. As to the case of *Sterling* v. *Turner*, 2 Lev. 50, 2 Vent. 25, where an action was brought by the plaintiff, who was candidate for the place of bridgemaster of London, for refusing him a poll, and adjudged maintainable, there is a loss of a profitable place. So the case of *Herring* v. *Finch*, 2 Lev. 250, where the plaintiff brought an action on the case against the defendant, for that, the plaintiff being a freeman, who had a voice in the election of mayor, the defendant, being the present mayor, refused to admit his voice; in that case the defendant is guilty of a breach of his faith: and in both these cases the plaintiff has no other remedy, either in parliament or anywhere else, as the plaintiff in our case has. So that I am of opinion that judgment ought to be given for the defendant upon the merits. But upon this declaration the plaintiff cannot maintain any action, for the plaintiff does not allege in his count that the two burgesses elected were returned, and if they were never returned, there is no damage to the plaintiff. See 2 Bulstr. 265. But I do not rely upon this fault in the declaration.

Powys, J.—I am of the same opinion, that no action lies against the defendant, 1, Because the defendant as bailiff is *quasi* a judge, and has a distinguishing power either to receive or refuse the votes of such as come to vote, and does preside in this affair at the time of election: though this determination be not conclusive, but subject to the judgment of the parliament, where the plaintiff must take his remedy.

2. If the defendant misbehave himself in his office by making a false or double return, an action lies against him for it on the late statute, 7 & 8 W. 3, c. 7, and therein all this matter of refusing the plaintiff's vote is comprised, and all the special matter is scanned in that action. And if you allow the plaintiff to maintain an action for this matter, then every elector may

(Powys, J.)

bring his action, and so the officer shall be loaded with a number of actions that may ruin him; and he may follow one law suit, though he may not be able to follow many. These actions proceed from heat, I will not call it revenge; and it is not like splitting of actions, *scilicet*, of one cause of action into many, but the causes of action are several, and the court cannot unite them, but A., B., C., D., E., and a hundred more, may at this rate bring actions.

3. There is a vast intricacy in determining the right of electors, and there is a variety, and a different manner and right of election in every borough almost. As in some boroughs every potwaller has a right to vote, in some residents only vote, and in others the outlying burgesses that live a hundred miles off; nay, I know Ludlow, a borough, where all the burgesses' daughters' husbands have a right to vote. But now all this matter is comprised in an action against the officer for a false return. But it is objected that by the law of England every one who suffers a wrong has a remedy; and here is a privilege lost, and shall not the plaintiff have a remedy? To that I answer, first, it is not an injury, properly speaking; it is not *damnum*, for the plaintiff does not lose his privilege by this refusal, for when the latter comes before the committee of elections, the plaintiff's vote will be allowed as a good vote; and so in an action upon the case by one of the candidates for a false return, this tender of his vote by the plaintiff shall be allowed as much as if it had been given actually and received. And if this refusal of the plaintiff's vote be an injury, it is of so small and little consideration in the law, that no action will lie for it; it is one of those things within the maxim *de minimis non curat lex*. In the case of *Ford* v. *Hoskins*, Cro. Jac. 368, Moo. 842, 2 Bulstr. 366, 1 Roll. Rep. 125, where an action is brought against the lord of a copyhold manor, for refusing to accept one named as successor for life by the preceding tenant for life, according to the custom, there the plaintiff suffers an injury, and yet it is adjudged that no action lies. The late statute, 7 & 8 W. 3, c. 7, gives an action against the officer for a misfeasance to the party aggrieved, *i.e.*, to the candidate, who is to have his vote; so that by the judgment of the parliament he cannot have any action. Before the

statute of 23 Hen. 6, no (*d*) action lay for the candidate, who was the party aggrieved, against the officer, for a false return, because it related to parliamentary matters, as is adjudged 3 Lev. 29, 30, *Onslow* v. *Rapley*, and yet he had an injury; and till the 7 & 8 W. 3, no (*e*) action lay for the candidate against the officer for a double return, as is adjudged in the same case, 3 Lev. 29, 2 Ventr. 37, and yet he suffered an injury thereby. *A fortiori* no action shall lie for the plaintiff in this case.

4. This action is not maintainable for another reason, which I think is a weighty one, *viz.* this action is *primæ impressionis*; never the like action was brought before, and therefore as (*f*) Littleton, s. 108, uses it to prove that no action lay on the Statute of Merton, 20 Hen. 3, c. 6, *si parentes conquerantur*, for if it had lain, it would have sometimes been put in use: so here. So in the case of Lord *Say and Seal* v. *Stephens*, Cro. Car. 135, for the law is not apt to catch at actions. It is agreed by the consent of all ages, that no (*d*) action lay at common law against the officer for a double return; and yet in one year, *viz.* 1641, there were no less than seventy double returns, and yet they made no act to help it, though the parliament could not be misconusant of the matter.

5. Another reason against the action is, that the determination of this matter is particularly reserved to the parliament, as a matter properly conusable by them; and to them it belongs to determine the fundamental rights of their house, and of the constituent parts of it, the members: and the courts of Westminster shall not tell them who shall sit there. Besides, we are not acquainted with the learning of elections; and there is a particular cunning in it not known to us, nor do we go by the same rules, and they often determine contrary to our opinions without doors. The late statute, which enacts that the last determination of the house as to the right of election shall be a rule to the judges in the trial of any cause, is a declaration of their power; and the paths the judges are to walk in are chalked out to them, so that they are not left to use their own judgment; but the determination of the house is to be the rule of law to us, and we are not to examine beyond that. Suppose in this action we

(*d*) 1 Wils. 127, *contra*.
(*e*) *Ibid.*
(*f*) See Co. Litt. 81 b, 13th ed., n. 2.

(Powys, J.)

should adjudge one way, and after in parliament it should be determined another way; or suppose a judge of *nisi prius*, before whom the cause comes to be tried, should say, "I am not bound by the rule of the last determination in parliament in this action, for this is another sort of action, not within the meaning of the statute:" these things would be of ill consequence.

6. Another reason against this action is, that if we should allow this action to lie for the plaintiff, *à fortiori* we must allow an action to be maintainable for the candidates against the defendant for the same refusal; for the candidates have both *damnum et injuriam*, and are the parties aggrieved; and if we should allow that, we shall multiply actions upon the officers, at the suit of the candidates, and every particular elector too; so that men will be thereby deterred from venturing to act in such offices, when the acting therein becomes so perilous to them and their families. I will not insist upon the exceptions to the declaration, but give my opinion upon the merits. I think there is a sufficient allegation in the count of the return of the election, especially after a verdict. Nor shall I insist that it does not appear in the declaration how near the party was to be chosen; nor that this action is brought merely for a possibility; for this is an action for a personal injury; and the plaintiff might give his vote for which he pleased, either the candidate that had fewer or more voices; or he might give his vote for one who had no other burgess's voice but the plaintiff's own; for the plaintiff, in those cases, is deprived as much of his privilege, as if the person for whom he voted was nearest to be chosen. But it has been objected that the defendant should not have absolutely refused to receive the plaintiff's vote, but should have reserved it for scrutiny, and should have admitted it *de bene esse*. To that I answer; he might indeed have done so; but he was not obliged to do it, for the officer is supposed to know every man's right and pretence of election, and commonly the weaker party are for bringing in new votes, and devising new contrivances; but the officer ought to disallow them at first, and not give so much countenance to such a practice as to reserve it for a scrutiny. As here in Westminster-hall, when a matter of law

comes before us, if it be a clear case, we may give judgment in it on the first argument, and it will be a good judgment, although it be usual to hear several arguments. The objection of weight is the resolution between *Sterling* and *Turner*, 2 Lev. 50,—Hale said that it was a good precedent,—and the case of *Herring* and *Finch*, 2 Lev. 250, though, as to that case, it was not adjudged upon the matter of law, but went off upon a point of evidence: yet I will admit the action to lie for the plaintiff in those cases, but they do not at all relate to the parliament, but are matters of custom merely relating to the government of the city, and are properly determinable at common law. And although it may be said that this case also relates to the government of the town, so does a public nuisance in a highway, but if a particular person receive an injury, he may have his action: but that does not relate to the parliament as this matter does, and the whole case here turns upon that, *viz.*, its being a parliamentary matter. If we should admit this action to lie, we shall have work enough in Westminster-hall brought in by a side-wind; nay, so much, that we shall even be glad to petition the parliament to take this power away from us. Besides, the judgment here cannot be called properly a determination; it will only be a litigation; for our judgment cannot be cited as an authority in parliament, nor will the parliament mind it, or be bound up by it, for they (*h*) themselves are not bound even by their own determination, but may determine contrary to it, though that be a rule upon the courts of Westminster. But it has been objected, that this is no determination of the election in this judgment, but only of a particular injury. To that I answer, It will be in consequence of a determination of the election; for if the plaintiff had a right to vote, then this action is maintainable; if he has no right, then he can have no action; and, by consequence, twenty others may have a right to vote, and the election may turn upon this single vote; and his right of voting is as much parliamentary as the whole election, and may as much entangle the case. It is said in *Onslow's Case*, 2 Vent. 37, that the courts of Westminster must not enlarge their jurisdiction in these matters, further than the statute gives them;

(*h*) See 2 G. 2, c. 24, s. 4; 1 Dougl. on Elections, 18.

(Powys, J.)

and indeed it is a happiness to us that we are so far disengaged from the heats which attend elections. Our business is to determine of *meum* and *tuum*, where the heats do not run so high as in things belonging to the legislature. Therefore, this being an unprecedented case, I shall conclude with a saying of my Lord Coke, 2 Bulst. 338, *Omnis innovatio plus novitate perturbat quam utilitate prodest.*

Powell, J.—I am of the same opinion, that the judgment ought to be arrested. As to the novelty of this action, I think it no argument against the action; for there have been actions on the case brought, that have never been brought before, but had their beginning of late years; and we must judge upon the same reason as other cases have been determined by. I do not agree with my brothers upon their first reason, that the defendant is a judge. I do not understand what my brother Powys means by saying he is *quasi* a judge: surely he must be a judge or no judge. The bailiff is not a judge, but only an officer or minister to execute the precept. But I agree with them in their other reasons to give judgment against the plaintiff; and chiefly, because in this action there does not appear such an injury or damage as is necessary to maintain an action on the case. An injury must have relation to some privilege the party has. The case of *Turner* v. *Sterling*, 2 Lev. 50, is adjudged upon a particular reason; for the defendant, by refusing him the poll, deprived him of the means of knowing whether he had a right or not. If *cestuy que use* desires the feoffees to make a feoffment over to another, and they refuse, no action upon the case lies against them for this refusal. And in the case of *Ford* against *Hoskins*, 2 Bulstr. 337, 2 Cro. 368, it is resolved that no action lies for the nominee against the lord, for refusing to keep a court, and to admit him (*i*); yet this is a hard case, for the party is

(*i*) But he may have a mandamus; *R.* v. *Lord of the Manor of Hendon*, 2 T. R. 484; *R.* v. *Coggan*, 6 East, 431. And so may the heir; *R.* v. *Masters of Brewers' Co.*, 3 B. & C. 172; though in *R.* v. *Rennett*, 2 T. R. 197, it had been held otherwise. So may the surrenderee of the heir, although the heir was not admitted, upon payment of the proper fine, including the fine payable upon the descent to the heir; *R.* v. *Dullingham*, 8 A. & E. 858, 1 P. & D. 172. But where the heir's title is clearly barred by lapse of time, a mandamus will not be granted to admit him, for he may bring ejectment without; *R.* v. *Agardsley*, 5 Dowl. 19. And in cases involving questions of equity, *e.g.* that of the surrenderee of a

thereby deprived of the means of coming to his right. But that case differs from the case of *Sterling* v. *Turner*; for the party hath a known remedy in Chancery, to compel the lord to hold a court and admit him, but the other had no remedy against the mayor but an action. Here is no injury to the plaintiff; for though he has alleged, in his declaration, that he had a right to vote, and was hindered of it by the defendant, yet that does not give him a right, unless the finding thereof by the jury do confer such right; but that cannot be so, for the jury cannot judge of this right in the first instance, because it is a right properly determinable in parliament. The parliament have a peculiar right to examine the due election of their members, which is to determine whether they are elected by proper electors, such as have a right to elect; for the right of voting is the great difficulty in the determination of the due election, and belongs to the parliament to decide. But it is objected, admitting the plaintiff had a right to vote, and was deprived of it, shall he have no remedy? To that I answer, he shall have a remedy in proper time; but the plaintiff here comes too soon; he shall have a remedy by action after the parliament have determined that he had a right, but not before. This is not such a right, the deprivation whereof will make an injury, till it be determined in parliament. But the plaintiff has a proper remedy by petition to the parliament setting forth his case; and after the parliament have adjudged that he had a right of voting, he shall have an action at law to recover damages, when his right is so fixed and settled. The opinion of my lord Hobart in the case of Sir *William Elvis* and the Archbishop of *York*, Hob. 317, 318, and the reason of that opinion comes very near to the present case: that if the church be litigious, and two clerks be presented to the ordinary, and he award a *jure patronatus* (*k*) to inquire which patron has the right, and the inquest find for one, and yet the ordinary receive the clerk of the other, contrary to the finding of the jury, in that case, if the other patron bring his *quare impedit* against the usurper and his incumbent, not naming the bishop, and

trustee appointed under 11 Geo. 4 & 1 Will. 4, c. 60, s. 8, the Court of Queen's Bench will not interfere by mandamus; *R.* v. *Pitt*, 10 A. & E. 272. Also, inasmuch as the lord must be included in the writ, no mandamus lies to admit to a copyhold held of the crown; *R.* v. *Powell*, 1 Q. B. 352.

(*k*) See the nature of this proceeding explained, 3 Bl. Comm. 246.

(Powell, J.)

proves his title, he may afterwards have an action upon the case against the ordinary for that wilful wrong, delay, and trouble, that he hath put him to, and he shall recover costs and damages, not in respect of the value of the church (for there are no damages for that by the common law, but by West. 2, 13, Edw. 1, st. 1, c. 5, s. 3), but for the other respects before mentioned. But if he name the ordinary in the *quare impedit*, he can have no other action of the case; neither shall he have such action upon the case before he hath tried his title in a proper action, and against the proper parties. So that in that case, though the patron's right, being found by the jury on the *jure patronatus*, is in some measure determined, yet he shall not maintain an action upon the case against the ordinary, but he must first prove his title in a proper manner by a *quare impedit*, and thereby prove the ordinary a disturber; and after that he may bring his action on the case against the ordinary for his damages. Where the party has no possibility of settling his right, as in the case of *Sterling* and *Turner*, there he shall maintain his action for the disturbance before his right be settled; but where he has a proper method, as in our case, he shall not maintain an action till his right be determined; and the reason of this difference is very strong, because of the inconveniences of contrary determinations upon the several actions, or of the different judgments by the House of Commons, and the judges at common law; for the house may be of opinion that the plaintiff has a right to vote, and yet the judges may be of opinion upon the action that he hath none, and give judgment against him; and even though he has a right, he will have no remedy; *et e converso*. But this difference of opinions will be prevented by such previous application to the house before any action brought. Besides, in this case, here is not a damage, upon which this action is maintainable; for, to maintain an action upon the case, there must be either a real damage, or a possibility of a real damage, and not merely a damage in opinion, or consequence of law. For a possibility of a damage, as an action upon the case, lies for the owner of an ancient market, for erecting a new market near his; and yet perhaps the cattle that come to the old market might not be sold, and so no toll due, and consequently no real damage;

but there is a possibility of damage. But in our case there is no possibility of a damage. It is laid in the declaration, that the defendant obstructed him from giving his vote; but that is too general without showing the manner how he obstructed him, as that the defendant kept him out of the usual place where the votes are taken. The plaintiff shows no damage in his count, and the verdict will not supply it, for the plaintiff ought always to allege a damage; as in an action upon the case, brought against the lessee by him in the reversion, for refusing to permit him to enter to view waste, it would not be sufficient to allege thus generally, that the defendant obstructed him, &c. It is laid here, that the defendants *ipsum* the plaintiff *ad suffragium suum dare obstruxerunt, et penitus recusaverunt*: I do not know what that means in this case. Indeed, it is a sufficient description of a disseisin of a rent seck; but if the plaintiff gives his vote for a candidate, that is as effectual as if the officer writ it down, for it is his vote by the giving of it, and the officer cannot hinder him of it, and on a poll it will be a good vote, and must be allowed, and so there is no wrong done to the plaintiff, for his vote was a good vote notwithstanding what the defendant did. Besides, the plaintiff can make no profit of his vote; and it is like the case of a *quare impedit*, in which the plaintiff at common law recovered no damages, because he ought not to sell the presentation, and so could make no profit of it. So here, for it would be criminal for the plaintiff to sell his vote. Perhaps the putting the plaintiff to trouble and charge, to maintain and vindicate his right of voting, might be sufficient damage to maintain an action on the case; but as our case is, I cannot see that the plaintiff has received any damage. Great inconveniences do attend the allowance of this action, as my brothers have said; as that it will occasion multiplicity of actions, and for that reason it is, that the law gives no action to a private person for a public nuisance, for there is a remedy by indictment to redress it. So here the plaintiff has a remedy in parliament. As to the case of *Westbury* v. *Powell*, Co. Lit. 50 a, where the inhabitants of Southwark had a watering-place for their cattle by custom, which was stopped up, there any inhabitant might have an action, because there was no other remedy by presentment or the like: but if it had been a nuisance presentable, no action (*l*) would have lain.

(*l*) See Ld. Raym. 486.

(Powell, J.)

So in the case of *Sterling* and *Turner*, the party had no other remedy. So in the case of *Herring* and *Finch*, which is a strong case; and I do not know whether an action will lie in that case, for refusing to admit his voice to the election of a mayor; but there the plaintiff has no other remedy, nor other way to settle his right. If we should adjudge that this action lies, it will be dangerous to execute any office of this nature, and will deter men from undertaking public offices, which will be a thing of ill consequence. I am of opinion upon the whole matter, that after a determination in the parliament for the plaintiff's right, the trouble and charge of vindicating it will maintain an action, but in this case no action lies, and therefore the judgment ought to be arrested.

Holt, Chief Justice (*m*).—The single question in this case is, Whether, if a free burgess of a corporation, who has an undoubted right to give his vote in the election of a burgess to serve in parliament, be refused and hindered to give it by the officer, an action on the case will lie against such officer?

I am of opinion that judgment ought to be given in this case for the plaintiff. My brothers differ from me in opinion; and they all differ from one another in the reasons of their opinion; but notwithstanding their opinion, I think the plaintiff ought to recover and that this action is well maintainable, and ought to lie. I will consider their reasons. My brother Gould thinks no action will lie against the defendant, because, as he says, he is a judge; my brother Powys indeed says, he is no judge, but *quasi* a judge; but my brother Powell is of opinion, that the defendant neither is a judge, nor anything like a judge, and that is true: for the defendant is only an officer to execute the precept, *i.e.*, only to give notice to the electors of the time and place of election, and to assemble them together in order to elect, and upon the conclusion to cast up the poll, and declare which candidate has the majority.

(*m*) Lord Holt's argument has been more fully and lucidly set forth by himself in a manuscript which was first published in 1837, at the request of Lord Denman, under the title of "The judgments of Lord Holt in the case of *Ashby v. White* and in the case of *John Patey and others*." This manuscript probably contains a revised form of the judgment prepared for use in the House of Lords; see *post*, p. 282.

But to proceed, I will do these two things: First, I will maintain that the plaintiff has a right and privilege to give his vote: Secondly, in consequence thereof, that if he be hindered in the enjoyment or exercise of that right, the law gives him an action against the disturber, and that this is the proper action given by the law.

I did not at first think it would be any difficulty to prove that the plaintiff has a right to vote, nor necessary to maintain it, but from what my brothers have said in their arguments I find it will be necessary to prove it. It is not to be doubted, but that the Commons of England have a great and considerable right in the government, and a share in the legislative, without whom no law passes; but because of their vast numbers this right is not exercisable by them in their proper persons, and therefore, by the constitution of England, it has been directed that it should be exercised by representatives, chosen by and out of themselves, who have the whole right of all the Commons of England vested in them: and this representation is exercised in three different qualities, either as knights of shires, citizens of cities, or burgesses of boroughs; and these are the persons qualified to represent all the Commons of England. The election of knights belongs to the freeholders of the counties, and it is an original right vested in and inseparable from the freehold, and can no more be severed from their freehold, than the freehold itself can be taken away. Before the statute of 8 Hen. 6, c. 7, any man that had a freehold, though never so small, had a right of voting, but by that statute the right of election is confined to such persons as have lands or tenements to the yearly value of forty shillings at least, because, as the statute says, of the tumults and disorders which happened at elections, by the excessive and outrageous number of electors; but still the right of election is an original right, incident to and inseparable from the freehold. As for citizens and burgesses, they depend on the same right as the knights of shires, and differ only as to the tenure, but the right and manner of their election is on the same foundation. Now, boroughs are of two sorts: first, where the electors give their voices by reason of their burgership; or, secondly, by reason of their being members of the corporation. Littleton, in his chapter of tenure in burgage, 162, Co. Litt. 108 b, 109, says,

(Holt, C.J.)

"Tenure in burgage is, where an ancient borough is, of the which the king is lord, of whom the tenants hold by certain rent, and it is but a tenure in socage;" and sect. 164, he says, "and it is to wit, that the ancient towns, called boroughs, be the most ancient towns that be within England, and are called boroughs, because of them come the burgesses to parliament." So that the tenure of burgage is from the antiquity, and their tenure in socage is the reason of their estate, and the right of election is annexed to their estate. So that it is part of the constitution of England, that these boroughs shall elect members to serve in parliament, whether they be boroughs corporate or not corporate; and in that case the right of election is a privilege annexed to the burgage land, and is, as I may properly call it, a real privilege. But the second sort is, where a corporation is created by charter, or by prescription, and the members of the corporation, as such, choose burgesses to serve in parliament. The first sort have a right of choosing burgesses as a real right, but here in this last case it is a personal right, and not a real one, and is exercised in such a manner as the charter or custom prescribes; and the inheritance of this right, or the right of election itself, is in the whole body politic, but the exercise and enjoyment of this right is in the particular members. And when this right of election is granted within time of memory, it is a franchise that can be given only to a corporation; as is resolved by all the judges, against my lord Hobart, in the case of *Dungannon* in Ireland, 12 Co. 120, 121, that if the king grant to the inhabitants of Islington to be a free borough, and that the burgesses of the same town may elect two burgesses to serve in parliament, that (*n*) such a grant of such privilege to burgesses not incorporated is void, for the inhabitants have not capacity to take an inheritance. See Hob. 15. The principal case there was, the king constituted the town of Dungannon to be a free borough, and that the inhabitants thereof shall be a body politic and corporate, consisting of one provost, twelve free burgesses, and commonalty; and in the same name may sue and be sued; *et quod ipsi præfatus præpositus et liberi burgenses burgi prædicti et successores sui in*

(*n*) See Co. Litt. 3 a.

perpetuum habeant plenam potestatem et authoritatem eligendi, mittendi, et retornandi duos discretos et idoneos viros ad inserviendum et attendendum in quolibet parliamento, in dicto regno nostro Hiberniæ in posterum tenendo; and so proceeds to give them power to treat, and give voice in parliament, as other burgesses of any other ancient borough, either in Ireland or England, have used to do. And upon this grant it was adjudged, by all the judges of England, that this power to elect burgesses is an inheritance of which the provost and burgesses were not capable, for that it ought to be vested in the entire corporation, *viz.* provost, burgesses, and commonalty, and that therefore the law in this case did vest that privilege in the whole corporation in point of interest, though the execution of it was committed to some persons, members of the same corporation; 12 Co. 120, 121; Hob. 14, 15. As to the manner of election, every borough subsists on its own foundation, and where this privilege of election is used by particular persons, it is a particular right vested in every particular man; for if we consider the matter, it will appear that the particular members and electors, their persons, their estates, and their liberties are concerned in the laws that are made, and they are represented as particular persons, and not *quatenus* a body politic; therefore, when their particular rights and properties are to be bound (which are much more valuable perhaps than those of the corporation) by the act of the representative, he ought to represent the private persons. And this is evident from all the writs, which were anciently issued for levying the wages of the knights and burgesses that served in parliament. As 46 Edw. 3. *Ro. Parl. memb.* 4 *in dorso*. For when wages were paid to the members, they were not assessed upon the corporation, but upon the commonalty as private persons, as the writ shows, which is indeed directed to the sheriff, or to the mayor, &c., yet the command is '*quod de communitate comitatus civitatis vel burgi, habere faciat militibus civibus aut burgensibus* 10*l. pro expensis suis*.' But now, if the corporation were only to be represented, and not the particular members of it, then the corporation only ought to be at the charge; but it is plain that the particular members are at the charge. And this is no new thing, but agreeable to reason and the rules of law, that a franchise should be vested in

(Holt, C.J.)

the corporation aggregate, and yet the benefit of it to redound to the particular members, and to be enjoyed by them in their private capacity. As is the case of *Walter* and *Hanger*, Moo. 832, 833, where the king granted to the mayor and citizens of London, *quod nulla prisagia sint soluta de vinis civium et liberorum hominum de London, &c.* And there it was resolved, that although the grant be to the corporation, yet it should not enure to the body politic of the city, but to the particular persons of the corporation, who should have the fruit and execution of the grant for their private wines, and it should not extend to the wines belonging to the body politic; and so is the constant experience at this day. So in the case of *Mellor* v. *Spateman*, 1 Saund. 343, where the corporation of Derby claim common by prescription, and though the inheritance of the common be in the body politic, yet the particular members enjoy the fruit and benefit of it, and put in their own cattle to feed on the common, and not the cattle belonging to the corporation: but that is not indeed our case. But from hence it appears that every man, that is to give his vote on the election of members to serve in parliament, has a several and a particular right in his private capacity, as a citizen or burgess. And surely it cannot be said that this is so inconsiderable a right as to apply that maxim to it, *de minimis non curat lex*. A right that a man has to give his vote at the election of a person to represent him in parliament, there to concur to the making of laws which are to bind his liberty and property, is a most transcendent thing, and of an high nature, and the law takes notice of it as such in divers statutes; as in the statute of 34 & 35 Hen. 8, c. 13, intituled an act for making of knights and burgesses within the county and city of Chester, where in the preamble it is said that "whereas the said county palatine of Chester, is, and hath been always hitherto, exempt, excluded, and separated, out and from the king's court, by reason whereof the said inhabitants have hitherto sustained manifold disherisons, losses, and damages, as well in their lands, goods, and bodies, as in the good, civil, and politic governance and maintenance of the commonwealth of their said county," &c. So that the opinion of the parliament is that the want of this privilege occasions great loss and damage.

And the same farther appears from the 25 Car. 2, c. 9, an act to enable the county palatine of Durham to send knights and burgesses to serve in parliament, which recites, "whereas the inhabitants of the county palatine of Durham have not hitherto had the liberty and privilege of electing and sending any knights and burgesses to the high court of parliament," &c. The right of voting at the election of burgesses is a thing of the highest importance, and so great a privilege, that it is a great injury to deprive the plaintiff of it. These reasons have satisfied me to the first point.

2. If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy (*o*); for want of right and want of remedy are reciprocal. As if a purchaser of an advowson in fee-simple, before any presentment, suffer an usurpation, and six months to pass, without bringing his *quare impedit*, he (*p*) has lost his right to the advowson, because he has lost his *quare impedit*, which was his only remedy; for he (*q*) could not maintain a writ of right of advowson; and though he afterwards usurp and die, and the advowson descend to his heir; yet (*r*) the heir cannot be remitted, but the advowson is lost for ever without recovery. 6 Co. 50. Where a man has but one remedy to come at his right, if he loses that, he loses his right. It would look very strange, when the Commons of England are so fond of their right of sending representatives to parliament, that it should be in the power of a sheriff or other officer to deprive them of that right, and yet that they should have no remedy; it is a thing to be admired at by all mankind. Supposing then that the plaintiff had a right of voting, and so it appears on the record, and the defendant has excluded him from it, nobody can say that the defendant has done well: then he must have done ill, for he has deprived the plaintiff of his right; so that the plaintiff having a right to vote, and the defendant having hindered him of it, it is an injury to the plaintiff. Where a new act of parliament is made for the benefit of the

(*o*) D. acc. Co. 58 b.
(*p*) See, now, 7 Ann. c. 18.
(*q*) See H. Bl. 1; Lit. s. 514; Co. Lit. 293 a.
(*r*) See 6 Co. 58.

(Holt, C.J.)

subject, if a man be hindered from the enjoyment of it, he shall have an action against such person who so obstructed him. How else comes an action to be maintainable by the party on the statute of 2 Ric. 2, *de scandalis magnatum*, 12 Co. 134, but in consequence of law? For the statute was made for the preservation of the public peace, and that is the reason that no writ of error lies in the Exchequer Chamber, by force of the statute of 27 Eliz., in a judgment in the King's Bench on an action *de scandalis*, for it is not included within the words of the statute: for though the statute says, such writ shall lie upon judgments in actions on the case, yet it does not extend to that action, although it be an action on the case, because (*s*) it is an action of a far higher degree, being founded specially upon a statute; Cro. Car. 142. If then, when a statute gives a right, the party shall have an action for the infringement of it, is it not as forcible when a man has his right by the common law? This right of voting is a right in the plaintiff by the common law, and consequently he shall maintain an action for the obstruction of it. But there wants not a statute too in this case, for by *West.* 1, 3 Edw. 1, c. 5, it is enacted, "that forasmuch as elections ought to be free, the king forbids, upon grievous forfeiture, that any great man, or other, by power of arms, or by malice, or menaces, shall disturb to make free election." 2 Inst. 168, 169. And this statute, as my Lord Coke observes, is only an enforcement of the common law; and if the parliament thought the freedom of elections to be a matter of that consequence, as to give their sanction to it, and to enact that they should be free, it is a violation of that statute to disturb the plaintiff in this case in giving his vote at an election, and consequently actionable.

And I am of opinion, that this action on the case is a proper action. My brother Powell indeed thinks, that an action upon the case is not maintainable, because there is no hurt or damage to the plaintiff; but surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for *a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right.* As in an action for slanderous words,

(*s*) See 1 Bl. Com. 28.

though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little *diachylon*, yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage: for it is an invasion of his property, and the other has no right to come there; and in these cases the action is brought *vi et armis*. But for invasion of another's franchise trespass *vi et armis* does not lie, but an action of trespass on the case; as where a man has *retorna brevium*, he shall have an action against any one who enters and invades his franchise, though he lose nothing by it. So here in the principal case, the plaintiff is obstructed of his right, and shall therefore have his action. And it is no objection to say that it will occasion multiplicity of actions: for if men will multiply injuries, actions must be multiplied too, for every man that is injured ought to have his recompense. Suppose the defendant had beat forty or fifty men, the damage done to each one is peculiar to himself, and he shall have his action. So if many persons receive a private injury by a public nuisance, every man shall have his action, as is agreed in *Williams' Case*, 5 Co. 73 a; and *Westbury* and *Powell*, Co. Lit. 56 a. *Indeed, where many men are offended by one particular act, there they must proceed by way of indictment, and not of action; for in that case the law will not multiply actions.* But it is otherwise when one man only is offended by that act; he shall have his action; as if a man dig a pit in a common, every commoner shall have an action on the case *per quod communiam suam in tam amplo modo habere non potuit*; for every commoner has a several right. But it would be otherwise if a man dig a pit in a highway; every passenger shall not bring his action, but the (*t*) party shall be punished by indictment, because the injury is general, and common to all that pass. But when the injury is particular and peculiar to every man, each man shall have his action. In the case of *Turner* v. *Sterling*, the plaintiff was not elected; he could not give in evidence the loss of his place as a damage, for he was never in it; but the *gist* of the action is, that, the plaintiff having a right to stand for the place, and it being difficult to determine

(*t*) See 1 Ld. Raym. 486.

(Holt, C.J.)

who had the majority, he had therefore a right to demand a poll, and the defendant, by denying it, was liable to an action. If public officers will infringe men's rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offences. So the case of *Hunt* and *Dowman*, Cro. Jac. 478, where an action on the case is brought by him in reversion against lessee for years for refusing to let him enter into the house to see whether any waste was committed. In that case the action is not founded on the damage, for it did not appear that any waste was done, but because the plaintiff was hindered in the enjoyment of his right, and surely no other reason for the action can be supposed.

But in the principal case, my brother says we cannot judge of this matter, because it is a parliamentary thing. O! by all means, be very tender of that. Besides, it is intricate, that there may be contrariety of opinions. But this matter can never come in question in parliament, for it is agreed that the persons for whom the plaintiff voted were elected, so that the action is brought for being deprived of his vote; and if it were carried for the other candidates against whom he voted, his damage would be less. To allow this action will make public officers more careful to observe the constitution of cities and boroughs, and not to be so partial as they commonly are in all elections, which is indeed a great and growing mischief, and tends to the prejudice of the peace of the nation. But they say that this is a matter out of our jurisdiction, and we ought not to enlarge it. I agree we ought not to encroach or enlarge our jurisdiction; by so doing we usurp both on the right of the queen and the people: but sure we may determine on a charter granted by the king, or on a matter of custom or prescription, when it comes before us, without encroaching on the parliament. And if it be a matter within our jurisdiction, we are bound by our oaths to judge of it. This is a matter of property determinable before us. Was ever such a petition heard of in parliament, as that a man was hindered of giving his vote, and praying them to give him remedy? The parliament undoubtedly would say, take your remedy at law. It is not like the case of determining the right of election between the candidates.

My brother Powell says, that the plaintiff's right of voting ought first to have been determined in parliament, and to that purpose cites the opinion of my Lord Hobart, 318, that the patron may bring his action upon the case against the ordinary after a judgment for him in a *quare impedit*, but not before. It is indeed a fine opinion, but I do not know whether it will bear debating, or how it will prove when it comes to be handled. For at common law the patron had no remedy for damages against the disturber, but the statute 13 Ed. 1, st. 1, c. 5, s. 3, gives him damages; but if he will not make the bishop a party to the suit, he has lost his remedy which the statute gives him. But in our case the plaintiff has no opportunity to have remedy elsewhere. My brother Powys has cited the opinion of Littleton on the statute of Merton that no action lay upon the words "*si parentes conquerantur*," because none had ever been brought; yet he cannot depend upon it. Indeed, that is an argument, when it is founded upon reason, but it is none when it is against reason. But I will consider the opinion. Some question has arisen on the opening of that statute on those words, "*si parentes conquerantur*," &c., what was the meaning of them, whether they meant a complaint in a court in a judicial manner (*u*). But it (*x*) is plain the word "*conquerantur*" means only "*si parentes lamententur*," that is, only a complaint *in pais*, and not in a court: for the guardian in socage shall enter in that case, and shall have a special writ *de ejectione custodiæ terræ et hæredis*. But this saying has no great force; if it had, it would have been destructive of many new actions, which are at this day held to be good law. The case of *Hunt* and *Bowman*, before mentioned, was the first action of that nature; but it was grounded on the common reason and the ancient justice of the law. So the case of *Turner* and *Sterling*. Let us consider wherein the law consists, and we shall find it to be, not in particular instances and precedents, but in the reason of the law, and *ubi eadem ratio, idem jus*. This privilege of voting does not differ from any other

(*u*) That usage may explain the meaning of an ancient statute, see *Rex* v. *Scot*, 3 T. R. 604; *Sheppard* v. *Gosnald*, Vaugh. 169; *Dunbar* v. *Roxburghe*, 3 Cl. & Fin. 335; *The Montrose Peerage Case*, 1 Macqueen, H. L. 401. In *Bank of England* v. *Anderson*, 3 B. N. C. 666, Tindal, C.J., said: "We attribute great weight to that maxim of law, *contemporanea expositio fortissima est in lege*." And this was said with reference to a statute no older than 5 & 6 W. & M. (See *Broom's Legal Maxims*, 6th ed. 638, *et seq.*

(*x*) See Litt. 108.

(Holt, C.J.)

franchise whatsoever. If the House of Commons do determine this matter, it is not that they have an original right, but as incident to elections. But we do not deny them their right of examining elections; but we must not be frighted, when a matter of property comes before us, by saying it belongs to the parliament; we must exert the queen's jurisdiction. My opinion is founded on the law of England. The case of *Mors* and *Slue*, 1 Vent. 190, 238, was the first action of that nature: but the novelty of it was no objection to it. So the case of *Smith* and *Crashaw*, Cro. Car. 15, W. Jones, 93, that an action of the case lay for falsely and maliciously indicting the plaintiff for treason; though the objections were strong against it, yet it was adjudged, that if the prosecution were without probable cause, there was as much reason the action should be maintained as in other cases. So 15 Car. 2, C. B., between *Bodily* and *Long*, it was adjudged by Bridgman, Chief Justice, &c., that an action on the case lay for a riding whenever the plaintiff and his wife fought, for it was a scandalous and reproachful thing (*y*). So in the case of *Herring* and *Finch*, 2 Lev. 250, nobody scrupled but that the action well lay, for the plaintiff was thereby deprived of his right. And if an action is maintainable against an officer for hindering the plaintiff from voting for a mayor of a corporation, who cannot bind him in his liberty nor estate, to say that yet this action will not lie in our case, for hindering the plaintiff to vote at an election of his representative in parliament, is inconsistent. Therefore, my opinion is, that the plaintiff ought to have judgment.

Friday, the 14th of January, 1703, this (*z*) judgment was reversed in the House of Lords, and judgment given for the plaintiff by fifty lords against sixteen. Trevor, Chief Justice, and Baron Price were of opinion with the three judges of the King's Bench; Ward, C.B., and Bury and Smith, barons, were of opinion with the Lord Chief Justice Holt; Tracy *dubitante*, Neville and Blencowe absent.

(*Note.*—I had it from good hands, that Tracy agreed clearly that the action lay, but was doubtful upon the manner of laying the declaration.)

(*y*) As to "riding Skimmington," or "riding the stang," see also *R.* v. *Roberts*, 3 Keb. 578; *Mason* v. *Jennings*, Sir T. Raym. 401; *Cropp* v. *Tilney*, 3 Salk. 226.

(*z*) See 1 Bro. Parl. Cas. 45.

Upon the arguments of this case, Holt, Chief Justice, said, the plaintiff has a particular right vested in him to vote. Is it not then a wrong, and an injury to that right, to refuse to receive his vote? So, if a borough has a right of common, and the freemen are hindered from enjoying it by enclosure and the like, every freeman may maintain his action. This action is brought by the plaintiff for the infringement of his franchise. You would have nothing to be a damage but what is pecuniary, and a damage to property. If a man has *returna brevium*, although no fees were due to him at common law, yet if the sheriff enters within his liberty, and executes process there, it is an invasion of his franchise, and he may bring his action; and there is the same reason in this case. Although this matter relates to the parliament, yet it is an injury precedaneous to the parliament, as my Lord Hale said in the case of *Bernardiston* v. *Soame*, 2 Lev. 114, 116. The parliament cannot judge of this injury, nor give damage to the plaintiff for it: they cannot make him a recompense. Let all people come in and vote fairly: it is to support one or the other party to deny any man's vote. By my consent, if such an action comes to be tried before me, I will direct the jury to make him pay well for it; it is denying him his English right: and if this action be not allowed, a man may be for ever deprived of it. It is a great privilege to choose such persons as are to bind a man's life and property by the laws they make.

Ashby v. *White* is usually cited to exemplify the maxim of the law, *ubi jus ibi remedium*; a maxim which has at all times been considered so valuable, that it gave occasion to the first invention of that form of action called an action on the case. For the statute of Westminster 2, 13 Edw. I. c. 24, which was only in affirmance of the common law on this subject, and was passed to quicken the diligence of the clerks in the chancery, who were too much attached to ancient precedents, enacted, that "whensoever from thenceforth a writ shall be found in the chancery, and in a like case falling under the same right, and requiring like remedy, no precedent of a writ can be produced, the clerks in chancery shall agree in forming a new one; and, if they cannot

Ubi jus ibi remedium.

Action on the case.

agree, it shall be adjourned till the next parliament, where a writ shall be framed by consent of the learned in the law, lest it happen for the future that the court of our lord the king be deficient in doing justice to the suitors." Accordingly the courts have always held that the novelty of the particular complaint alleged in an action on the case is no objection, provided an injury cognizable by law be shown to have been inflicted on the plaintiff. Thus, in *Chapman* v. *Pickersgill*, 2 Wilson, 146, which was an action for falsely and maliciously suing out a commission of bankruptcy, Pratt, C.J., in answer to the objection that the action was of a novel description, said that "this had been urged in *Ashby* v. *White*, but he did not wish ever to hear it again. This was an action for a *tort*; *torts* were infinitely various, for there was not anything in nature that might not be converted into an instrument of mischief." So in *Pasley* v. *Freeman*, 3 T. R. 63, *per* Ashurst, J.: "Another argument which has been made use of is that this is a new case, and that there is no precedent of such an action. Where cases are new *in their principle*, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new *in the instance*, and the only question is upon the application of a principle recognised in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago. If it were not so, we ought to blot out of our law books one fourth part of the cases that are to be found in them." In *Winsmore* v. *Greenbank*, Willes, 577, the declaration stated that the plaintiff's wife unlawfully, and against his consent, went away and absented herself from him, and that during her absence a large estate was devised to her separate use; that she thereupon became desirous of being reconciled and cohabiting with her husband, but that the defendant persuaded and enticed her to continue apart till her death, which she did; whereby the plaintiff lost the comfort and society of his wife, and her assistance in his domestic affairs, and the profits and advantage of her fortune. On motion in arrest of judgment it was objected that the action was unprecedented; but Willes, C.J., said, "a special action on the case was introduced for this reason, that the law would never suffer an injury and a damage without a remedy: but there must be new facts in every special action on the case." Numerous other

Novelty of complaint no objection.

instances might here be cited, but this in so clear a matter seems unnecessary. See the judgment in *Langridge* v. *Levy*, 2 M. & W. 519.

Damage without legal injury.

The class of cases from which it is important to distinguish *Ashby* v. *White*, consists of those in which a damage is incurred by the plaintiff, but a damage not occasioned by anything which the law esteems an injury. In such cases he is said to suffer *damnum sine injuriâ*, and can maintain no action. Thus, in *Pryce* v. *Belcher*, 3 C. B. 58, 4 Id. 866, which presents some features of resemblance to *Ashby* v. *White*, it appeared that Pryce, who was registered as a voter for the borough of Abingdon, but who, in consequence of non-residence, had, under 6 & 7 Vict. c. 18, s. 79, in fact lost the right to vote, had notwithstanding tendered his vote at an election for the borough; whereupon Belcher, the returning officer, exceeding his duty, which, by 6 & 7 Vict. c. 18, s. 81, was confined to putting questions as to the voter's identity, and whether he had voted before at the election, wilfully, but not maliciously, instituted an inquiry into Pryce's right to vote, and, upon his appearing not to be qualified in point of residence, refused to receive the vote except as *tendered*, and did not reckon it amongst the votes given for the candidate for whom Pryce desired to vote. An action upon the case was thereupon brought by Pryce, in which he declared in one count for the refusal to permit him to vote, in another for the omission of his vote in the account of the poll, and in a third for the unauthorised scrutiny and decision upon his right to vote whereby, as he alleged, he was delayed and hindered in the exercise of his right; all which counts were held to present good *primâ facie* causes of action; 3 C. B. 58. But it was finally decided that Pryce could not maintain his action, on the ground "that although a party in the situation of the plaintiff has the *power* to compel the returning officer, under the apprehension of a prosecution, to put his name upon the poll, he has not the *right* to do so; that in doing so he is acting in direct contravention of the act of parliament, the terms of which are express 'that he shall not be entitled to vote;' and that the rejection of his vote cannot amount to a violation of anything which the law can consider as his right. The foundation of the plaintiff's action is the injury to his right; but we are of opinion, for the reasons above given, that he has *no right*, and, consequently, that he has suffered *no injury*;" 4 C. B. 866, 883.

Groundless legal proceedings.

No *injuriâ*, unless there be malice and want of reasonable and probable cause.

More striking instances of *damnum absque injuriâ* occur in legal proceedings, instituted for the *bonâ fide* purpose of asserting some supposed right, or prosecuting a criminal charge, which however in the event proves groundless. In such cases, in order, it seems, to facilitate the administration of justice, it is established that unless there be both malice *and* an absence of reasonable and probable cause, the person against whom the proceedings are taken has no legal ground of action. See note (*c*) to *Skinner* v. *Gunton*, 1 Wms. Saund. 230 *a*; and for later instances see *Gibbs* v. *Pike*, 9 M. & W. 351, where one who, without malice, had registered under 1 & 2 Vict. c. 110, an order which, as he contended, had the effect of a judgment, was held justified, without regard to whether it had that effect, or was properly registered; *Horsley* v. *Styles*, 69 L. T. 222, where a document was erroneously registered as a bill of sale; *Davies* v. *Jenkins*, 11 M. & W. 745, where an attorney, by mistake, sued to judgment and execution a person of the same name as the intended defendant; *De Medina* v. *Grove*, 10 Q. B. 152, 172, where a judgment debtor was taken in execution for more than was due on the judgment, and malice and want of reasonable and probable cause were not proved (*secus* where the amount was agreed, *Wentworth* v. *Bullen*, 9 B. & C. 840); *Phillips* v. *Naylor*, 3 H. & N. 14, where a person entitled to protection under the Bankruptcy Acts was arrested for non-payment of rates; *Churchill* v. *Siggers*, 3 E. & B. 929; *Jenings* v. *Florence*, 2 C. B. N. S. 467, where there was malice and want of probable cause, with damage; *Roret* v. *Lewis*, 5 D. & L. 371, where a person privileged from arrest was nevertheless arrested through malice, but not without reasonable or probable cause; *Gilding* v. *Eyre*, 10 C. B. N. S. 592, where the party arrested had not obtained an order for his discharge; *Ram Coomar Coondoo's Case*, 2 App. Cas. 186; *Rayson* v. *S. London Trams*, (1893) 2 Q. B. 304, where summary proceedings were taken against the plaintiff under the Tramways Act, 1870.

There must be damage.

And, though there be malice and want of reasonable and probable cause, there must also be what the law accounts damage. This, according to Lord Holt, in *Savile* v. *Roberts*, 1 Ld. Raym. 374, may be of three kinds: damage to a man's fame; damage to the person; damages to property. And such is still the law, for "The broad canon is still true that in the present day, and according to

our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution;" *per* Bowen, L.J., *Quartz Hill Co.* v. *Eyre*, 11 Q. B. D. 674, 690; see *Cotterell* v. *Jones*, 11 C. B. 713; *The Walter D. Wallet*, (1893) P. 202.

Unreversed judgment raises a necessary presumption of reasonable and probable cause.

An unreversed judgment raises a necessary presumption that the proceedings to obtain it were instituted with reasonable and probable cause; *Barber* v. *Lesiter*, 7 C. B. N. S. 175; *Castrique* v. *Behrens*, 30 L. J. Q. B. 163; see *Met. Bank* v. *Pooley*, 10 App. Cas. 210; even though the conviction be summary under a statute which gives no appeal; *Basebé* v. *Matthews*, L. R. 2 C. P. 684. Therefore in an action for malicious prosecution the declaration must show that the proceedings terminated in the plaintiff's favour; and for the same reason an action will not lie for a conspiracy to make it appear that the plaintiff was guilty of an offence, if he was subsequently convicted of the offence, and the conviction continues in force; *Barber* v. *Lesiter*, *supra*. So, where the debtor against whom a writ had been issued had without appearing paid part of the claim, and judgment was nevertheless signed against him for the whole amount, it was held that until the judgment was set aside he could not maintain an action; *Huffer* v. *Allen*, L. R. 2 Ex. 15. And though it has been set aside, bad faith must still be shown; *Smith* v. *Sydney*, L. R. 5 Q. B. 203, where the judgment was set aside, not for irregularity, but as a matter of favour. But the success of *ex parte* proceedings, wherein the person proceeded against is not entitled to be heard in his own defence, *e.g.*, to obtain sureties for the peace, does not show that there was reasonable and probable cause for taking these proceedings; *Steward* v. *Grommett*, 7 C. B. N. S. 191.

Distinction where proceedings *ex parte*.

How far question for jury.

The question whether or no there was reasonable and probable cause is for the judge alone, but if the facts on which that question depends are in dispute, the jury must first find the facts; *Panton* v. *Williams*, 2 Q. B. 169; *Douglas* v. *Corbett*, 6 E. & B. 511; *Hailes* v. *Marks*, 7 H. & N. 56; *Lister* v. *Perryman*, L. R. 4 H. L. 521; *Brown* v. *Hawkes*, (1891) 2 Q. B. 718. The burden of proving the facts from which the judge may infer want of reasonable and probable cause is upon the plaintiff; *Abrath* v. *N. E. R. Co.*, 11 Q. B. D. 440, 11 App. Cas. 247. It seems that on the question of malice the jury are not bound by the finding of the

judge as to reasonable and probable cause; nor is the want of reasonable and probable cause conclusive evidence of malice, which must be inferred from all the facts; *Hicks* v. *Faulkner*, 8 Q. B. D. 167, 174; see *per* Brett, M.R., *Quartz Hill Co.* v. *Eyre*, 11 Q. B. D. p. 687; *Brown* v. *Hawkes, supra.*

Action for maliciously procuring adjudication of bankruptcy, where adjudication set aside on appeal.

In *Johnson* v. *Emerson*, L. R. 6 Ex. 329, an action for maliciously and without reasonable and probable cause procuring the plaintiff to be adjudicated bankrupt, it appeared that the plaintiff had been adjudicated bankrupt, and the adjudication confirmed by the Chief Judge, but afterwards set aside on appeal. The court was equally divided in opinion as to whether, under the circumstances of the case, the action was maintainable. Martin, B., doubted whether, under the existing bankruptcy law, an action could be maintained for procuring an adjudication, and Bramwell, B., laid it down that no action lies where the want of reasonable and probable cause is only error in law. Kelly, C.B., and Cleasby, B., who held that the action was maintainable, were of opinion that the fact that the court made the adjudication was only evidence that the defendant might have had reasonable and probable cause for believing that an act of bankruptcy had been committed, an inference which was negatived by other evidence. This latter opinion was approved in the C. A. in *Quartz Hill Co.* v. *Eyre*, 11 Q. B. D. 674, where it was held that an action was maintainable by a trading company against a person who had falsely and maliciously, and without reasonable and probable cause, presented a petition to wind it up.

Privileged statements.

Another head of *damnum absque injuriâ* is furnished by the immunity of certain privileged or confidential statements defamatory of third persons, on the ground that they are made *bonâ fide* in the assertion of a right, or the performance of a duty whether legal or moral; *Whitely* v. *Adams*, 15 C. B. N. S. 392; *Cowles* v. *Potts*, 34 L. J. Q. B. 247; *Dawkins* v. *Paulet*, L. R. 5 Q. B. 94; *Dawkins* v. *Rokeby*, 8 Id. 255; *Laughton* v. *Sodor and Man*, L. R. 4 P. C. 495; *Grant* v. *Sec. of State for India*, 2 C. P. D. 445; *Waller* v. *Loch*, 7 Q. B. D. 619; *Allbutt* v. *Medical Council*, 23 Id. 400; *Stuart* v. *Bell*, (1891) 2 Q. B. 341; *Hunt* v. *G. N. R. Co.*, Id. 189; *Andrews* v. *Nott Bower*, (1895) 1 Q. B. 888; *Chatterton* v. *Sec. of State for India*, 2 Id. 189; or that they are fair criticism on matter of public interest; *Campbell* v. *Spottiswoode*, 32 L. J. Q. B. 185; *Wason* v. *Walter*, L. R. 4 Q. B. 73; *S. Hetton Co.* v. *N. E. News Ass.*, (1894) 1 Q. B. 133. In

such cases, generally speaking, however harsh, hasty, or untrue may be the language employed, so long as it is honestly believed by the speaker or writer to be true, it does not furnish a legal ground of action; see *Todd* v. *Hawkins*, 8 C. & P. 88, *per* Alderson, B., *Huntley* v. *Ward*, 6 C. B. N. S. 514, *per* Willes, J.; and the definition of privileged communications in *Harrison* v. *Bush*, 5 E. & B. 344, 348; and provided he believes them to be true, it does not matter that he had no reasonable grounds for his belief; *Clark* v. *Molyneux*, 3 Q. B. D. 237. Nor, it seems, is it essential, if the occasion be privileged, that the writer or speaker believe the statement to be true, provided he make it without malice in fact, for it may be his duty to communicate statements which he himself does not believe; Id., *per* Bramwell, L.J.; see *Jenoure* v. *Delmege*, (1891) A. C. 73. The extent and application of this doctrine of privilege have given rise to much discussion and difference of opinion; see *Coxhead* v. *Richards*, 2 C. B. 569; *Somerville* v. *Hawkins*, 10 Id. 583; *Taylor* v. *Hawkins*, 16 Q. B. 308; *Harris* v. *Thompson*, 13 C. B. 333; *Lawless* v. *Anglo-Egyptian Co.*, L. R. 4 Q. B. 262; *Spill* v. *Maule*, L. R. 4 Ex. 232; and *Davies* v. *Snead*, L. R. 5 Q. B. 608, where a statement to one of two persons of a charge affecting both, and privileged as to the person to whom it was made, was held privileged also as to the other. In *Tompson* v. *Dashwood*, 11 Q. B. D. 43, a letter containing defamatory statements, written under circumstances of privilege to the person for whom the letter was intended, was, through negligence, sent to the wrong person. It was held not to be actionable without proof of express malice. But the C. A. disapproved of this decision in *Hebditch* v. *MacIlwaine*, (1894) 2 Q. B. 54, where it was laid down that a communication cannot be privileged unless the person to whom it is made has in fact some duty or interest in receiving it, and that no privilege arises merely from an honest and reasonable belief that the occasion is privileged.

Instances of privilege.

The publication, without malice, of a fair and accurate report of proceedings in public courts of law is privileged; *Lewis* v. *Levy*, E. B. & E. 537; *Usill* v. *Hales*, 3 C. P. D. 319; even if the proceedings are *ex parte*; *Kimber* v. *Press Association*, (1893) 1 Q. B. 65; but though the report be fair and accurate, it is not privileged, if published with malice; *Stevens* v. *Sampson*, 5 Ex. D. 53. It seems that the publication, without malice, of an accurate report of part only of the proceedings, *e.g.*, of the judgment alone, is privileged;

Reports of legal proceedings.

see *Macdougall* v. *Knight* (*No.* 2), 25 Q. B. D. 1, where *M.* v. *K.* (*No.* 1), 17 Id. 636, 14 App. Cas. 194, was considered. *Newspaper* reports, if contemporaneous, have a statutory privilege under the Law of Libel Amendment Act, 1888, s. 3. The publication of a copy of a register of judgments, kept in pursuance of a statute, which the public are entitled to inspect, is privileged; *Scarles* v. *Scarlett*, (1892) 2 Q. B. 56;

Of parliament. *Williams* v. *Smith*, 22 Q. B. D. 134. Reports of proceedings in parliament, and fair comments thereon, stand on the same footing as reports of proceedings in law courts; see *Wason* v. *Walter*, L. R. 4 Q. B. 73.

Reports made to the editor of a newspaper and published by him, of statements charging specific acts of misconduct against a public man, are not privileged; *Davis* v. *Shepstone*, 11 App. Cas. 187.

Reports of public meetings. No privilege exists at common law for reports of *ex parte* charges against an individual made at a public meeting; *Davison* v. *Duncan*, 7 E. & B. 229; or at a meeting of a vestry; *Popham* v. *Pickburn*, 7 H. & N. 891; or of a board of guardians; *Purcell* v. *Sowler*, 2 C. P. D. 215.

51 & 52 Vict, c. 64. But under the Law of Libel Amendment Act, 1888, s. 3, privilege is now conferred upon fair and accurate newspaper reports, if published without malice, of proceedings at public meetings (as therein defined), or (except where neither the public nor any newspaper reporter is admitted) at meetings of vestries, town councils, school boards, boards of guardians, statutory boards and local authorities, or committees of such bodies, or at meetings of commissioners acting under lawful warrant or authority, select parliamentary committees, or justices of the peace in quarter sessions for administrative or deliberative purposes; and also upon publications, at request of a government office or department, officer of state, commissioner of police, or chief constable, of a notice or report issued for the information of the public; provided that the matter published is not blasphemous or indecent, and that it is of public concern and for the benefit of the public, and that, in the case of newspapers, the defendant has not refused to publish a reasonable letter or statement by way of contradiction or explanation of the matter complained of.

Counsel. Words pertinent to the matter in issue, and spoken by counsel, or by an attorney acting as advocate, in the course of a judicial proceeding, are privileged; *Mackay* v. *Ford*, 5 H. & N. 792; *Kane* v. *Mulvany*, 2 Ir. R. C. L. 402; and

so they are if spoken with reference to and in the course of a judicial inquiry, although irrelevant and malicious; *Munster* v. *Lamb*, 11 Q. B. D. 588, overruling the opinion of Lord Denman, in *Kendillon* v. *Maltby*, Car. & M. 402. In *Pedley* v. *Morris*, 61 L. J. Q. B. 21, the same rule was applied to statements made by a solicitor in written objections to taxation; and in *Lilley* v. *Roney*, 61 L. J. Q. B. 727, to the charges made against a solicitor in a complaint to the Incorporated Law Society under the Solicitors Act, 1888.

Judge. Words spoken by any judge, while acting in his judicial capacity, are privileged, even if spoken maliciously; *Miller* v. *Hope*, 2 Shaw, App. Cas. 125; *Thomas* v. *Churton*, 2 B. & S. 475; *Scott* v. *Stansfield*, L. R. 3 Ex. 220; *Anderson* v. *Gorrie*, (1895) 1 Q. B. 668.

Witness. An action will not lie against a witness merely for defamation, or for perjury, either in giving his evidence, or in an affidavit in a cause; *Revis* v. *Smith*, 18 C. B. 126; *Henderson* v. *Broomhead*, 4 H. & N. 569. But such perjury may go to make up a liability; as in *Fitzjohn* v. *Mackinder*, 9 C. B. N. S. 505, where in a county court the defendant's perjury and forgery, and the plaintiff's unsatisfactory manner, led the judge to commit the latter for perjury, and to bind over the defendant to prosecute; and an indictment having accordingly been preferred by the defendant, he was, on the plaintiff's acquittal, held liable to an action by the latter for malicious prosecution; see *Farley* v. *Danks*, 4 E. & B. 493, where the defendant was held liable for having falsely, &c., caused the plaintiff to be adjudged bankrupt, by false depositions which, even if true, would not have supported the adjudication; and see *Johnson* v. *Emerson*, *supra*, p. 262. In *Seaman* v. *Netherclift*, 1 C. P. D. 540, 2 Id. 53, which was an action of slander for words spoken by a witness, the jury found that the words were spoken by him maliciously, and as a volunteer for his own purposes. The court held that since the words were spoken by the witness in the course of giving, and as part of, his evidence, no question should have been left to the jury, and that the action would not lie. The privilege extends to witnesses giving evidence before a parliamentary committee; *Goffin* v. *Donnelly*, 6 Q. B. D. 307. A letter addressed to the Privy Council complaining of the character of a public officer removable by them, is actionable if express malice be proved; *Proctor* v. *Webster*, 16 Q. B. D. 112.

Parliament. Words spoken by a member of parliament in parliament are absolutely privileged; *R.* v. *Abingdon*,

1 Esp. 228; *Dillon* v. *Balfour*, 20 L. R. Ir. 600; see *Bradlaugh* v. *Gossett*, 12 Q. B. D. 271. Words spoken at meetings of public bodies, like county councils, are privileged, if spoken *bonâ fide*, in the belief that they are true; but not so, if spoken maliciously; *Royal Aquarium* v. *Parkinson*, (1892) 1 Q. B. 431; see *Pittard* v. *Oliver*, (1891) 1 Q. B. 474.

Damage arising from acts of self-defence against common enemy.

Acts done by way of self-defence against a common enemy, such as the erection of banks to prevent inroads of the sea, may cause *damnum absque injuriâ*, and damage resulting therefrom is not actionable; *R.* v. *Pagham*, 8 B. & C. 355; *Scott* v. *Shepherd*, 2 W. Bl. 892, set forth *post*; *Nield* v. *L. & N. W. R. Co.*, L. R. 10 Ex. 4; and conversely there is no common law duty on a frontager to prevent the sea-water from getting over his wall on to his neighbour's land, and he is not liable to his neighbour for neglect to top his wall, whereby his neighbour's land is flooded; *Hudson* v. *Tabor*, 2 Q. B. D. 290. But it is otherwise where he has interfered with the level of his own frontage and thereby allowed the water to get through on to his neighbour's land; *Nitro-Phosphate Co.* v. *L. & St. K. Docks*, 9 Ch. D. 503. In that case there was a statutory duty to maintain the wall at a certain height, but the C. A. rested their judgment on the common law obligation also, an obligation which Romilly, M.R., seems to have regarded as existing in *Morland* v. *Cook*, 6 Eq. 252, 262, 267. In *A.-G.* v. *Tomline*, 12 Ch. D. 214, 14 Id. 58, the owner of the foreshore was restrained by injunction from removing shingle, forming a natural defence against the sea, and thereby exposing the plaintiff's land to its inroads; see *West Norfolk Manure Co.* v. *Archdale*, 16 Q. B. D. 754, 758.

Seduction without loss of service.

Instances might be multiplied in which wrongs the most grievous are without legal redress. The seduction of a daughter not in her father's service, actual or constructive; *Blaymire* v. *Haley*, 6 M. & W. 55; *Davies* v. *Williams*, 10 Q. B. 725; *Manley* v. *Field*, 7 C. B. N. S. 96; *Thompson* v. *Ross*, 5 H. & N. 16; *Rist* v. *Faux*, 4 B. & S. 409; even though the father be thereby forced to maintain her; *Grinnell* v. *Wells*, 7 M. & Gr. 1033; and the seduction of a daughter in her father's service, unless an actual loss of service accrue; *Eager* v. *Grimwood*, 1 Exch. 61; *Hedges* v. *Tagg*, L. R. 7 Ex. 283; are *damna absque injuriâ*. But where a loss of service has accrued from the defendant's act, a right to the daughter's services at the time of the seduction,

though none were then being actually rendered, is sufficient to enable the father to sue; *Terry* v. *Hutchinson*, L. R. 3 Q. B. 599.

Injuries resulting in death before Lord Campbell's Act, 9 & 10 Vict. c. 93.

Before Lord Campbell's Act, no action at law was maintainable against a person who, by his wrongful act, neglect, or default, had caused the death of another, though under circumstances which would have given the sufferer a right of action had he survived; and the husband, wife, parent, or children of the deceased were without remedy against the wrong-doer, by whom they had been deprived of comfort and support. And such is still the law in cases not provided for by the Act: see *Osborn* v. *Gillett*, L. R. 8 Ex. 88, where, to an action brought by a master for injury done to his servant by the negligent driving of the defendant's servant, a plea that the plaintiff's servant was killed on the spot was held (*diss.* Bramwell, B.) to be a good answer. And that Act itself only gives compensation for the pecuniary damage sustained; *Blake* v. *Mid. R. Co.*, 18 Q. B. 93; *Chapman* v. *Rothwell*, E. B. & E. 168; *Duckworth* v. *Johnson*, 4 H. & N. 653; including the loss of such pecuniary advantage as might reasonably have been expected to be derived from the person killed, if he had continued alive; *Pym* v. *G. N. R. Co.*, 4 B. & S. 396; *Franklin* v. *S. E. R. Co.*, 3 H. & N. 211; but not funeral expenses (unless, perhaps, where there was a legal duty on the plaintiff to bury, *per* Bramwell, B., *Osborn* v. *Gillett*, L. R. 8 Ex. 88) nor mourning; *Dalton* v. *S. E. R. Co.*, 4 C. B. N. S. 296. It has been held that where death has resulted from breach of contract to carry safely, and damage to the personal estate has been caused thereby, the executors may maintain an action; *Bradshaw* v. *L. & Y. R. Co.*, L. R. 10 C. P. 189. That decision was questioned in *Leggott* v. *G. N. R. Co.*, 1 Q. B. D. 599; see *Pulling* v. *G. E. R. Co.*, 9 Id. 110; but it was approved in *Daly* v. *Dublin R. Co.*, 30 L. R. Ir. 514.

Competition between traders.

The case of the school set up near another school, reported H. 11 H. 4, fol. 47, pl. 21, is one of the earliest on the subject of damage without legal cause of action, and possesses much interest. It is well established that a trader has no right of action for loss caused merely by the competition, however keen, of rival traders; see *Mogul Co.* v. *McGregor*, (1892) A. C. 25; and *Hopkins* v. *G. N. R. Co.*, 2 Q. B. D. 224, where the owner of a ferry, who was damaged by the opening of a bridge, was held to have no cause of action.

Other instances.

Other instances are mentioned in Com. Dig., *Actions upon the case* (B), and *Actions upon the case for a nuisance* (C), in which serious damages have been held not actionable, as being either not temporal injuries, or only such as must be expected to result from the reasonable exercise of legal rights.

Offensive trades.

If a man establish an offensive trade near my dwelling-house, so as to sensibly or materially diminish its value, or the comfort and enjoyment of it, I may maintain an action on the case against him for a nuisance, for here is *damnum* coupled with *injuriâ*, even though the trade be a benefit to the public; *Bamford* v. *Turnley*, 3 B. & S. 66, over-ruling *Hole* v. *Barlow*, 4 C. B. N. S. 334 (but see *Wanstead L. B.* v. *Hill*, 13 C. B. N. S. 479); *Stockport Co.* v. *Potter*, 7 H. & N. 160; *Tipping* v. *St. Helen's Co.*, 4 B. & S. 608, 11 H. L. C. 642; *A.-G.* v. *Manchester*, (1893) 2 Ch. 87; the fact that my neighbour's trade by its unsightliness destroys the mere beauties and amenities of my grounds gives me no cause of action; see *per* James, L.J., *Salvin* v. *N. Brancepeth Co.*, 9 Ch. 705, 710; and "a man who carries on an exceptionally delicate trade cannot complain because it is injured by his neighbour doing something lawful on his property, if it is something which would not injure anything but an exceptionally delicate trade;" *Robinson* v. *Kilvert*, 41 Ch. D. 88, 97; the law does not take notice of "any sentimental, speculative, trivial discomfort or personal annoyance;" see *per* Lord Selborne, *Fleming* v. *Hislop*, 11 App. Cas. 686, 690.

New-comer building near them.

But if I build my house near his premises, at all events if they have been so used for twenty years, the case is altered; and, although I have *damnum*, yet I shall maintain no action, since it is not coupled with what the law considers *injuriâ*. Such, too, it was once thought, might be the law, even if the new-comer had built within the twenty years, since otherwise a man setting up an offensive trade even in the remotest spot might be ruined by the first person who chose to come and dwell near him within twenty years. In *Bliss* v. *Hall*, 4 B. N. C. 183, some expressions, however, dropped from the court from which it may be thought that their lordships' opinion was that nothing but a twenty years' user will entitle a man to carry on an offensive trade without interruption. The point was not, however, necessary for the decision of that case or that of *Elliotson* v. *Feetham*, 2 B. N. C. 134, on the authority of which it was decided.

In those cases, to an action for a nuisance to plaintiff's dwelling-house, a plea that the noisome trade was established *before the plaintiff became possessed of the dwelling-house*, was held bad; *non constat*, however, what would have been the decision had the plea alleged that the defendant carried on the trade there *before the building of the plaintiff's house*; see *Flight* v. *Thomas*, 10 A. & E. 590. It seems clear, however, that the date of the building of the plaintiff's house could only be material as tending to show at what point of time it became possible for an occupier to be inconvenienced by the nuisance so as to put him in a position either to complain or to acquiesce, and that no right could be acquired against him except from the implication of acquiescence during the period necessary to establish a prescription either at Common Law or under the Prescription Act; see *Sturges* v. *Bridgman*, 11 Ch. D. 852. In *Fleming* v. *Hislop*, 11 App. Cas. 686, 697, Lord Halsbury said: "It is clear that whether the man went to the nuisance or the nuisance came to the man, the rights are the same."

It is pointed out in the judgment of the C. A. in *Sturges* v. *Bridgman*, *supra*, that the hardship which might result from a rigid application of the above principle, whereby it would be possible for a new-comer erecting a dwelling-house in a neighbourhood devoted to trades of a noisy or unsavoury character, to stop them altogether, is modified by the fact that the question, whether a particular trade gives rise to an actionable nuisance, must be decided by reference to the circumstances of the locality where it is carried on, and that what might be a nuisance in Belgrave Square might not be considered to be one in Bermondsey.

Support by adjoining land.

On the same principle—*viz.*, that *damage*, to sustain an action, must be coupled with *injury*—if A. build a house on the edge of his land, and the proprietor of the adjoining land, after twenty years, dig so near that it fall down, an action on the case lies, because the plaintiff has, by twenty years' use, acquired a prescriptive right to the support, and to infringe that right is an injury; *Stansell* v. *Jollard*, Selw. N. P., 10th ed., 435; see *Harris* v. *Rydnig*, 5 M. & W. 60; *Hide* v. *Thornborough*, 2 C. & K. 250; *Brown* v. *Robins*, 4 H. & N. 186; *Bonomi* v. *Backhouse*, E. B. & E. 622, 646, 34 L. J. Q. B. 181; and *Rowbotham* v. *Wilson*, 8 H. L. C. 348; and if, after its erection, the house be altered, so that in its altered state it needs greater lateral support, a right to such support may be acquired for it by twenty years'

enjoyment of it in its changed condition, provided the alteration be made without concealment; *Dalton* v. *Angus*, 6 App. Cas. 740, affirming the decision of the C. A., and the judgment of Lush, J., who dissented in the court below.

Newly-built house.

It is otherwise, however, if the owner of land adjoining a newly-built house dig in a similar manner and produce similar results, for, there, though there is *damage*, yet, as there is no right to support, there is no *injury* committed by withdrawing it, and therefore no action is maintainable; *Partridge* v. *Scott*, 3 M. & W. 220; *Wyatt* v. *Harrison*, 3 B. & Ad. 871. But there is some authority for saying that the person digging must not do so *negligently*, otherwise, he is liable to action; see *Dodd* v. *Holme*, 1 A. & E. 493; *Grocers' Co.* v. *Donne*, 3 B. N. C. 34; *Trower* v. *Chadwick*, Id. 334, 6 Id. 1; *Davis* v. *L. & Blackwall R. Co.*, 1 M. & Gr. 799; *Bradbee* v. *London*, 4 Id. 714; see, however, Gale on Easements, p. 250 *et seq.*; 2 Wms. Saunders, ed. 1871, p. 802 *et seq.*; *Jeffries* v. *Williams*, 5 Exch. 792; *Gayford* v. *Nicholls*, 9 Id. 702.

Where no notice of nature of property injured.

It is settled by *Chadwick* v. *Trower*, 6 B. N. C. 1, that even supposing that an action lies for mere omission to take care, while pulling down one's own property, that a neighbour's property be not injured, still the duty to take such care does not extend to cases where the defendant is not shown to have had notice of the existence or nature of the property injured, as where it was a vault.

Right against stranger.

And whatever be the rights of the owner of the adjoining land who digs near a newly-built house, it is clear that a mere stranger has none, and is liable for damage occasioned by so doing; *Jeffries* v. *Williams*, *supra*; *Bibby* v. *Carter*, 4 H. & N. 153. And as there is a common law *right* to have the soil in its natural unencumbered state left undamaged by the withdrawal of lateral support, the owner of a newly-built house may maintain an action for damage done by the withdrawal (however carefully) of such support, provided that the weight of the house itself did not occasion or contribute to the subsidence, and the damage to the house may be recovered as consequential upon the original injury; *Brown* v. *Robins*, 4 H. & N. 186; *Hamer* v. *Knowles*, 6 Id. 454; *Berkley* v. *Shafto*, 15 C. B. N. S. 79. In *Smith* v. *Thackerah*, the court seem at first sight from the report, L. R. 1 C. P. 564, to have decided that the damage arising from the subsidence of the soil itself must be more than

Common law right to have soil itself supported by adjoining land.

Damage to house consequent upon subsidence of soil.

Smith v. *Thackerah.*

nominal in order to constitute such an injury as can be made the foundation of an action for the consequential damages resulting therefrom. In that case the defendant by excavations in his own land caused the plaintiff's soil to subside, whereby a building erected thereon within twenty years was damaged. The jury found that the plaintiff's land would have sunk if there had been no building on it, but that the plaintiff would have suffered no *appreciable damage*, and it was held that the plaintiff had no cause of action. In the report, however, of this case in 35 L. J. C. P. 276, it does not clearly appear that the building did not contribute to the subsidence (see argument of defendant's counsel and judgment of Byles, J.); and the finding of the jury that had the building not been there the plaintiff would have suffered *no appreciable damage* was perhaps equivalent to a finding that the subsidence which would have taken place had the building not been there would have been inappreciable, and that the weight of the buildings contributed to the subsidence which actually took place—in which case no appreciable damage, actual or consequential, resulted from an invasion of any *right* of the plaintiff, and the action was clearly not maintainable. Unless such be the true *ratio decidendi*, the decision appears to conflict as well with principle as with the cases of *Brown* v. *Robins* and *Hamer* v. *Knowles*, *supra*, in neither of which does it appear that but for the existence of the buildings the pecuniary damage by the mere subsidence of the soil would have been more than nominal. No doubt in order to prove that a *right* has been invaded it is necessary to show that an actual sensible subsidence of the natural soil has taken place through the defendant's act, but if this be established and further damage consequent thereon be incurred, surely the latter may be recovered even though the damage by the mere letting down of the unencumbered soil were incapable of pecuniary assessment. Indeed, in most cases, the pecuniary damage occasioned by the sinking of the unencumbered soil itself must be merely nominal, but when two things have concurred—*viz.*, the invasion of a right and damage *consequent thereon*, the courts have held that such damage is recoverable by action. See the observations of Bowen, L.J., in *Mitchell* v. *Darley Main Co.*, 14 Q. B. D. 125, 137, which seem to support the view of *Smith* v. *Thackerah*, stated above, and also the observations of Collins, J., in *A.-G.* v. *Conduit Co.*, (1895) 1 Q. B., 301, 313, where he

said that "it is the subsidence, and not the pecuniary loss, which grounds the cause of action." In *Mitchell* v. *Darley Main Co.*, it was held by the H. L. (Lord Blackburn *diss.*), affirming the decision of the C. A., and overruling *Lamb* v. *Walker*, 3 Q. B. D. 389, that where the surface has subsided by reason of excavations, and a cause of action has accrued to the owner of the surface which has been satisfied by damages, he may nevertheless maintain an action for a second subsidence consequent upon the original excavation; 11 App. Cas. 127.

As to the right of a purchaser who has bought land for the purpose, known to his vendor, of erecting buildings thereon, to restrain by injunction his vendor from suffering excavations to be made in his own land, which would probably result in letting down the land sold, and the buildings about to be erected thereon, although no covenant against such excavation has been taken by the purchaser, and no damage has actually occurred, see *Siddons* v. *Short*, 2 C. P. D. 572, a case which so far at least as regards the protection claimed for the added weight of the buildings appears open to further consideration.

The right of a man to dig in his own land is not qualified by the fact that the land intervening between his and that of another owner has been excavated, and he is not responsible if, by so doing, he causes the land of another to fall in, if it would not have fallen in but for the intervening excavation; *Birmingham* v. *Allen*, 6 Ch. D. 284.

Adjoining houses.

As to the right to have one house supported by another, see *Solomon* v. *Vintners' Co.*, 4 H. & N. 586; *Lemaitre* v. *Davis*, 19 Ch. D. 281; and where a row of houses originally belonged to the same owner, *Richards* v. *Rose*, 9 Exch. 218.

Thistle-seeds.

If a man's land is damaged by the seeds of thistles blown from his neighbour's land, he has no cause of action; *Giles* v. *Walker*, 24 Q. B. D. 656; nor if his animals are injured by eating yew trees which are growing on his neighbour's land and not projecting over his land; *Ponting* v. *Noakes*, (1894) 2 Q. B. 281.

Sic utere tuo ut alienum non lædas.

Damage to neighbour by fire.

The maxim which governs such cases is *sic utere tuo ut alienum non lædas.* Therefore A. may be sued for so negligently erecting a hayrick on the edge of his land that it ignites and burns his neighbour's house; *Vaughan* v. *Menlove*, 3 B. N. C. 468; notwithstanding 6 Anne, c. 31, and 14 Geo. 3, c. 78, which do not, it seems, apply to fires traceable to negligence; see *per* Lord Lyndhurst in

Canterbury v. *A.-G.*, 1 Phillips, 306; and *Filliter* v. *Phippard*, 11 Q. B. 347, where the subject of liability for damage by fire was discussed. The other cases, formerly referred to in this part of the note, are now discussed in the note to *Fletcher* v. *Rylands*, *post*.

Underground water.

Very similar to the case of a man digging on the extremity of his own land is that of one digging on his own close, so as to divert the underground stream, or drain the well, of a neighbour. This, in the absence of some special right to such stream or well, is *damnum absque injuriâ*; *Acton* v. *Blundell*, 12 M. & W. 324; see *Dickinson* v. *Grand Junction Canal Co.*, 7 Exch. 282; *New River Co.* v. *Johnson*, 6 Jur. N. S. 374; *Rawstron* v. *Taylor*, 11 Exch. 369; *Broadbent* v. *Ramsbotham*, Id. 602; *Chasemore* v. *Richards*, 7 H. L. C. 349; *Hodgkinson* v. *Ennor*, 4 B. & S. 229; and *Bradford* v. *Pickles*, (1895) 1 Ch. 145. And if a subsidence be caused by the withdrawal of such underground water, the same rule holds good; *Popplewell* v. *Hodgkinson*, L. R. 4 Ex. 249; cf. *Corbett* v. *Hill*, 39 L. J. Ch. 547.

General rule that where *right* infringed damage presumed.

The mode of determining whether or no damage has been occasioned by what the law esteems an *injury*, is to consider *whether any right existing in the party damnified has been infringed upon; for if so, the infringement thereof is an injury*: and if an injury be shown, the law will presume that some damage resulted from it; see *Barker* v. *Green*, 2 Bing. 317; *Sampson* v. *Hoddinott*, 1 C. B. N. S. 590. Thus an action is maintainable against one who makes a projection over the land of another before any rain falls so as to cause damage; *Fay* v. *Prentice*, 1 C. B. 828. To use Lord Holt's words in the principal case, p. 252:—"Every injury to a right imports a damage in the nature of it, though there be no pecuniary loss."

Cases where absence of damage destroys right of action.

For instance, before the abolition of imprisonment for debt, a creditor who was ascertained to be such by a judgment, and had charged his debtor in execution, had a right to the body of his debtor every hour till the debt was paid; *per* Buller, J., 5 T. R. 40. He had a *right to have the body in gaol*, and the escape of a debtor for ever so short a time was necessarily a damage to him, and an action for an escape lay; *per* Parke, B., 4 M. & W. 153; *Clifton* v. *Hooper*, 6 Q. B. 468. But where a defendant was in custody on mesne process and after the return of the writ by which he was captured the plaintiff's right was "*to have the defendant in custody whenever he chooses to remove or declare against him*;"

and, therefore, although an escape which delayed the execution of a habeas corpus or the delivery of a declaration would have been actionable, yet an escape involving neither of those consequences was not so; *Williams* v. *Mostyn*, 4 M. & W. 145; *Planck* v. *Anderson*, 5 T. R. 37.

Upon the same principle an action will not lie against the sheriff for a false return to a writ of execution, if the plaintiff has not suffered actual damage in consequence of the false return; *Wylie* v. *Birch*, 4 Q. B. 566; *Levy* v. *Hale*, 29 L. J. C. P. 127; *Hobson* v. *Thelluson*, L. R. 2 Q. B. 642; *Stimson* v. *Farnham*, 7 Id. 175. So, if a landlord distrain for more rent than is due, an action does not lie against him if the goods he take be of less value than the rent actually due; *Leyland* v. *Tancred*, 16 Q. B. 664; *Glynn* v. *Thomas*, 11 Exch. 870; *French* v. *Phillips*, 1 H. & N. 564.

Depends on nature of right itself.

The distinction is really in the nature of the right itself. If the right be absolute, its infringement implies damage; but if it be merely a qualified right, as, for instance, to have one's land left undamaged by the withdrawal of lateral support, actual damage is necessary to complete the cause of action. So, in the cases above cited, the plaintiff's rights, as against the sheriff and the landlord, were merely qualified rights to be saved from pecuniary loss by their acts, and as a necessary consequence actual damage was held essential to the cause of action. See also the notes to *Mellor* v. *Spateman*, 1 Wms. Saund. 346 a.

Grievance to community as well as to individual not actionable.

There are, indeed, certain cases in which an act may be in law an *injury*, and may produce damage to an individual, and yet in which the law affords no remedy, or, at least, no immediate one. These are cases in which the act done is a grievance to the entire community, no one of whom is injured by it more than another. In such a case the mode of punishing the wrong-doer is by indictment, and by indictment only; 1 Inst. 56 a; see *Ricket* v. *Metropolitan R. Co.*, 5 B. & S. 149, L. R. 2 H. L. 175; *Winterbottom* v. *Derby*, L. R. 2 Ex. 316. Still, if any person have sustained a particular damage therefrom, beyond that of his fellow-citizens, he may maintain an action in respect of that particular damnification. Thus, to use the familiar instance put by the text-writers, if A. dig a trench across the highway, this is the subject of an indictment; but if B. falls into it, then the particular damage thus sustained by him will support an action. See also *Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662; *Fritz* v. *Hobson*, 14 Ch. D. 542.

Unless particular damage to individual.

Still this exception is subject to qualification, for the damage must not be occasioned by want of ordinary skill and care on the part of the plaintiff; *Butterfield* v. *Forrester*, 11 East, 60; and the like rule applies to all cases where the cause of action is negligence; *Flower* v. *Adam*, 2 Taunt. 314; *Bridge* v. *Grand Junction R. Co.*, 3 M. & W. 244; *Hawkins* v. *Cooper*, 8 C. & P. 473; *Coles* v. *Bank of England*, 10 A. & E. 437; *Marriott* v. *Stanley*, 1 M. & Gr. 568. In *Caswell* v. *Worth*, 5 E. & B. 849, the defendants were bound by statute to keep their machinery fenced, but omitted so to do, and yet they were held not to be liable to the plaintiff for an injury which he received from the machinery by setting it in motion, contrary to their orders, and with knowledge that it could not be used with safety. *Contra*, where he was guilty of no misconduct, though he knew of the danger; *Holmes* v. *Clarke*, 6 H. & N. 349; cf. *Watling* v. *Oastler*, L. R. 6 Ex. 73; *Britton* v. *Great Western Cotton Co.*, 7 Id. 130; *Woodley* v. *Metr. District R. Co.*, 2 Ex. D. 384. Contributory negligence.

However, where a man carelessly left his cart and horse unattended in the street, and a young child climbed into it and had a severe fall, the horse being led forward by a boy, the owner was held responsible in this case, seemingly on the ground that, having thrown temptation in the child's way, he could not be allowed to object that it had yielded to it; *Lynch* v. *Nurdin*, 1 Q. B. 29; but see, as to that case, *Lygo* v. *Newbold*, 9 Exch. 302; *Singleton* v. *E. Counties R. Co.*, 7 C. B. N. S. 287; *Mangan* v. *Atherton*, 35 L. J. Ex. 161 (a case which was observed upon in *Clark* v. *Chambers*, 3 Q. B. D. 327); and *Abbott* v. *Macfie*, 2 H. & C. 744. *Lynch* v. *Nurdin*.

The rule is not that *any* negligence on the plaintiff's part will preclude him from recovering; but that, though there has been negligence on the plaintiff's part, still he may recover, unless he could by ordinary care have avoided the consequence of the defendant's negligence. Therefore, a man who had improperly left an ass fettered on the highway was nevertheless held entitled to recover against one who negligently drove against it; *Davies* v. *Mann*, 10 M. & W. 546; and the owner of a barge which was negligently run into by a steamer in the Thames was held entitled to recover against the pilot of the steamer, who might easily have avoided her, although (contrary to 17 & 18 Vict. c. 104, s. 296) the helm of the barge was not ported on the approach of the steamer, and nobody on the barge was What is contributory negligence.

keeping a look-out; *Tuff* v. *Warman*, 2 C. B. N. S. 740; 5 Id. 573. "In some cases," said Lord Campbell, in *Dowell* v. *General Steam Navigation Co.*, 5 E. & B. 195, "there may have been negligence on the part of the plaintiff, remotely connected with the accident; and in those cases the question arises whether the defendant, by the exercise of ordinary care and skill, might have avoided the accident, notwithstanding the negligence of the plaintiff, as in the often quoted *donkey case*, *Davies* v. *Mann*. There, although without the negligence of the plaintiff the accident could not have happened, the negligence is not supposed to have contributed to the accident, within the rule upon this subject: and if the accident might have been avoided by the exercise of ordinary care and skill on the part of the defendant, to his gross negligence it is entirely ascribed, he, and he only, proximately causing the loss;" see *Netherlands Steamboat Co.* v. *Styles*, 9 Moo. P. C. 286; *Smith* v. *Dobson*, 3 M. & Gr. 59; and *Colchester* v. *Brooke*, 7 Q. B. 339, where oysters were placed in the channel of a public navigable river so as to create a public nuisance, yet a person navigating the river was held not justified in running his vessel against them, when he had room to pass without so doing (*quære* as to the effect upon this case of the judgments in *Gann* v. *Whitstable*, 11 H. L. C. 192; *Dimes* v. *Petley*, 15 Q. B. 276; *Bateman* v. *Bluck*, 18 Q. B. 870; *Witherley* v. *Regent's, &c. Co.*, 12 C. B. N. S. 2).

Contributory negligence.

Where person having some knowledge of danger risks it.

If a way is made dangerous by an obstruction, and a person, being to some extent aware of the danger, yet risks it, and is injured, he may still maintain an action for the injury, unless the danger was so obvious that it was against common prudence to encounter it; *Clayards* v. *Dethick*, 12 Q. B. 439; see *Thompson* v. *N. E. R. Co.*, 2 B. & S. 106; *Holmes* v. *Clark*, 6 H. & N. 349; *Wyatt* v. *G. W. R. Co.*, 34 L. J. Q. B. 204; *Adams* v. *L. and Y. R. Co.*, L. R. 4 C. P. 739; but compare *Gee* v. *Metr. R. Co.*, L. R. 8 Q. B. 161, where the latter decision is questioned. This question of contributory negligence has been much discussed and has given rise to considerable diversity of opinion in cases against railway companies; see *Bridges* v. *N. London R. Co.*, L. R. 7 H. L. 213; *Met. R. Co.* v. *Jackson*, 3 App. Cas. 193; *Slattery* v. *Dublin-Wicklow R. Co.*, Id. 1155; *Davey* v. *L. & S. W. R. Co.*, 12 Q. B. D. 70; *Wakelin* v. *L. & S. W. R. Co.*, 12 App. Cas. 41. As to the doctrine "*volenti non fit injuria*," see *Thomas* v. *Quartermaine*, 18 Q. B. D. 685;

Yarmouth v. *France*, 19 Id. 647; *Membery* v. *G. W. R. Co.*, 14 App. Cas. 179; *Smith* v. *Baker*, (1891) A. C. 325.

Contributory negligence of persons managing train in which plaintiff was.

In *Bridge* v. *Grand Junction R. Co.*, 3 M. & W. 244, a passenger by the train of one railway company sued another railway company, with whose train a collision had taken place, whereby he had sustained injury; the defendants pleaded that the injury was caused in part by the negligence of the persons who had the management of the train in which the plaintiff was riding. The plea was held bad in substance, for not showing that, by ordinary care on the part of the persons managing the train in which the plaintiff was, the collision might have been avoided. A hasty perusal of the report of that case might lead to the supposition that, according to the opinion of the court, the plea might have been made good in substance, though not in form, by an averment that the plaintiff's driver could by ordinary care have avoided the accident; but that result does not by any means follow from what the learned judges said, much less from what they actually decided. It may, perhaps, safely be asserted that the plea was at all events bad in substance, for not alleging that *the passenger* who brought the action was guilty of negligence. If two drunken stage coachmen were to drive their respective carriages against each other and injure the passengers, each would have to pay for his own carriage, no doubt; but it is inconceivable that each set of passengers should, by a fiction, be identified with the coachman who drove them, so as to be restricted for remedy to actions against their own driver or his employer. This, nevertheless, appeared to be the result of the decision in *Thorogood* v. *Bryan*, 8 C. B. 115. Former editors of this work doubted whether the reasoning of the court in that case was consistent with *Rigby* v. *Hewitt*, 5 Exch. 240, and *Greenland* v. *Chaplin*, Id. 243, or with the series of decisions from *Quarman* v. *Burnett*, 6 M. & W. 499, to *Reedie* v. *L. and N. W. R. Co.*, 4 Ex. 244; and they urged that the question why both the wrong-doers should not be held liable to an innocent person who was not answerable for the acts of either of them, and whom they both injured, deserved more consideration than it received in *Thorogood* v. *Bryan*. At length *Thorogood* v. *Bryan*, though followed in *Armstrong* v. *L. & Y. R. Co.*, L. R. 10 Ex. 47, was overruled by the C. A. and the H. L. in *The Bernina*, 12 P. D. 58, 13 App. Cas. 1, where the above comments were quoted with approval; see 12 P. D. 70.

How far it affects plaintiff's rights against company whose train came into collision.

In *Child* v. *Hearn*, L. R. 9 Ex. 176, a servant of a railway

company was injured by an accident to a trolly, caused by the defendant's pigs, which had strayed on to the line through the company's neglect to repair a fence; it was held that no action lay, since the company could not have sued, and "the servant can be in no better position than the master when he is using the master's property for the master's purposes."

Contributory negligence of third party.

As to the contributory negligence or wrongful act of a stranger intervening, see *Burrows* v. *March Gas Co.*, L. R. 5 Ex. 67, 7 Id. 96; *Clark* v. *Chambers*, 3 Q. B. D. 327; *Sneesby* v. *L. & Y. R. Co.*, 1 Id. 42; *Halestrap* v. *Gregory*, (1895) 1 Q. B. 561; see also *post*, p. 280.

Contributory negligence, where tort arises out of contract.

It has been questioned whether the doctrine of contributory negligence applies to the case of tort in the execution of a contract; *Martin* v. *G. N. R. Co.*, 16 C. B. 179; but see *per* Lord Campbell, *Waite* v. *N. E. R. Co.*, E. B. & E. 719, 726. In the latter case a child about five years old was taken by his grandmother to a railway station where she got tickets for herself and him for a train, to get to which it was necessary to cross the line. In crossing the line with the child about a quarter of an hour before the train was due, she was killed and the child injured by another train. These disasters were caused both by the neglect of the railway company to warn her of the danger, and by her own negligence. The child sued the company for his injuries, but the action was held not to be maintainable on two grounds: namely, that the grandmother was the contracting party in respect of the tickets, and had undertaken to take due care of the child, and that the child was identified with her in respect of the negligence on her part which had contributed to the accident; see *The Bernina*, 12 P. D. 72, 92.

When tort a felony.

Though the damage and wrong be excessive, and peculiarly concern an individual, still, if it amount to a felony, it has been said that the private remedy is suspended until public justice has been satisfied: a very wholesome rule, tending to prevent the composition of felonies under pretence of seeking remedy by action. This rule was applied in *Wellock* v. *Constantine*, 32 L. J. Ex. 285, where Willes, J., nonsuited a servant girl who sued her master for assault and proved a rape, for which he had not been prosecuted; and the nonsuit was upheld, Martin, B., *diss.*, in the Court of Exch. More recently this rule and its application were considered in *Wells* v. *Abrahams*, L. R. 7 Q. B. 554. The action was for conversion of goods, the pleas being "not guilty," and "not possessed," and the verdict having passed

Wells v. *Abrahams.*

for the plaintiff, a rule for a new trial was obtained on the ground that the evidence proved a felony, which had not been prosecuted, and that the judge ought therefore to have nonsuited or directed a verdict for the defendant. The court, however, discharged the rule, refusing to follow *Wellock* v. *Constantine*, and being unanimously of opinion that, though there was authority that such a rule existed, it could not be applied in the manner contended, on the ground that the judge was a mere instrument to try the issues upon the record. Some of the court also gave weight to the objection that the defendant, while denying the commission of the felony, could not be allowed to set up the rule. The court expressed themselves with great hesitation as to how the rule in question, supposing it to exist, could be put into operation, and it is submitted that the effect of this decision is to render the rule itself a nullity in most cases, since the defendant cannot raise the defence by plea; *Lutterell* v. *Reynell*, 1 Mod. 282; or by demurrer; *Roope* v. *D'Avigdor*, 10 Q. B. D. 412. The decision itself is in conflict with numerous authorities besides *Wellock* v. *Constantine*; see *Prosser* v. *Rouce*, 2 C. & P. 421; *Hayes* v. *Smith*, Sm. & Bat. 378; *Quinlan* v. *Barber*, Bat. 47; *Gordon* v. *Fluskey*, 1 Arm. M. & O. 155, and, for American cases, see Bishop's Criminal Law, 6th ed,, i. § 267; see also *Fissington* v. *Hutchinson*, 15 L. T. 390; *Chowne* v. *Baylis*, 31 L. J. Ch. 757. As regards the question of the issues, assuming the existence of the rule of law above stated, it might perhaps be contended that where, in an action of conversion, the plaintiff proves facts amounting not to a mere conversion, but to a felony, for which the defendant has not been brought to justice, the issue upon not guilty should be properly decided in favour of the defendant, and that the judge would be in exactly the same position as to nonsuiting as in other cases where he is obliged to form his own judgment upon the facts proved in order to determine whether or not they amount to a legal cause of action. See further *Ex p. Ball*, 10 Ch. D. 667; *Midland Ins. Co.* v. *Smith*, 6 Q. B. D. 561.

The above stated rule, however, does not apply to actions brought against persons other than the person guilty of the felony; *White* v. *Spettigue*, 13 M. & W. 603; *Lee* v. *Bayes*, 18 C. B. 599; or brought by persons other than the person against whom the felony was committed; *Osborn* v. *Gillett*, L. R. 8 Ex. 88; *Appleby* v. *Franklin*, 17 Q. B. D. 93; *Ex p.*

Ball, supra. And Lord Campbell's Act, while it recognises the general rule, expressly enacts that it shall not apply to actions brought pursuant to its provisions; see *Osborn* v. *Gillett, supra.* See also Com. Dig. *Action on the Case* (B. 5).

Damage remote.

Again, there are some cases in which a damage is sustained by one man in consequence of the act of another, which act would be considered tortious by the law if the damage incurred could be properly deduced from it; but which, nevertheless, is dispunishable, because the damage actually incurred is, to use the legal phrase, too *remote* to be the subject-matter of an action; in other words, because it is not the natural consequence of the act committed by the defendant. Thus, if the plaintiff is made ill and put to medical expense by the defendant's slander of him by words not actionable *per se*, that is not sufficient special damage to support an action for the slander; *Allsop* v. *Allsop*, 5 H. & N. 534; *Weldon* v. *De Bathe*, 54 L. J. Q. B. 113; see also *Richardson* v. *Dunn*, 8 C. B. N. S. 655; *Parkinson* v. *Scott*, 1 H. & C. 153; *Chamberlain* v. *Boyd*, 11 Q. B. D. 407; Com. Dig. *Action on case for Defamation*; and *Kelly* v. *Partington*, 5 B. & Ad. 645.

Where damage is the illegal or improper act of third party.

And it has been thought that damage must always be considered too remote when it proceeds from the illegal act of a third person, for that the law will not esteem it natural that an illegal act should be induced by any consideration. Thus, if A. falsely assert that B. has spoken in disparagement of C., in consequence of which C. ceased to befriend and invite B., an action would be maintainable; see *Moore* v. *Meagher*, 1 Taunt. 39; *Davies* v. *Solomon*, L. R. 7 Q. B. 112; but if C. were in consequence to beat B., no action could be maintained by him against A. on account of the damage sustained from the beating. So in *Vicars* v. *Wilcocks*, 8 East, 1, where the defendant accused the plaintiff of unlawfully cutting his (the defendant's) cord, in consequence of which O. dismissed the plaintiff from his service before the expiration of his year, Lord Ellenborough said, "the special damage must be the *legal* and *natural* consequence of the words spoken; and here it was an *illegal* consequence, a mere wrongful act of the master, for which the defendant was no more answerable than if, in consequence of the words, other persons had seized the plaintiff and thrown him into a horsepond for his supposed transgression;" see *Morris* v. *Langdale*, 2 B. & P. 284; *Knight* v. *Gibbs*, 1 A. & E. 43; *Ashley* v. *Harrison*,

1 Esp. 48; *Ward* v. *Weeks*, 7 Bing. 211; *Dixon* v. *Smith*, 5 H. & N. 540; *Parkinson* v. *Scott*, 1 H. & C. 153; *Schofield* v. *Londesborough*, (1895) 1 Q. B. 536. This doctrine, however, has been questioned; see *Green* v. *Button*, 2 C. M. & R. 707; *Kendillon* v. *Maltby*, 1 Car. & M. 402; *Haddon* v. *Lott*, 15 C. B. 411; Sedgwick on Damages, 66; 1 Stark. on Libel, 205; and notes to *Vicars* v. *Wilcocks*, *post*, vol. ii.

Lumley v. *Gye*.

This note would not be complete without a reference to the case of *Lumley* v. *Gye*, 2 E. & B. 216, where the majority of the Queen's Bench (Coleridge, J., *diss.*) held that an action lies for maliciously causing and procuring one of two contracting parties not to perform the contract, whereby loss accrues to the other. This case, not having been one of master and servant, was of the first impression, and inasmuch as by reason of the defendant having obtained a verdict it became unnecessary to take the opinion of a Court of Error, there seemed room for further discussion. See the very learned judgment of Coleridge, J., as to the origin of the action for seducing servants from their duty. The point was, however, decided by *Bowen* v. *Hall*, 6 Q. B. D. 333, which (*diss.* Lord Coleridge) affirmed the decision of the majority in *Lumley* v. *Gye*; see also *Temperton* v. *Russell*, (1893) 1 Q. B. 715; *Flood* v. *Jackson*, (1895) 2 Q. B. 21.

Dispute between Lords and Commons.

The decision in *Ashby* v. *White*, occasioned one of the most furious controversies between the Houses of Lords and Commons of which there is any example in English history. A full account, setting forth at large the parliamentary documents respecting it, will be found in the notes to Gale's edition of Lord Raymond, pp. 597 to 608. It arose from an idea entertained by the Commons that the attempt to bring a case involving the right to the elective franchise before a court of law, was a breach of the privileges of their house; and they proceeded so far as to order the arrest of Mead (Ashby's attorney), and the committal of the plaintiffs in several similar actions to Newgate. Paty, one of these plaintiffs, sued out a *habeas corpus* to the keeper of Newgate, who returned the Speaker's warrant of commitment. On argument upon this return, Powell, Powys, and Gould, JJ., held, against the opinion of Lord Holt, that they had no authority to discharge the prisoner; *R.* v. *Paty*, 2 Ld. Raym. 1105. On this decision Paty applied for a writ of error, and the judges being summoned to deliver their opinion, whether a writ of error was a writ of right or of grace, ten of them held that it was of right, except in treason and felony; 2 Salk. 504. The parliament was, however, prorogued before the writs

were issued, but not before the House of Commons, who appear to have been actuated by great indignation, had committed Cæsar, the cursitor, for neglecting to inform them what writs of error were applied for, and had also directed the Serjeant-at-Arms to arrest Montague, Denton, Page, and Lechmere (afterwards Attorney-General), who had been counsel for the prisoners on the return of the *habeas corpus*. Montague and Denton were accordingly arrested, and the Serjeant-at-Arms informed the House "that he had also like to have taken Mr. Nicholas Lechmere, but that he got out of his chamber in the Temple, two pair of stairs high, at the back window, by the help of his sheets and a rope;" 14 Commons' Journals, 553. Writs of *habeas corpus* were served on the Serjeant-at-Arms on behalf of Montague and Denton, but the House forbade him to make any return thereto. At last, after two conferences between the Houses, which served only to widen the breach, Queen Anne put an end to the dispute by proroguing parliament. See Hallam's Const. Hist. of England, 8th ed., vol. iii. 271—274, 279.

In the course of these discussions the Lords appointed a committee to prepare an argument in the shape of a report upon the proceedings in *Ashby* v. *White*. This argument was principally drawn up by Lord Holt, and contains a masterly disquisition upon all the subjects connected with the case. It is printed entire in Gale's note, above referred to, and consists of three parts: *first*, it is argued that the plaintiff had a right to vote; *secondly*, that if so, he must, as a necessary consequence, as an inseparable incident to his right, have a *remedy* to assert and maintain it; *thirdly*, that his proper remedy was that which he had pursued, *viz.*, by action; see 6 Cobbett, Parl. Hist. 224.

Fraud and malice averred in principal case.

It will be observed that the declaration in *Ashby* v. *White* charged the defendants with fraud and malice. Of this, according to the text, Lord Holt took no notice. But in a revised form of his judgment, which he prepared himself, he observed that, according to the very words of the Statute of Westminster 1, c. 5, the action lay, because fraud and malice were alleged in the declaration, and had been proved (see his judgments in *Ashby* v. *White* and in the case of *Paty and others*, published by Saunders & Benning, A.D. 1837, p. 12); and in the argument prepared by the Lords' Committee, fraud and malice are expressly stated to be the gist of the action. In the words of that argument, "There is no danger to an honest officer that means to do his duty;

Revised edition of Lord Holt's judgment.

for where there is a real doubt touching the party's right of voting, and the officer makes use of the best means to be informed, and it is plain his mistake arose from the difficulty of the case, and not from any malicious or partial design, no jury will find an officer guilty in such case, nor can any court direct them to do it; *for it is the fraud and the malice that entitles the party to the action.* In this case the defendants knew the plaintiff to be a burgess, and yet fraudulently and maliciously hindered him from his right of voting; and justice must require that such an unjust and ministerial officer should not escape with indemnity;" 6 Cobbett, Parl. Hist., 314. And subsequently, in reference to *Ashby* v. *White*, the House of Lords resolved, "that by the known laws of this kingdom, every freeholder, or other person, having a right to give his vote at the election of members to serve in parliament, and being *wilfully* denied or hindered so to do by the officer who ought to receive the same, may maintain an action in the Queen's courts against such officer to assert his right, and recover damages for the injury;" see 17 Lords' Journals, 707. Yet both Lord Holt and subsequently the House of Lords held the office of a returning officer to be merely ministerial. "That the officer is only ministerial in this case, and not a judge, nor acting in a judicial capacity, is most plain; his business is only to execute the precept, to assemble the electors, to make the election by receiving their votes, computing their numbers, and returning the persons elected; the sheriff or other officer of a borough is put to no difficulty in this case; but what is absolutely necessary in all cases. If an execution be against a man's goods, the sheriff must at his peril take notice what goods a man has;" 6 Cobbett, Parl. Hist., 314; (see Com. Dig., *Viscount* (C. 4), and the form of the writ, Dalton's Office of Sheriff, 337).

Duty and liability of returning officer.

But in *Barnardistone* v. *Soame* (decided previously to *Ashby* v. *White*), in which the H. L., affirming the judgment of the Exch. Cham., held that an action could not be maintained against a returning officer for having falsely and maliciously made a double return, North, C.J. (afterwards Lord Keeper Guilford), held the officer to be a *judge* as to declaring the majority, and therefore not liable, although he acted with fraud and malice; 6 Howell, St. Tr., 1095 (see further as to the exemption of judges from civil liability, *Garnett* v. *Ferrand*, 6 B. & C. 625, 626; *Ferguson* v. *Kinnoull*, 9 C. & F. 251; *Kemp* v. *Neville*, 10 C. B. N. S.

If a judge, not liable to action though fraud and malice averred.

523; *Thomas* v. *Churton*, 2 B. & S. 475; *Scott* v. *Stansfield*, L. R. 3 Ex. 220; *Dawkins* v. *Paulet*, L. R. 5 Q. B. 94; *Dawkins* v. *Rokeby*, 8 Id. 255; *Willis* v. *Maclachlan*, 1 Ex. D. 376; *Anderson* v. *Gorrie*, (1895) 1 Q. B. 668). These extremes were avoided by Lord Tenterden in *Cullen* v. *Morris*, 2 Stark. 587. "The returning officer," said his lordship, "is to a certain degree a ministerial one, but he is not so to all intents and purposes; neither is he wholly a judicial officer; his duties are neither entirely ministerial nor wholly judicial; they are of a mixed nature. It cannot be contended that he is to exercise no judgment, no discretion whatsoever, in the admission or rejection of votes; the greatest confusion would prevail if such a discretion were not to be exercised. On the other hand, the officer could not discharge his duty without great peril and apprehension, if, in consequence of a mistake, he became liable to an action." This passage was cited with approval in *Tozer* v. *Child*, 7 E. & B. 377. (See also Dalton's Office of Sheriff, 35, and the form of oath given by 2 Geo. 2, c. 24, s. 3; *Ferguson* v. *Kinnoull*, 9 C. & F. 289, *per* Lord Brougham; and as to the mode of directing the jury upon the question of malice, *Drewe* v. *Coulton*, 1 East. 563, n. (*a*), 2 Luders, 244, n. (F), and *Cullen* v. *Morris*, *supra*.)

Analogous offices.

There are several instances of offices analogous to that of the returning officer for members of parliament, as it existed at common law, to which the principles above stated apply; thus in *Tozer* v. *Child*, 7 E. & B. 377, which was an action against church-wardens for maliciously rejecting the plaintiff's vote at an election for vestrymen, under 18 & 19 Vict. c. 120, the defendants were held not to be liable, because it did not appear that they had acted maliciously (see B. N. P. 64; Bac. Abr., *Action on the Case* (F), 1).

Returning officer for parliament.

But with regard to the returning officer of members of parliament, 6 & 7 Vict. c. 18, s. 82, has made it unlawful for him to reject any vote tendered by a person whose name is on the register of voters, unless it appears to him, on putting to such person the questions as to identity, and as to whether he has voted before at the same election, that the person claiming to vote is not the person whose name appears on the register, or that he has voted before, or unless such person refuses to answer these questions, or to take either of the two oaths prescribed by the Act. And, by s. 86, even if the person tendering the vote appears to be personating the registered voter, the officer is bound (if these questions are

answered in the affirmative, and the oaths, if required, are taken) to receive the vote, though under protest. In *Pryce* v. *Belcher*, *supra*, p. 259, it appears to have been assumed that after the passing of this Act the officer might be liable to an action for damages for refusing to receive a vote wilfully, though not maliciously, (see also *Knill* v. *Towse*, 24 Q. B. D. 186, 697). But it was not necessary in that case to consider the effect of s. 97, which provides a particular remedy, namely, an action of debt for a penalty against the returning and other officers for every *wilful* misfeasance or *wilful* act of commission or omission contrary to the act, but preserves any remedy against any returning officer according to the law then in force. (See *Stevens* v. *Jeacocke*, 11 Q. B. 731; *Shepherd* v. *Hills*, 11 Exch. 55; *St. Pancras* v. *Batterbury*, 2 C. B. N. S. 477.) Probably the breach of so plain a duty as that of the officer to receive the vote would in itself be deemed sufficient evidence to support an allegation of malice, if such were necessary. The duties cast upon presiding officers under the Ballot Act, 1872, 35 & 36 Vict. c. 33, sched. i., r. 21, are ministerial, and for a breach of them an action lies by a party who has thereby lost his election without proof of malice or want of reasonable care on the defendant's part; *Pickering* v. *James*, L. R. 8 C. P. 489.

Remedy against.

35 & 36 Vict. c. 33.

It may be useful to cite the rules laid down by Willes, J., with reference to remedies in cases of statutory liability, in *Wolverhampton Waterworks Co.* v. *Hawkesford*, 28 L. J. C. P. 242: "There are three classes of cases in which a liability may be established by statute. There is that class where there is a liability existing at common law, which is only re-enacted by the statute, with a special form of remedy; there, unless the statute contains words necessarily excluding the common law remedy, the plaintiff has his election of proceeding either under the statute or at common law. Then there is a second class, which consists of those cases in which a statute has created a liability, but has given no special remedy for it; there, the party may adopt an action of debt or other remedy at common law to enforce it. The third class is where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it . . and with respect to that class it has been always held that the party must adopt the remedy given by the statute." He has a further remedy, however, by injunction either in equity or under the Judicature Act, 1873, s. 25, sub-s. 8; *Cooper* v. *Whittingham*, 15 Ch. D.

Remedies where statutory liability.

501. In *Couch* v. *Steel*, 3 E. & B. 402, it was held that an action lay, at the suit of a sailor who had suffered special damage, against a shipowner for not supplying medicines pursuant to a statute which imposed a penalty recoverable by a common informer. The principle laid down in that case, that, wherever a statutory duty is created, any person who has sustained injuries from its non-performance may bring an action against the person on whom the duty is imposed, unless such remedy is impliedly excluded by the statute itself, was questioned in *Atkinson* v. *Newcastle Waterworks Co.*, 2 Ex. D. 441. Exception was also taken to the position that where the penalty is not to go to the party grieved, he may maintain an action, although, were the penalty made payable to him, he would have no other remedy; and it was pointed out that the intention must be gathered in each case from the general purview of the particular statute, a distinction being drawn between those which affect the rights of the whole public and those which partake of the nature of private legislation. It was held in that case that an action would not lie against a waterworks company for breach of their statutory duty, in respect of which a penalty was made recoverable by an informer, of keeping their pipes charged at a certain pressure, whereby the plaintiff, who would have been entitled to use the water, was prevented from extinguishing a fire in his house. See also *Gorris* v. *Scott*, L. R. 9 Ex. 125; *Ross* v. *Rugge-Price*, 1 Ex. D. 269; *Holborn Union* v. *St. Leonards*, 2 Q. B. D. 145; *Vallance* v. *Falle*, 13 Id. 109.

Later conflict between the House of Commons and the Queen's Bench.

For some particulars of a later memorable conflict between the House of Commons and the Queen's Bench, which cannot be stated within the limits of a note, see *Stockdale* v. *Hansard*, 7 C. & P. 731, 9 A. & E. 1, 11 Id. 253; the case of the *Sheriff of Middlesex*, Id. 273; the 3 & 4 Vict. c. 9; *Stockdale* v. *Hansard*, 11 A. & E. 297; *Howard* v. *Gossett*, 1 Car. & K. 380; *Howard* v. *Gossett*, 10 Q. B. 359; *Gossett* v. *Howard*, Id. 411; *Kielley* v. *Carson*, 4 Moore, P. C. 63; and May's Law of Parliament, 10th edit., 137. As to rights claimed by colonial legislatures similar to those of the House of Commons, see *Speaker of Victoria* v. *Glass*, L. R. 3 P. C. 560.

Ashby v. *White* appears to have been acted upon in *Milward* v. *Sargent*, Hil. T. 1786, without any interference upon the part of the House of Commons; see 1 East, 567, n.; 2 Luders, 248.

BIRKMYR *v.* DARNELL.

MICH.—3 *ANNE, B. R.*

[REPORTED, 1 SALKELD, 27.]

A promise to answer for the debt, default, or mis-carriage of another, for which that other remains liable, must be in writing to satisfy the Statute of Frauds. *Contra*, where the other does not remain liable.

DECLARATION, That in consideration the plaintiff (*a*) would deliver his gelding to A., the defendant promised that A. should re-deliver him safe; and evidence was, that the defendant undertook that A. should re-deliver him safe: and this was held a collateral undertaking for another; for where the undertaker comes in aid only to procure a credit to the party, in that case there is a remedy against both, and both are answerable according to their distinct engagement; but where the whole credit is given to the undertaker, so that the other party is but as his servant, *and there is no remedy against him*, this is not a collateral undertaking. But it is otherwise in the principal case, for the plaintiff may maintain detinue upon the bailment against the original hirer, as well as an *assumpsit* upon the promise against this defendant.

Et per Curiam. If two come to a shop (*b*), and one buys, and the other, to gain him credit, promises the seller, *If he does not pay you, I will*, this a collateral undertaking, and void without writing by the Statute of Frauds. But if he says, *Let him have the*

(*a*) S. C., 2 Ld. Raym. 1085, as *Buckmyr* v. *Darnall*; Holt. 606, and 6 Mod. Cas. 248, as *Burkmire* v. *Darnell*.

(*b*) In such a case the question to which of the two was credit given is generally left to the determination of the jury, who, in deciding it, must take into their consideration all the circumstances of the case; *Keate* v. *Temple*, 1 B. & P. 158. *Darnell* v. *Trott*, 1 C. & P. 82. *Storr* v. *Scott*, 6 C. & P. 241. If, on production of the plaintiff's books, it appears the defendant was not originally debited there, that is strong evidence that he is but a surety, but it is not conclusive; *Keate* v. *Temple*, *Croft* v. *Smallwood*, 1 Esp. 121. As to the employment of an attorney by a person really interested in the event of a suit, though not a party to the record, see *Howes* v. *Martin*, 1 Esp. 162; *Noel* v. *Hart*, 8 C. & P. 230.

goods, I will be your paymaster, or *I will see you paid* (*c*), this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant.

(*c*) This form of words can make no difference if the undertaking be really collateral, for in *Matson* v. *Wharam*, 2 T. R. 80, where the words were "If you do not know him you know me, and *I will see you paid,*" the statute was considered to apply.

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29 Car. 2, c 3, s. 4.

The *fourth* section of the *Statute of Frauds* enacts, that "no action shall be brought whereby . . . to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

What promises to answer for another person are within the statute.

The present case turned, as we have just seen, on the meaning of the words, "upon any special promise to answer for the debt, default, or miscarriage of another person;" and the distinction here taken has ever since been held the true one. It is clearly explained in the notes to *Forth* v. *Stanton*, 1 Wms. Saund. (6 ed.) 211 c, n. (*l*), where the following rule is laid down for the purpose of distinguishing between cases which fall and cases which do not fall within the statute. "There is considerable difficulty in the subject, occasioned perhaps by unguarded expressions in the reports of the different cases; but the fair result seems to be that the question whether each particular case comes within this clause of the statute or not depends, not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property except such as arises from his express promise." This passage was adopted by Cockburn, C. J., in *Fitzgerald* v. *Dressler*, 7 C. B. N. S. 374, 392, and cited by Lord Esher in *Sutton* v. *Grey*, (1894) 1 Q. B. 285, 288. In some cases, of course, the consideration for the promise may be the extinguishment of the liability of the original party; see *Goodman* v. *Chase*, 1 B. & Ald. 297.

The original debtor must continue liable.

Goodman v. *Chase*, *Butcher* v. *Stewart.*

In *Goodman* v. *Chase*, as subsequently in *Butcher* v. *Stewart*, 11 M. & W. 857, the defendant, in consideration

that the plaintiff would discharge A., whom he had taken under a *ca. sa.*, promised to pay A.'s debt. In both cases it was held that this promise did not require to be in writing, because the defendant's liability could not begin until A.'s discharge, but upon his discharge A.'s own liability ended; so that the debt ceased to be due from A. before the defendant became liable to pay it, and the defendant was accordingly never liable for another's debt. So in *Bird* v. *Gammon*, 3 B. N. C. 883, where the defendant, in consideration that the plaintiff and L.'s other creditors would give up their claims against L., and that L.'s farm should be assigned to the defendant, undertook to pay the plaintiff, this was held not to be a promise to pay "the debt of another person," because L. ceased to be liable. On the other hand, in *Tomlinson* v. *Gell*, 6 A. & E. 564, where the defendant, in consideration that a suit between himself and A. should be discontinued, promised the plaintiff, who was A.'s solicitor, to pay him the costs which A. owed him in respect of the suit, this promise was held to be within the statute, because A.'s liability continued. It was doubted, however, whether there was any consideration for the promise.

Bird v. *Gammon.*

Tomlinson v. *Gell.*

In *Eastwood* v. *Kenyon*, 11 A. & E. 438, 446, the Q. B. held that "the statute only applies to promises made to the person to whom another is answerable," and that, accordingly, a promise to pay a debt made to the debtor himself need not be in writing. This rule was approved of, and acted upon, by the Court of Exch. in *Hargreaves* v. *Parsons*, 13 M. & W. 561, where it was laid down that "the statute applies only to promises made to the persons to whom another is already, or is about to become, answerable. It must be a promise to be answerable for a debt of, or a default in some duty by, that other person towards the promisee." It must be a promise to answer for the debt or default for which the other person is, or is to be, answerable. Accordingly, the following promises have been held not to be within the statute: a promise to indemnify a person against any liability which he might incur by executing a bond as surety, *Thomas* v. *Cook*, 8 B. & C. 728; a promise by the defendant to the plaintiff that P. would perform a contract made, not with the plaintiff, but with the defendant himself, *Hargreaves* v. *Parsons*, *supra*; a promise by the defendant to a bailiff that, if he would release a judgment-debtor, whom he had arrested under a com-

The promise must be made to the person to whom the original debtor is answerable.

And must be a promise to answer for a debt or duty due to the promisee.

Instances not within the statute.

mittal order, the defendant would pay the amount of the judgment-debt, for the debt was due to the judgment-creditor, and not to the bailiff, *Reader* v. *Kingham*, 13 C. B. N. S. 344; a promise to indemnify against liability by becoming bail in a criminal proceeding, inasmuch as no debt or legal duty was owing from the person bailed to the promisee, *Cripps* v. *Hartnoll*, 32 L. J. Q. B. 381; a promise to indemnify against loss by joining in a promissory note as surety, *Wildes* v. *Dudlow*, 19 Eq. 198; see *Batson* v. *King*, 4 H. & N. 740; or by accepting a bill of exchange, *Guild* v. *Conrad*, (1894) 2 Q. B. 885; a promise by one partner of a firm to the other partners to indemnify them against any loss in respect of an existing debt due to the firm, *Re Hoyle*, (1893) 1 Ch. 84, where Bowen, L. J., said: "I think that to bring a debt within the statute the debt for which the defendant has promised to answer must be a debt due to the person to whom the promise is made, and the promise must be made to a person who could bring an action for the debt." In *Green* v. *Cresswell*, 10 A. & E. 453, a view prevailed contrary to that stated above, and it was held that a promise to indemnify the plaintiff against the consequences of becoming bail for a debtor arrested under a *ca. sa.* required writing. But in *Batson* v. *King*, *supra*, Pollock, C. B., expressed an opinion that this case was erroneously decided; it was not acted upon either in *Reader* v. *Kingham*, or in *Cripps* v. *Hartnoll*, *supra*; in *Wildes* v. *Dudlow*, *supra*, Malins, V.-C., treated it as over-ruled, and his decision was approved in *Guild* v. *Conrad*, *supra*, where it was again laid down that "a promise to become liable for a debt whenever the person to whom the promise is made should become liable is not within the statute."

Green v. *Cresswell*, now over-ruled.

"The statute only applies to promises on which actions at law could be maintained," and not to promises which could only be enforced by a suit in equity, such as a promise by one partner, made to the other partners, to pay a debt due to the firm, which can only be enforced by an equitable suit for an account; *Re Hoyle*, *supra*, *per* Lindley, L. J.

Statute only applies where promise actionable at law.

It has been thought that it is enough to bring the case within the statute if the contract be made with reference to a supposed future liability of a third person towards the promisee, even though such liability was never in fact created; *Mountstephen* v. *Lakeman*, L. R. 5 Q. B. 613. Lord Selborne, however, criticized this view in the H. L.,

L. R. 7 H. L. 24; and in the Exch. Cham., L. R. 7 Q. B. 202, Willes, J., pointed out that if the supposed liability was the basis of the contract, but never in fact came into existence, the contract would fail by the general law of contract, apart from the question whether it was within the statute or not.

There must be no independent liability on the part of the promiser or his property.

It is further laid down in the notes to *Forth* v. *Stanton*, *ante*, that there must be an "absence of any liability on the part of the defendant or his property, except such as arises from his express promise." This rule has been applied in several cases; and in *Sutton* v. *Grey*, (1894) 1 Q. B. 285, where the authorities were reviewed, the rule was re-stated more fully by Lopes, L. J., as follows: "The true test as derived from the cases is, to see whether the person who makes the promise is, but for the liability which attaches to him by reason of the promise, totally unconnected with the transaction, or whether he has an interest in it independently of the promise." Thus the statute does not apply to a promise by a man to pay off an incumbrance on his own property, which another is liable to pay; *Williams* v. *Leper*, 3 Burr. 1886; *Fitzgerald* v. *Dressler*, 7 C. B. N. S. 374; or to the contract by a *del credere* agent with his principal; *Couturier* v. *Hastie*, 8 Exch. 40; *Wickham* v. *Wickham*, 2 K. & J. 478, 486; or to a contract which regulates the terms of the employment of the defendant by the plaintiff; *Fleet* v. *Murton*, L. R. 7 Q. B. 126, 132; *Sutton* v. *Grey*, *supra*.

An agreement to give a guarantee is within the statute; *Mallett* v. *Bateman*, 16 C. B. N. S. 530, L. R. 1 C. P. 163.

When it is settled that the promise is one to answer *for the debt, default, or miscarriage of another*, within the meaning of the statute, or to use Lord Holt's expression in the text, that it is a *collateral*, not an *original* promise, the next question is, what must appear in the writing? Now, the statute in terms requires that the *agreement, or some memorandum or note thereof*, shall be in writing; and, since the word *agreement* comprehends both a *consideration* and a *promise*, it was held that both these must appear in the writing. This was determined in the celebrated case of *Wain* v. *Warlters*, 5 East, 10, which, though frequently doubted, was at last confirmed by *Saunders* v. *Wakefield*, 4 B. & Ald. 595; see *post*, p. 318.

What must appear in writing.

But in consequence of the difficulty of setting forth the consideration in a sufficient manner to satisfy the courts of

law, this rule proved to be a grievance to the mercantile community, and therefore, after having been in force for more than half a century, it was at last rescinded by the Mercantile Law Amendment Act, 1856, s. 3 of which enacts, that no special promise made by any person "to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorised," is to be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise has been made, "*by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.*" This Act, therefore, extends to cases within the second branch of s. 4 of the Statute of Frauds the rule which had been already applied to s. 17, namely, that it is sufficient if the *promise* of the party to be charged appears in the writing; see *Egerton* v. *Mathews*, 6 East, 307.

19 & 20 Vict. c. 97, s. 3.

Consideration need not appear in writing.

This Act does not, it must be observed, exempt guarantees from the application to them of the ordinary rules of evidence with reference to written instruments, but only allows the term constituting the consideration to be *added* by parol. By the ordinary rules of evidence proof of the actual consideration is admissible in cases of patent ambiguity, where the language of the instrument renders it uncertain as to which of two or more matters severally mentioned therein was the consideration upon which it was given. If, however, the instrument states that to be the consideration for the promise, which in law is no consideration, and a consideration cannot be collected from the rest of the instrument (*Oldershaw* v. *King*, 2 H. & N. 517), or if, looking only to the terms of the instrument, it appears that no consideration was given, or if the consideration is misstated, in none of these cases does this Act profess to affect the rule, that the terms of a written instrument cannot be *varied* by parol.

Rules as to admissibility of parol evidence, how far affected by 19 & 20 Vict. c. 97, s. 3.

If the whole of the *promise* does not sufficiently appear in writing, parol evidence of the consideration is not admissible to supply the defect. This point was decided by *Holmes* v. *Mitchell*, 7 C. B. N. S. 361. There the defendant had by word of mouth advised the plaintiff to lend 400*l.* to Spooner and Cubitt on mortgage of certain premises, and the defendant having consulted Lyne (his solicitor), addressed and signed the following letter to the plaintiff:—"I saw Lyne

Parol evidence of consideration not admissible to *supply* promise.

Holmes v. *Mitchell.*

this morning, and told him to call on you, as he seemed anxious to have the mortgage completed, and I thought he offered very fair; but do as you please about it. I will undertake any responsibility myself respecting it, should there be any." The plaintiff, acting on the faith of this letter, lent the 400*l.* on the mortgage, and thereby suffered considerable loss. Thereupon he sued the defendant as on a guarantee, relying on the promise contained in the letter. The court held that the action would not lie. "At the time the letter was written," said Byles, J., delivering the judgment, "*no mortgage existed*. The letter is silent as to the sum to be advanced, as to the nature of the security, whether a mortgage in fee or for years, and as to the land to be charged. The letter, if read by itself, without reference to any previous conversations, would be a promise to be responsible for any sum of money, however large, at any rate of interest, secured by any kind of mortgage, on any land, with any title. That, however, would be an unreasonable construction, and is not its true meaning; it evidently refers to previous conversations in which those particulars were supplied. The whole promise, therefore, is not in writing, as the statute requires that it should be. It cannot be made out without reference to previous conversations. In *Shortrede* v. *Cheek*, 1 A. & E. 57, and in *Bateman* v. *Phillips*, 15 East, 272, an existing document or an existing debt was referred to in the writing, so that evidence of oral statements was not necessary to explain the promise. The recent statute, 19 & 20 Vict. c. 97, s. 3, it is true, abrogates the rule laid down in *Wain* v. *Warlters*, 5 East, 17, and enables a party to give parol evidence of the consideration for a guarantee. But a consideration expressed in writing formerly discharged two offices, it sustained the promise, and might also explain it. Now, however, parol evidence, though it may supply the consideration, cannot go further, and explain the promise."

In order to determine whether the promise sufficiently appears in writing, recourse must still frequently be had to the authorities decided upon the questions relating to the sufficiency of the statement of the consideration, for many of these cases were decided upon grounds which would have been equally applicable had the questions turned on the sufficiency of the statement of the promise. Thus it will be sufficient (as has been held in regard to the *consideration*) if the *promise* can be gathered by fair intendment from the whole tenor of the writing; not that a mere *conjecture*, how-

ever plausible, would be sufficient to satisfy the statute, but there must be a well-grounded inference to be necessarily collected from the terms of the memorandum; see *Newbury* v. *Armstrong*, 6 Bing. 201, *per* Tindal, C.J.; *James* v. *Williams*, 5 B. & Ad. 1109, *per* Patteson, J.; *Bentham* v. *Cooper*, 5 M. & W. 628; *Jarvis* v. *Wilkins*, 7 M. & W. 410.

Evidence to identify subject-matter of promise admissible.

In *Shortrede* v. *Cheek*, *supra*, where a guarantee was expressed to be in consideration that the plaintiff "would withdraw *the* promissory note," the K. B. held that it was sufficiently certain, and that parol evidence was admissible to show what promissory note was meant; and the promise having been to pay the promissory note, the parol evidence was as much required to apply the promise as the consideration. In *Bateman* v. *Phillips*, *supra*, the plaintiff was about to sue Williams for a debt, when his attorney received this letter signed by the defendant:—"The bearer, Williams, has a sum of money to receive from a client of mine next week, and I trust you will give him indulgence till that day, when I undertake to see you paid." The debt of Williams, which was the subject-matter both of the consideration and promise, having been identified by parol evidence, the letter was held a sufficient memorandum within the statute. The above two cases are illustrations of the general rule that parol evidence is admissible to identify the subject-matter of a written instrument; see also *Macdonald* v. *Longbottom*, 1 E. & E. 977; *Mumford* v. *Gething*, 7 C. B. N. S. 305.

Parol evidence admissible to *explain* guarantee.

Parol evidence is admissible, as in the case of a will or other written instrument, not to alter or vary the meaning of a guarantee, but to interpret or explain it; not to make that appear to be a consideration which upon the face of the guarantee appears not to be so; but either (as in *Shortrede* v. *Cheek*) to fix the particular subject-matter to which the guarantee relates, or even to show, by reference to time or other circumstances, that matter indicated by the guarantee, but which, as described therein, may be a good, and does not appear to be a bad, is, by reason of such circumstances, in fact a good consideration. Thus in *Haigh* v. *Brooks*, 10 A. & E. 309, parol evidence was held admissible to show that future advances were referred to in a guarantee worded —"In consideration of your being in advance to L. and Sons in 10,000*l.*, for the purchase of cotton, I hereby give you my guaranty for that amount, on their behalf." And in *Goldshede* v. *Swan*, 1 Exch. 154, a guarantee worded—"In consideration of your having this day advanced to S. D.,

To show that consideration which may be good or bad is really good.

750*l.*, secured, &c., we jointly and severally undertake, &c." —was held to be "sufficiently ambiguous"—(that is, not ambiguous as to what was the matter intended to be the consideration, for that was sufficiently *identified*, but as to whether that matter, when its *circumstances* were ascertained, would furnish a sufficient consideration in point of law)—to admit of evidence to show that the advance was not a past one, but made simultaneously with the execution of the guarantee. In each of those cases the subject-matter of the consideration was identified by the writing, and its circumstances only were added by parol to show that what appeared by the writing itself to be *the* consideration was a valid consideration in law. See also *Hoad* v. *Grace*, 7 H. & N. 494, where "goods supplied" was construed to mean goods to be supplied; and *Way* v. *Hearn*, 13 C. B. N. S. 292, 305, *per* Williams, J. Parol evidence how far admissible.

In *Raikes* v. *Todd*, 8 A. & E. 846, a guarantee thus:—"Oct. 19th, 1832, I undertake to secure to you the payment of any sums you have advanced, or may hereafter advance to D., on his account with you commencing 1st Nov. 1831, not exceeding 2,000*l.*"—was considered invalid on the ground that it was doubtful whether the consideration consisted of forbearance to sue for the past advances, or partly that and partly the making of further advances, and the court decided that, at all events, it did not sustain a declaration alleging the *advances* to be the consideration. There can, however, be no doubt that, as suggested by Parke, B., in *Kennaway* v. *Treleaven*, 5 M. & W. 498, future advances would form a sufficient consideration for a guarantee of their own amount, and also of past advances; and accordingly in *Johnstone* v. *Nicholls*, 1 C. B. 251, and *Chapman* v. *Sutton*, 2 C. B. 634, guarantees of past and future debts given in consideration of a continuance of dealings with the principal debtor were sustained. *Semple* v. *Pink*, 1 Exch. 74, which decided that forbearance to sue was not a sufficient consideration to support a guarantee, must be considered as over-ruled by *Oldershaw* v. *King*, 2 H. & N. 517; see *Coles* v. *Pack*, L. R. 5 C. P. 65; *Wynne* v. *Hughes*, 21 W. R. 628; *Miles* v. *New Zealand Co.*, 32 Ch. D. 266; *Crears* v. *Hunter*, 19 Q. B. D. 341. Future advances. Forbearance to sue.

In construing a guarantee, the surrounding circumstances should be looked to; *Heffield* v. *Meadows*, L. R. 4 C. P. 595; *Laurie* v. *Scholefield*, Id. 622; *Newell* v. *Radford*, Surrounding circumstances.

Construction *ut res magis valeat quam pereat.*

L. R. 3 C. P. 52; *Coles* v. *Pack*, L. R. 5 C. P. 65; *Morrell* v. *Cowan*, 7 Ch. D. 151; and in certain cases the rule, *ut res magis valeat quam pereat*, will be applied. Thus in *Broom* v. *Batchelor*, 1 H. & N. 255, the defendant's guarantee was as follows:—"In consideration of the credit given by S. Broom to J. Edge, I guarantee the payment of all bills of exchange *drawn* by the said S. B., and accepted by the said J. E.; also I agree to guarantee payment of any balance that *may be* due from the said J. E. to the said S. B.; this guarantee to include all bills of exchange now running, as well as the balance of account due;" and it was held that the writing extended to future transactions, and was sufficient to support an action on a promise to answer for the default of Edge in respect of a bill accepted by him after the date of the agreement.

Enough if promise can be collected from different writings if sufficiently connected.

Provided that the agreement or *promise* be reduced to writing according to the above rules, it matters not out of how many different papers it is to be collected, so long as they can be sufficiently connected in sense; *Jackson* v. *Lowe*, 1 Bing. 9; see *Johnson* v. *Dodgson*, 2 M. & W. 653; *Hammersley* v. *de Biel*, 12 Cl. & F. 45; *Ridgway* v. *Wharton*, 6 H. L. C. 238. But this connection in sense must appear upon the documents themselves, for parol evidence is not admissible for the purpose of connecting them.

Boydell v. *Drummond.*

That was one of the principal points decided in *Boydell* v. *Drummond*, 11 East, 142, which arose upon s. 4 of the statute, although the contract there sued upon was not a guarantee. In that case the plaintiff proposed to issue an edition of Shakspeare, to be published in numbers. The particulars of publication and terms of subscription were printed in a *prospectus*. A book was kept, entitled, "Shakspeare subscribers, their signatures," which did not refer to the *prospectus*. The defendant signed the book as a subscriber, but, after receiving and paying for a few numbers, refused to take any more. In an action brought against the defendant to enforce the contract, the court held that the contract was within s. 4 of the Statute of Frauds (see *post*, p. 305); and that, though the *prospectus* contained the terms of the agreement, and would be a sufficient *memorandum* thereof if it could be coupled with the book in which the defendant signed his name, still, as it contained no reference to the book, nor the book to it, there was no connection in sense between them which would enable the court to couple

The connection must appear on the

them together and treat them as one document; and *that such connection could not be introduced by parol evidence, but must, in order to satisfy the statute, appear upon the face of the documents themselves.* face of the documents.

This rule that the connection between several documents must appear on the face of the documents themselves, has ever since been adopted and acted upon; see *Peek* v. *N. Stafford R. Co.*, E. B. & E. 958, 1000, *per* Williams, J.; S. C. 32 L. J. Q. B. 241, 270, *per* Lord Westbury; *Fitzmaurice* v. *Bayley*, 9 H. L. C. 78; *Wilkinson* v. *Evans*, L. R. 1 C. P. 407; *Crane* v. *Powell*, 4 Id. 123, *per* Willes, J.; *Peirce* v. *Corf*, L. R. 9 Q. B. 210; *Nene Co.* v. *Dunkley*, 4 Ch. D. 1; *Kronheim* v. *Johnson*, 7 Id. 60; *Long* v. *Millar*, 4 C. P. D. 450; *Cave* v. *Hastings*, 7 Q. B. D. 125; *Shardlow* v. *Cotterell*, 20 Ch. D. 90; *Studds* v. *Watson*, 28 Id. 305; *Oliver* v. *Hunting*, 44 Id. 205; *Taylor* v. *Smith*, (1893) 2 Q. B. 65. In *Oliver* v. *Hunting*, *supra*, Kekewich, J., seems to say that, though there is no reference in one document to another, parol evidence may be given to connect them, but that expression of opinion was unnecessary to the decision. Parol evidence is always admissible to identify the document referred to, or to show that a reference, which may be to a document, is so in fact; see the above cases, and particularly *Long* v. *Millar*, and *Taylor* v. *Smith*, *per* Kay, L.J.

It does not signify to whom the memorandum containing the agreement is addressed. It may be contained in a letter to a third person; *per* Lord Hardwicke, 3 Atk. 503; *Bateman* v. *Phillips*, 15 East, 272; *Longfellow* v. *Williams*, Peak. Ad. Ca. 225; *Gibson* v. *Holland*, L. R. 1 C. P. 1. It may be merely an offer acted upon; *Powers* v. *Fowler*, 4 E. & B. 511; *Smith* v. *Neale*, 2 C. B. N. S. 67; see *Peek* v. *N. Staff. R. Co.*, *supra*; *Holmes* v. *Mitchell*, 7 C. B. N. S. 361; *Shadwell* v. *Shadwell*, 9 Id. 159; *Forster* v. *Rowland*, 7 H. & N. 103. The reason of this is, that the memorandum is necessary only to *evidence* the contract, not to *constitute* it. As was observed by Tindal, C. J., in *Laythoarp* v. *Bryant*, 2 B. N. C. 735, 744, "The agreement, in truth, is made before any signature." Upon this ground it was decided in *Leroux* v. *Brown*, 12 C. B. 801, that a contract within the statute, though made abroad, must be in writing. Does not signify to whom memorandum be addressed. Offer acted upon. Memorandum is only the evidence, not the contract.

The names or a sufficient description of both the parties to the agreement must appear in the memorandum; What must appear in memorandum.

Williams v. *Lake*, 29 L. J. Q. B. 1; *Vandenbergh* v. *Spooner*, L. R. 1 Ex. 316; *Newell* v. *Radford*, L. R. 3 C. P. 52; and there must be a sufficient identification of the property dealt with in the document or documents constituting the memorandum; *Shardlow* v. *Cotterell*, 20 Ch. D. 90; see also *ante*, p. 294. In memoranda of contracts for the sale of lands, the following have been held sufficient descriptions of a party:—"The proprietor," *Sale* v. *Lambert*, 18 Eq. 1; *Rossiter* v. *Miller*, 3 App. Cas. 1124; "a trustee selling under a trust for sale," *Catling* v. *King*, 5 Ch. D. 660; "the executors of" a named person, *Hood* v. *Barrington*, 6 Eq. 218; "the company," where the memorandum showed that the company was in actual occupation, *Commins* v. *Scott*, 20 Eq. 11. "Vendor" alone is insufficient, *Potter* v. *Duffield*, 18 Eq. 4; so is "vendor," or "friend," or "client" of a named person, *Jarrett* v. *Hunter*, 34 Ch. D. 182; or "proposing lender," *Pattle* v. *Anstruther*, 69 L. T. 175. In *Coombs* v. *Wilkes*, (1891) 3 Ch. 77, the memorandum referred to "the landlord," but, as it did not show that the person thereby meant was the same person as "the vendor," it was held insufficient. In *Marshall* v. *Berridge*, 19 Ch. D. 233, it was held, overruling *Jaques* v. *Millar*, 6 Id. 153, that an agreement for a lease not stating the day from which the term was to commence did not satisfy the statute; see *May* v. *Thompson*, 20 Id. 705; and compare *Phelan* v. *Tedcastle*, 15 L. R. Ir. 169.

Signature.

The memorandum must be signed by the party against whom it is sought to enforce the contract or his agent; but it need not be signed by the party seeking to enforce it; *Laythoarp* v. *Bryant*, 2 B. N. C. 744; *Liverpool Borough Bank* v. *Eccles*, 4 H. & N. 139. It was objected in *Laythoarp* v. *Bryant*, which case arose on a contract to sell lands, that unless it were signed by both parties, there would be a want of mutuality, as the party who signed would be bound, and the party who had not signed would be loose, so that there would be no consideration for his agreement. "But," said Tindal, C. J., "whose fault is that? The defendant might have required the plaintiff's signature, but the object of the statute was to secure the defendant's. The preamble runs, 'for prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury;' and the whole object of the legislature is answered, when we put this

construction on the statute. Here, when this party who has signed is the party to be charged, he cannot be subject to any fraud. And there has been a little confusion in the argument between the consideration of an agreement and mutuality of claims. It is true the consideration must appear upon the face of the agreement. *Wain* v. *Warlters* was decided on the express ground that an *agreement* under the fourth section imports more than a *bargain* under the seventeenth; but I find no case, nor any reason for saying that the signature of both parties is that which makes the agreement. The agreement is in truth made before any signature." It is, however, of course possible that an agreement may be so framed as not to be binding, unless both parties have signed; as where one signs on condition that the terms of the writing are not to be obligatory unless the other signs; see *Furness* v. *Meek*, 27 L. J. Ex. 34; *Hubert* v. *Treherne*, 3 M. & Gr. 755.

Signature before contract concluded.

The memorandum is sufficient though it was signed before the agreement was concluded, as in those cases where a signed proposal of a contract accepted by parol has been held sufficient as a memorandum to bind the party proposing; see *Smith* v. *Neale*, 2 C. B. N. S. 67; *Reuss* v. *Picksley*, L. R. 1 Ex. 342, where the earlier cases are collected; and the remarks on this case in *Re New Everhardt Co.*, 43 Ch. D. 118. The *dictum* attributed to Fry, J., in *Munday* v. *Asprey*, 13 Ch. D. 855, was unnecessary to the decision, and is contrary to the above cases.

Place of signature.

The statute requires a "signature" and not a "subscription," and therefore the signature need not be at the end of the memorandum; it is sufficient if it is so introduced as to govern and authenticate every material or operative part of it; *Caton* v. *Caton*, L. R. 2 H. L. 127; *Kronheim* v. *Johnson*, 7 Ch. D. 60; *Jones* v. *Victoria Co.*, 2 Q. B. D. 314; *Evans* v. *Hoare*, (1892) 1 Q. B. 593; *Re Hoyle*, (1893) 1 Ch. 84; *Sims* v. *Landray*, (1894) 2 Ch. 318. As to signature by agents, and as to what is a signature, see notes to *Wain* v. *Warlters*, *post*, p. 319 *et seq.*

Deeds.

The statute does not diminish the force of deeds, because they are not signed, or otherwise affect them; see *Areline* v. *Whisson*, 4 M. & Gr. 801; *Cooch* v. *Goodman*, 2 Q. B. 580; *Cherry* v. *Heming*, 4 Exch. 631; *Holmes* v. *Mitchell*, 7 C. B. N. S. 361, 368, *per* Willes, J.

Alterations after signature.

Where alterations made in a written contract after it has been signed by the defendant are subsequently assented to

by him, parol evidence is admissible to prove such assent; *Stewart* v. *Eddowes*, L. R. 9 C. P. 311. In like manner, where there is a written memorandum of the contract, parol evidence is admissible after performance to show that the defendant accepted a substituted mode of performance; *Leather Cloth Co.* v. *Hieronimus*, L. R. 10 Q. B. 140; or requested that performance should be delayed beyond the stipulated time; *Hickman* v. *Haynes*, L. R. 10 C. P. 598; but parol evidence is not admissible to prove an alteration which creates a substituted contract; *Plevins* v. *Downing*, 1 C. P. D. 220.

Purpose for which memorandum made, immaterial.

The purpose for which the memorandum was made is immaterial. "The object of the statute being merely to exclude parol evidence, any writing embodying the terms of an agreement and signed by the person to be charged is sufficient:" "It is shown by a catena of cases down to *Gibson* v. *Holland*, L. R. 1 C. P. 1, and *Wilkinson* v. *Evans*, Id. 407, that the question is not one of intention of the party who signs the document, but simply one of evidence against him;" *per* Lindley and Bowen, L.JJ., *Re Hoyle*, (1893) 1 Ch. 84, where it was held that a recital in a will may be a good memorandum. So also may an affidavit made in previous proceedings; *Barkworth* v. *Young*, 4 Drew. 1; see *Lucas* v. *Dixon*, 22 Q. B. D. 357; or an entry in a minute-book signed for the purpose only of verifying the accuracy of the entry; *Jones* v. *Victoria Graving Dock Co.*, 2 Q. B. D. 314; or letters written to third parties; *Moore* v. *Hart*, 1 Vern. 110, 201; *Smith* v. *Watson*, Bunb. 55; *Bateman* v. *Phillips*, 15 East, 272; *Gibson* v. *Holland*, *supra*. A letter written, long after the contract was made, for the purpose of repudiating all liability under it, may be a sufficient memorandum; *Bailey* v. *Sweeting*, 9 C. B. N. S. 843; *Wilkinson* v. *Evans*, L. R. 1 C. P. 407; *Buxton* v. *Rust*, L. R. 7 Ex. 1, 279.

Without writing, promise not void, but no action can be brought on it.

The words attributed in the text of the principal case to the court, that a guarantee is *void* without writing, by the Statute of Frauds, are too strong, if literally understood; for that Act does not direct that the promise shall be *void*, but that "no action shall be brought" upon it. "I think that it is now finally settled that the true construction of the Statute of Frauds, both the 4th and the 17th sections, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract;" *Maddi-*

son v. *Alderson*, 8 App. Cas. 467, 488, *per* Lord Blackburn. The contract is an existing contract; *Britain* v. *Rossiter*, 11 Q. B. D. 123; see *Hugill* v. *Masker*, 22 Id. 364.

Accordingly, though no action can be brought upon a parol guarantee, the courts have been known to enforce one against a solicitor by virtue of their summary jurisdiction over their own officers; *Evans* v. *Duncan*, 1 Tyrw. 283, and *Senior* v. *Butt* and *Payne* v. *Johnson*, there cited; *Re Hilliard*, 2 D. & L. 919. And an oral guarantee may be given in evidence in some cases as, for instance, to show that the defendant had accepted a bill as an accommodation bill; *Cresswell* v. *Wood*, 10 A. & E. 460; or that payments made to the defendant were not made without consideration; *Sweet* v. *Lee*, 4 Scott, N. R. 77; *Shaw* v. *Woodcock*, 7 B. & C. 73, 84; *Thomas* v. *Brown*, 1 Q. B. D. 714.

If effect of action be to *charge* defendant by means of agreement, it must be in writing.

However, it is not necessary, in order that the statute should apply, that the action should be brought on the agreement; it is enough if the effect of the action is to "charge" the defendant by means of the agreement. Thus in *Carrington* v. *Roots*, 2 M. & W. 248, the plaintiff sued in trespass for seizure of his cart; the defendant pleaded that he seized it on his premises damage feasant; the plaintiff replied that the cart was there under an agreement between them for the sale and removal of a crop; parol evidence of such a sale was rejected and plaintiff non-suited. And where a question arises between either of the contracting parties and a stranger, whether a contract has passed an interest in services or other property, the stranger may, equally with a party to the contract, insist upon the statute. Thus, where a contract of service is, as between the parties to it, not actionable for want of writing to satisfy the statute, the master can maintain no action for enticing away the servant; *Sykes* v. *Dixon*, 9 A. & E. 693; nor could he proceed criminally under the Master and Servant Act, 1867; *Banks* v. *Crossland*, L. R. 10 Q. B. 97; and a vendee cannot, where the contract of sale is invalid by the statute, effect an insurance upon the goods; *Stockdale* v. *Dunlop*, 6 M. & W. 224; nor, it seems, could he bring an action against the carrier for loss of the goods, treating the vendor as his agent to forward; see *Coats* v. *Chaplin*, 3 Q. B. 483; *Coombs* v. *Bristol and Exeter R. Co.*, 3 H. & N. 510; nor against a stranger for conversion of the goods after the making of the actual contract and before the reduction of its terms to writing; *Felthouse* v. *Bindley*, 31 L. J. C. P. 204.

A stranger to the contract may insist upon the statute.

Memorandum must exist before action.

The note or memorandum in writing must exist at the time when the action is commenced, so that an action cannot be supported by a memorandum signed after its commencement; *Lucas* v. *Dixon*, 22 Q. B. D. 357; *Bill* v. *Bament*, 9 M. & W. 36; see *Fricker* v. *Thomlinson*, 1 M. & Gr. 772; *Sievewright* v. *Archibald*, 17 Q. B. 103, 107; *Bailey* v. *Sweeting*, 9 C. B. N. S. 843, 856; *Gibson* v. *Holland*, L. R. 1 C. P. 1, 8. "As the statute affects only the mode of proof, this rule must be considered anomalous; but it is founded on the wording of the statute;" *per* Lindley, L.J., *Re Hoyle*, (1893) 1 Ch. 84, 97.

Statute of Frauds a weapon of defence, not offence.

It must be remembered that the Statute of Frauds "is a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties;" *per* Lord Selborne, *Jervis* v. *Berridge*, L. R. 8 Ch. 351, 360, and *Hussey* v. *Horne Payne*, 4 App. Cas. 311, 323. Accordingly, in the latter case, where two letters of a correspondence seemed to constitute a complete contract in writing sufficient to satisfy the statute, the party to be charged was allowed to show by the other letters and by parol evidence of conversations that a complete contract was not intended by the two letters in question; see also *Bristol Aërated Bread Co.* v. *Maggs*, 44 Ch. D. 616; *Bellamy* v. *Debenham*, 45 Id. 481, 493. In cases where letters, relied on as constituting a sufficient memorandum of agreement within the statute, contemplate the drawing up of a formal instrument between the parties, it is a question of construction whether the parties intended that the letters themselves should constitute a binding agreement or that there should be no binding agreement until the formal instrument had been drawn up and accepted by them; *Rossiter* v. *Miller*, 3 App. Cas. 1124; *Bonnewell* v. *Jenkins*, 8 Ch. D. 70; *Bolton* v. *Lambert*, 41 Id. 295; *Gray* v. *Smith*, 43 Id. 208.

Cases where parties contemplate drawing up a formal instrument.

PETER *v.* COMPTON.

TRINITY.—5 *W. & M., KING'S BENCH.*

[REPORTED, SKINNER, 353.]

"An agreement that is not to be performed within the space of one year from the making thereof" means, in the Statute of Frauds, an agreement which appears from its terms to be incapable of performance within the year.

THE question upon a trial before Holt, Chief Justice, at *nisi prius*, in an action upon the case, upon an agreement, in which the defendant promised for one guinea to give the plaintiff so many at the day of his marriage, was if such agreement ought to be in writing (*a*), for the marriage did not happen within a year: the Chief Justice advised with all the Judges; and by the great opinion (for there was diversity of opinion, and his own (*b*) was *e contra*) where the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, there a note in writing is not necessary, for the contingent might happen within the year; but where it appears by the whole tenour of the agreement that it is to be performed after the year, there a note is necessary: otherwise not.

(*a*) According to the exigency of the Statute of Frauds, 29 C. 2, c. 3, s. 4; see Salk. 280.

(*b*) In *Smith* v. *Westall*, Lord Ray. 316, Lord Holt says, speaking of this case, that the reason of his opinion was "because the design of the statute was not to trust the memory of witnesses beyond one year."

THIS case, as well as *Birkmyr* v. *Darnell*, turns on the *fourth* section of the Statute of Frauds. That section directs, among other things, that no action shall be brought to charge any person, "*upon any agreement that is not to be performed within the space of one year from the making*

Statute does not apply to agreements which may be performed within a year

thereof," "unless the agreement, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." *Peter* v. *Compton* turned upon the meaning of the words printed in italics.

Rule in principal case well established.

The opinion of the majority of the judges in this case has been often confirmed. "The Statute of Frauds plainly means an agreement *not to be* performed within the space of a year, and expressly and specifically so agreed: it does not extend to cases where the thing *may be* performed within the year;" *per* Denison, J., *Fenton* v. *Emblers*, 3 Burr. 1281. Accordingly, the following contracts have been held not to be within the statute, viz., a contract to leave money by will, *Fenton* v. *Emblers*, *supra*; *Ridley* v. *Ridley*, 34 L. J. Ch. 462; a contract by A. that his executors shall pay 10,000*l.*, *Wells* v. *Horton*, 4 Bing. 40; a contract to maintain a child for its life, *Murphy* v. *Sullivan*, 11 Ir. Jur. N. S. 111; a contract to pay a wife a weekly sum for her maintenance, *McGregor* v. *McGregor*, 21 Q. B. D. 424; the reason in all the above cases being that death might occur within the year; also a contract to maintain a child "so long as the defendant should think proper," *Souch* v. *Strawbridge*, 2 C. B. 808; and a contract to pay the plaintiff 300*l.* a year quarterly so long as she should maintain and educate children properly, *Knowlman* v. *Bluett*, L. R. 9 Ex. 1; affirmed, Id. 307, but on the ground that the action was in substance for money paid at request. See also, *Anon.*, Salk. 280; *Francam* v. *Foster*, Skin. 356.

What agreements have been accordingly held not within the statute.

What agreements have been held to be within statute.

The words of the statute are, however, express, that no action shall lie upon any agreement that is not to be performed within one year after the making thereof, unless it be reduced into writing and signed. Accordingly, it has been held, that a signed memorandum is required to prove the following contracts, viz., a contract to hire a carriage for five years at ninety guineas a year, though determinable by custom at any time on payment of one year's hire, *Birch* v. *Liverpool*, 9 B. & C. 392; a contract for more than one year's service, *Giraud* v. *Richard*, 2 C. B. 835; though determinable by either party by notice within the year, *Dobson* v. *Collis*, 1 H. & N. 81; a contract for a year's service, to begin on a day subsequent to the date of the contract, *Bracegirdle* v. *Heald*, 1 B. & Ald. 722; *Snelling* v. *Huntingfield*, 1 C. M. & R. 20; *Britain* v. *Rossiter*, 11 Q. B. D. 123; unless, perhaps, the service is to begin on the next day,

see *per* Willes, J., *Cawthorne* v. *Cordrey*, 13 C. B. N. S. 406, commented on by Lord Esher, in *Britain* v. *Rossiter*, *supra*; a contract to supply goods for three years, determinable by six months' notice from either party, *Ex p. Acraman*, 31 L. J. Ch. 741; a contract to pay 80*l.* a year for five years, and then 60*l.* for life, *Sweet* v. *Lee*, 4 Scott, N. R. 77; a contract to buy a book to be published in parts, "one number at least to be published annually," *Boydell* v. *Drummond*, 11 East, 142; a contract to maintain a child about five years old, "until she be able to do for herself," *Farrington* v. *Donohoe*, 1 Ir. R. C. L. 675, upon the ground that the contract clearly contemplated maintenance until an event which could not happen within a year; an agreement that a yearly tenancy should not be determined before the end of three years, *Sidebotham* v. *Holland*, (1895) 1 Q. B. 378.

In *Eley* v. *Positive Assurance Co.*, 1 Ex. D. 21, affirmed Id. 88, but upon an independent ground, it was held that a contract that E. should be the solicitor to a company, and should "not be removed from his office unless for misconduct," was within the statute, because "the parties contemplated that the contract should continue to be binding, at least against the company, during the whole professional life of the plaintiff;" and in *Davey* v. *Shannon*, 4 Ex. D. 81, it was held that a contract not to engage in the trade of a tailor within a certain radius was within the statute. The latter case was expressly disapproved of by the C. A. in *McGregor* v. *McGregor*, 21 Q. B. D. 424, and both cases seem in effect to be over-ruled by the last-named case.

Rule, *per* Tindal, C.J.

The rule is, that "where the agreement distinctly shows upon the face of it that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the statute; but where the contract is such that the whole may be performed within a year, and there is no express stipulation to the contrary, the statute does not apply;" *per* Tindal, C.J., *Souch* v. *Strawbridge*, 2 C. B. 808.

Donellan v. *Read*.

Where all is to be done by one party within year agreement not within statute.

It was hinted in *Bracegirdle* v. *Heald*, 1 B. & Ald. 722, and decided in *Donellan* v. *Read*, 3 B. & Ad. 899, that an agreement is not within the statute, provided that all that is to be done by one of the parties can be done within a year. There the defendant was tenant to the plaintiff, *under a lease for* 20 *years*, of which 14 remained to run, and, in consideration that the plaintiff would lay out 50*l.* in alterations,

the defendant promised to pay an additional 5*l.* a year *during the remainder of the term.* The alterations were completed within the year, and an action being brought for the increased rent, it was objected among other things, that the contract could not possibly be performed within a year, and therefore ought to have been in writing. The court however held that it was not within the statute. "We think," said Littledale, J., delivering the judgment, "that as the contract was entirely executed on one side within the year, and as it was the intention of the parties, founded on a reasonable expectation, that it should be so, the Statute of Frauds does not extend to such a case. In case of a parol sale of goods, it often happens that they are not to be paid for in full till after the expiration of a longer time than a year: and surely the law would not sanction a defence on that ground, where the buyer had had the full benefit of the goods on his part. In *Boydell* v. *Drummond* the contract was not completely executed on one side, and the case was such that in the common course of the publication it was not expected that it should be completed in a year."

Remarks on *Donellan* v. *Read.*

It may be observed on this decision, that the contrary seems to have been taken for granted in *Peter* v. *Compton*, and others of the older cases; for instance, in *Peter* v. *Compton*, there would have been no occasion to argue the question, whether the possibility that the plaintiff's marriage might not happen for a year brought the case within the statute, if the payment of the guinea, which took place immediately, had been considered sufficient to exempt the agreement from its operation.

It may be further observed that the decision in *Donellan* v. *Read*, makes the word *agreement* bear two different meanings in the same section of the Statute of Frauds. The words of the 4th section are:—"That no action shall be brought whereby to charge . . . any person . . . upon any *agreement* that is not to be performed within one year from the making thereof; unless the *agreement* . . . be in writing . . ." Now, it is clear, that the word *agreement*, when lastly used in the section, means what is to be done *on both sides*; and it was frequently held upon that very ground, before the Mercantile Law Amendment Act, 1856, that guaranties were void, if they did not contain the consideration as well as the promise; see notes to *Wain* v. *Warlters*, *post*, p. 318, and to *Birkmyr* v. *Darnell*, *ante*, p. 291; but a much more confined sense appears to be bestowed upon the

word *agreement* when it is held that an *agreement* is capable of being performed within a year, when one part only of it is capable of being so. Remarks on *Donellan* v. *Read*.

In *Boydell* v. *Drummond*, 11 East, 159, it is expressly settled that *part performance* will not take an agreement out of the statute, and that upon principles which seem not inapplicable to the question in *Donellan* v. *Read*. "I cannot," said Bayley, J., "say that a contract is *performed*, when a great part of it remains *un*-performed within the year, or in other words, that *part performance* is *performance*. The mischief meant to be prevented by the statute was the leaving to memory the terms of a contract for a longer time than a year. The persons might die who were to prove it, or they might lose their faithful recollection of the terms of it." (See *Smith* v. *Westall*, L. Ray. 316.)

These observations seem applicable in full force to such a case as *Donellan* v. *Read*. The performance of one side of the agreement within the year could not be said to be more than part performance of the agreement; and the danger that witnesses may die, or their memories fail, seems to be pretty much the same in every case where an agreement is to be established, after the year is past, by *parol evidence*. Indeed, if there be any difference at all in the danger of admitting oral testimony after the year, it seems greater in a case where one side of the agreement only has been performed, than in such a case as *Boydell* v. *Drummond*; since, where the agreement has been partially performed on both sides, as in the latter case, a witness giving a false or mistaken account of its terms, would have to render his tale consistent with what had been done by *both* the contractors; whereas, if the part performance had been on one side only, the witness would only have to make his tale consistent with what had been done upon that side. It is true that, in *Donellan* v. *Read*, there was a part performance on both sides; but so there was in *Boydell* v. *Drummond*; and the reason assigned for the decision in *Donellan* v. *Read*, *viz.*, that the whole of one side of the agreement was performable within the year, would equally apply in a case where there had been, and could be, no part performance on the other side for twenty years. It seems, however, too late to question the correctness of that decision; *Cherry* v. *Heming*, 4 Exch. 631; *Miles* v. *New Zealand Co.*, 32 Ch. D. 266.

Although a plaintiff be prevented by the statute from

Claims founded upon common money counts.

availing himself of his special contract, he may, nevertheless, be able to recover, upon one of the common money counts, anything in the nature of a debt which has accrued due to him by reason of his acting upon the contract; *Pulbrook* v. *Lawes*, 1 Q. B. D. 284; as upon an account stated, *Knowles* v. *Mitchel*, 13 East, 249; *Teal* v. *Auty*, 2 B. & B. 99; *Cocking* v. *Ward*, 1 C. B. 858; *Laycock* v. *Pickles*, 33 L. J. Q. B. 43; or for work and labour done, *Souch* v. *Strawbridge*, 2 C. B. 808, 811, *per* Tindal, C. J.; or money had and received, *Green* v. *Saddington*, 7 E. & B. 503; or money paid, *Knowlman* v. *Bluett*, L. R. 9 Ex. 307; *McGregor* v. *McGregor*, 20 Q. B. D. 529, affirmed, 21 Id. 424, but on a different ground.

In *Hodgson* v. *Johnson*, E. B. & E. 685, the parties verbally agreed that the plaintiff should take over the defendant's tenancy of a brick-yard and buy the plant there, and that the defendant should pay the arrears of rent. The plaintiff accordingly took possession of the yard and paid for the plant, but the defendant did not pay the arrears, and the landlord distrained. Owing to the statute, the plaintiff failed to recover for the loss he sustained by the distress. The decision in this case was questioned in *Pulbrook* v. *Lawes*, *supra*, where it was pointed out that a claim for compensation clearly existed independently of the special contract. See also *Falmouth* v. *Thomas*, 1 C. & M. 89.

Equitable doctrine of part performance.

As the rules of equity now prevail in all branches of the High Court, it would seem that, under like circumstances, an action would now often be maintainable upon the agreement itself. Acts of part performance of a verbal agreement, which are distinctly referable to the agreement set up, would have been sufficient in equity to take the case out of the statute so far as the relief sought was such as a court of equity had jurisdiction to bestow. This doctrine of equity was, however, only applicable to cases where *from the nature of the contract itself* the court had jurisdiction, and did not apply to cases in which the only ground for the intervention of equity was the absence of a remedy at law by reason of the want of writing; for this would have had the effect of getting rid of the statute in all cases of part performance of verbal contracts; see *Kirk* v. *Bromley*, 2 Phil. 640. In *Britain* v. *Rossiter*, 11 Q. B. D. 123, it was laid down that this doctrine was limited to suits concerning land; but in *Maddison* v. *Alderson*, 8 App. Cas. 867, 874, Lord Selborne pointed out that this limitation is

hardly reconcileable with the view expressed by Lord Cottenham in *Hammersley* v. *De Biel*, 12 Cl. & F. 64, and *Lassence* v. *Tierney*, 1 Mac. & G. 572; and Kay, J., in *McManus* v. *Cooke*, 35 Ch. D. 681, upon a review of all the authorities, said that "the doctrine of part performance of a parol agreement, which enables proof of it to be given notwithstanding the Statute of Frauds, though principally applied in the case of contracts for the sale or purchase of land or for the acquisition of an interest in land, has not been confined to those cases. Probably it would be more accurate to say it applies to all cases in which a court of equity would entertain a suit for specific performance if the alleged contract had been in writing."

As to the recognition of this doctrine of part performance in courts of law before the Judicature Acts, see *per* Kelly, C. B., in *Ecclesiastical Commissioners* v. *Merral*, L. R. 4 Ex. 162, and *Kidderminster* v. *Hardwick*, 9 Id. 13. See generally the notes to *Lester* v. *Foxcroft*, Wh. & Tud. L. C. in Equity, Vol. I.

WAIN *v.* WARLTERS.

EASTER.—44 *GEO.* 3.

[REPORTED 5 EAST, 10.]

No person can, by the Statute of Frauds, be charged upon any *promise* to pay the debt of another, unless the *agreement* upon which the action is brought, or some note or memorandum thereof, be *in writing*; by which word *agreement* must be understood the *consideration* for the promise, as well as the promise itself (*a*). And therefore where one promised in writing to pay the debt of a third person, without stating on what consideration, it was held that *parol* evidence of the consideration was inadmissible by the Statute of Frauds; and consequently, such promise appearing to be without consideration upon the face of the written engagement, it was *nudum pactum*, and gave no cause of action.

THE plaintiffs declared that at the time of making the promise after mentioned they were the indorsees and holders of a bill of exchange, dated the 14th of February, 1803, drawn by one W. Gore upon and accepted by one J. Hall, whereby Gore requested Hall, seventy days after date, to pay to his, Gore's, order, 56*l.* 16*s.* 6*d.*; which bill of exchange Gore had before then indorsed to the plaintiffs, and which sum in the bill mentioned was at the time of making the promise by the defendant due and unpaid. And thereupon the plaintiffs, before and at the time of making the said promise by the defendant, had retained one A. as their attorney to sue Gore and Hall respectively for the recovery of the said sum so due, &c., whereof the defendant at the time of his promise, &c., had notice. And thereupon, on the 30th of April, 1803, at, &c., *in consideration of the premises and that the plaintiffs*, at the instance of the defendant, *would forbear* to proceed for the recovery of the said 56*l.* 16*s.* 6*d.*, he, the defendant, undertook and promised the plaintiffs to pay them, by half-past four o'clock on that day,

(*a*) Now by s. 3 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), the consideration of a *guarantee* need not appear upon the face of the written engagement. See *post in notâ*.

56*l.* and the *expenses* which had *then been incurred* by them *on the said bill.* The plaintiffs then averred that they did, within a reasonable time after the defendant's promise, stay all proceedings for the recovery of the said debt, and have hitherto *forborne to proceed* for the recovery thereof; and that the expenses by them incurred on the said bill at the time of making the promise by the defendant, and in respect of their having so retained the said A., and on account of his having, before the defendant's said promise, drawn and engrossed certain writs called special capias, against Gore and Hall respectively on the said bill, amounted to 20*l.*, of which the defendant had notice: yet the defendant did not, at half-past four o'clock on that day, &c., nor at any time before or since, pay the said sum of 56*l.* and the said expenses incurred, &c. There was another special count, charging that the reasonable expenses incurred on the bill were so much, which the defendant had refused to pay. And the common money counts.

In support of the undertaking laid in the declaration, the plaintiffs, at the trial at Guildhall, produced the written engagement signed by the defendant, which was in these words: "Messrs. Wain and Co., I will engage to pay you by half-past four this day, fifty-six pounds and expenses on bill that amount on Hall. (Signed) Jno. Warlters (and dated) No. 2, Cornhill, April 30th, 1803." Whereupon it was objected, on the part of the defendant, that though the promise, which was to pay the debt of another, were *in writing*, as required by the Statute of Frauds, yet that it did not express *the consideration* of the defendant's promise, which was also required by the statute to be in writing; and that this omission could not be supplied by parol evidence (which the plaintiffs proposed to call in order to explain the occasion and consideration of giving the note); and that for want of such consideration appearing upon the face of the written memorandum, it stood simply as an engagement to pay the debt of another without any consideration, and was, therefore, *nudum pactum* and void. And Lord Ellenborough, C.J., upon view of the Statute of Frauds, 29 Car. 2, c. 3, s. 4, which avoids any special promise to answer for the debt of another, "unless the *agreement* upon which the action shall be brought, or some memorandum or note thereof, shall be in writing, and

signed by the party to be charged therewith," &c., thought that the term *agreement* imported the substance at least of the terms on which *both* parties consented to contract, and included the *consideration* moving to the promise, as well as the *promise* itself: and the *agreement* in this sense not having been reduced to writing for want of including the *consideration* of the promise, he thought it could not be supplied by parol evidence, which it was the object of the statute to exclude; and therefore nonsuited the plaintiffs. A rule *nisi* was obtained in the last term for setting aside the nonsuit and granting a new trial, on the ground that the statute only required the *promise* or binding part of the contract to be *in writing*, and that parol evidence might be given of the consideration, which did not go to contradict, but to explain and support the written promise.

Garrow and *Lawes* showed cause against the rule.—The question is simply this, Whether *parol* evidence can be given of an *agreement*, which the Statute of Frauds avoids, unless it be in *writing*? The words are, "that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, &c., of another person, &c., unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be *in writing*, and signed by the party to be charged therewith," &c. Now, to every *agreement* there must be at least two parties; and, in order to make it available in law, there must be some consideration for it; which necessarily forms part of the agreement itself, being that in respect of which either party consents to be bound. It is no answer to say that the parol evidence offered of the consideration, namely, the forbearance to sue Hall, did not go to contradict the written promise: it is enough that, being part, and a material part of the *agreement*, it was not reduced to writing and signed by the party to be charged, as required by the statute. The effect of such parol evidence, if admitted, would be to render valid that which, so far as appears by the writing itself, is void in law for want of a consideration; and this would be letting in all the dangers of fraud and perjury which it was the object of the statute to guard against. Upon the face of the paper the debt appears to be the debt of another; and as a mere promise to pay the debt of another, without any consideration, would,

before the statute, have been void as *nudum pactum* at common law: so it is not made good by the statute without a consideration in law for entering into such an agreement; which *agreement, i.e.*, the whole agreement, or some memorandum or note of the whole, specifying the contracting parties, the consideration, and the promise, must be made in writing. The consideration is an essential part of every executory agreement; and this was altogether executory, on the part at least of the defendant. If the agreement had been declared on as in writing, the mere production of the note could not have proved the consideration of forbearance laid in the declaration; and such consideration could not have been supplied by parol evidence. In *Preston* v. *Merceau* (*a*), where the plaintiff had agreed in writing with the defendant's testator to let him certain premises at a certain rent, parol evidence, tendered to show that the tenant had agreed to pay a certain sum for ground-rent to the ground landlord, was rejected as subversive of the Statute of Frauds; although it was there contended that the evidence offered did not go to *alter* but to *explain* the agreement. So in *Gunnis* v. *Erhart* (*b*), the verbal declaration of an auctioneer, at the time of a sale, that there was a charge on the estate, was deemed inadmissible to contradict the printed conditions, which stated the premises to be free from all incumbrances.

Erskine and *Marryat*, in support of the rule, said that the evidence tendered in the two cases cited went, not to explain, but to contradict the written agreements; in the one case to increase the *quantum* of the rent specified, in the other to subtract so much as the charge amounted to from the value of the estate, which was offered for sale *free from incumbrances*. But here the parol evidence went merely to show on what occasion the written agreement had been entered into: and it is in common practice to admit parol evidence for such a purpose: it is part of the *res gestæ*, and no part of the agreement itself, which must in its nature be executory at the time of the writing made. The foundation of the action in this case is not the writing, but the *promise* by the defendant to pay the debt of Hall. This, before the Statute of Frauds, might have been proved wholly by oral testimony, but since that statute the promise can only be

(*a*) 2 W. Bl. 1249. (*b*) 1 H. Bl. 289.

evidenced by writing signed by the party to be charged therewith, or by some other lawfully authorised. It is difficult, indeed, to account for the introduction of the word *agreement* into the latter part of the clause, which, in its strict sense, as compounded of "*aggregatio mentium*, or the union of two or more minds in a thing done or to be done" (*c*), is more properly applicable to the other branches of the clause, namely, "an *agreement* on consideration of marriage, or upon *contract* or sale of lands, &c., or upon any *agreement* not to be performed within the space of one year," &c., than to any special *promise* by an executor to answer damages out of his own estate, or to any special *promise* to answer for the debt, &c., of another. To such *promises* the word *agreement* can only be considered applicable so far as it is synonymous to *engagement* or *undertaking*, in which sense it is often used in common parlance, and therefore means in this respect the agreement or promise to pay the debt of another. Besides, the statute does not require the *whole* agreement to be set out in form, but it is sufficient if there be a *note* or *memorandum* of it in writing; that is, so much of the agreement as is obligatory on "the party to be charged therewith." In whatever form of words, therefore, the *promise* is made, which before the statute would have been evidence to bind the party making it under the circumstances of the case, it will, if those words are reduced into writing, still bind him since the statute, under the like circumstances. But in either case the inducement for making such promise, which is part of the *res gestæ*, may be evidenced by parol. Thus, suppose a promise in writing to pay the *expenses* attending a certain bill drawn by another; parol evidence must necessarily be let in to show to what bill the promise was meant to apply, and how the expenses arose, and the bill itself would be produced. And this would be evidence not to vary, but to corroborate the written promise. The 3rd, 7th, and 17th sections of the Act all require the signature of the party to some note in writing in order to charge him with the several subject-matters of those sections. But in all those cases the party must be charged on the special written *agreement*; but here he is charged on the *promise*, of which the writing is only evidence. Yet the 4th section supposes that the party is to be

(*c*) 1 Com. Dig. 311.

charged *upon the agreement*, "unless the agreement *upon which* such action shall be brought," &c.; which shows that *agreement* as there used means no more than *undertaking* or *engagement*. And in this sense an *agreement* signed by one party only on a sale by auction was holden sufficient to charge him within the Statute of Frauds (*d*). (Lord Ellenborough, C. J.—There it was deemed sufficient proof of such agreement so as to charge the party signing it. He was estopped by his signature from protecting himself under the statute. But there the consideration appeared in writing.) They then observed, that though the objection must have often before occurred in actions of this sort, which were in common practice, the word *agreement* had never before received such a construction as applicable to this branch of the clause.

Lord Ellenborough, C. J., after noticing the definition of the word *agreement* by Lord C. B. Comyns, who considered it as a thing to which there must be the assent of two or more minds, and which, as he says, ought to be so certain and complete that each party may have an action upon it; for which, in addition to the author's own authority, was cited that of Plowden; and better (his lordship observed) could not be cited:

In all cases where, by long habitual construction, the words of a statute have not received a peculiar interpretation, such as they will allow of, I am always inclined to give to them their natural ordinary signification. The clause in question in the Statute of Frauds has the word *agreement* ("unless the *agreement* upon which the action is brought, or some memorandum or note thereof, shall be in writing," &c.). And the question is, Whether that word is to be understood in the loose incorrect sense in which it may sometimes be used, as synonymous to *promise* or *undertaking*, or in its more proper and correct sense, as signifying a mutual contract or consideration between two or more parties? The latter appears to me to be the legal construction of the word, to which we are bound to give its proper effect: the more so when it is considered by whom that statute is said to have been drawn, by Lord Hale (*e*), one of the greatest judges who ever sat in Westminster Hall, who was as competent to express as he was

(*d*) *Seton* v. *Slade*, 7 Ves. jun. 265.

(*e*) Lord Mansfield expressed a doubt whether Lord Hale drew the statute, "any farther than by perhaps leaving some loose notes behind him, which were afterwards unskilfully digested;" *Wyndham* v. *Chetwynd*, 1 W. Bl. 99; see 1 Burr. 418.

(Lord Ellenborough, C.J.)

able to conceive the provisions best calculated for carrying into effect the purposes of that law. The person to be charged for the debt of another is to be charged, in the form of the proceeding against him, upon his special *promise*; but without a legal consideration to sustain it, that promise would be *nudum pactum* as to him. The statute never meant to enforce any promise which was before invalid, merely because it was put in writing. The obligatory part is indeed the *promise*, which will account for the word *promise* being used in the first part of the clause, but still in order to charge the party making it the statute proceeds to require that the *agreement*, by which must be understood *the agreement in respect of which the promise was made*, must be reduced into writing. And, indeed, it seems necessary for effectuating the object of the statute that the consideration should be set down in writing as well as the promise; for otherwise the consideration might be illegal, or the promise might have been made upon a condition precedent, which the party charged may not afterwards be able to prove, the omission of which would materially vary the promise, by turning that into an absolute promise which was only a conditional one: and then it would rest altogether on the conscience of the witness to assign another consideration in the one case, or to drop the condition in the other, and thus to introduce the very frauds and perjuries which it was the object of the Act to exclude, by requiring that the *agreement* should be reduced into writing, by which the consideration as well as the promise would be rendered certain. The authorities referred to by Comyns, Plowd. 5 a, 6 a, 9, to which may be added Dyer, 336 b, all show that the word *agreement* is not satisfied unless there be a consideration, which consideration forming part of the agreement ought therefore to have been shown; and the promise is not binding by the statute unless the consideration which forms part of the agreement be also stated in writing. Without this, we shall leave the witness, whose memory or conscience is to be refreshed, to supply a consideration more easy of proof, or more capable of sustaining the promise declared on. Finding therefore the word *agreement* in the statute, which appears to be the most apt and proper to express that which the policy of the law seems to require, and finding no case

in which the proper meaning of it has been relaxed, the best construction which we can make of the clause is to give its proper and legal meaning to every word of it.

GROSE, J.—It is said that the parol evidence tendered does not contradict the agreement; but the question is, Whether the statute does not require that the consideration for the promise should be in writing as well as the promise itself? Now, the words of the statute are, "that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, &c., of another person, &c., unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be in writing," &c. What is required to be in writing, therefore, is the *agreement* (not the promise, as mentioned in the first part of the clause), or some *note or memorandum of the agreement*. Now the *agreement* is that which is to show what *each party* is to do or perform, and by which *both parties* are to be bound; and *this* is required to be *in writing*. If it were only necessary to show what *one* of them was to do, it would be sufficient to state the *promise* made by the defendant who was to be charged upon it. But if we were to adopt this construction, it would be the means of letting in those very frauds and perjuries which it was the object of the statute to prevent. For, without the parol evidence, the defendant cannot be charged upon the written contract for want of a consideration in law to support it. The effect of the parol evidence then is to make him liable: and thus he would be charged with the debt of another by parol testimony, when the statute was passed with the very intent of avoiding such a charge, by requiring that the *agreement*, by which must be understood the *whole agreement*, should be in writing.

LAWRENCE, J.—From the loose manner in which the clause is worded, I at first entertained some doubt upon the question; but upon further consideration I agree with my lord and my brothers upon their construction of it. If the question had arisen merely on the first part of the clause, I conceive that it would only have been necessary that the *promise* should have been stated in writing; but it goes on to direct that no person shall be charged on such *promise*, unless the *agreement* or some *note or memorandum thereof*, that is, *of the agreement*, be in writing; which

(Lawrence, J.)

shows that the word *agreement* was meant to be used in a sense different from *promise*, and that something besides the mere promise was required to be stated. And, as the consideration for the promise is part of the agreement, that ought also to be stated in writing.

Le Blanc, J.—If there be a distinction between *agreement* and *promise*, I think we must take it that *agreement* includes *the consideration* for the promise as well as *the promise* itself: and I think it is the safer method to adopt the strict construction of the words in this case, because it is better calculated to effectuate the intention of the Act, which was to prevent frauds and perjuries by requiring written evidence of what the parties meant to be bound by. I should have been as well satisfied, however, if, recurring to the words used in the first part of the clause, they had used the same words again in the latter part, and said, "unless *the promise* or *agreement* upon which the action is brought, or some note or memorandum thereof, shall be in writing." But not having so done, I think we must adhere to the strict interpretation of the word *agreement*, which means the *consideration* for which, as well as the *promise* by which, the party binds himself. Rule discharged.

Main point discussed in note to *Birkmyr* v. *Darnell*, *ante*.

The main point involved in this case has been already discussed in the note to *Birkmyr* v. *Darnell*, *ante*. The case of *Wain* v. *Warlters* is, however, one of so much celebrity, that it would have been improper to omit it in a selection of *leading cases*; it was confirmed by *Saunders* v. *Wakefield*, 4 B. & Ald. 595; and was afterwards acted on in numerous cases.

19 & 20 Vict. c. 97, altered law, but only as regards *guarantees*.

It has been mentioned, *ante*, p. 292, that the Mercantile Law Amendment Act, 1856, provides, by s. 3, that "no special promise to be made by any person to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized, *shall be deemed invalid* to support an action, suit, or other proceeding to charge the person by whom such promise

shall have been made, *by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.*" The rule laid down in *Wain* v. *Warlters* (a rule which some have thought to be hardly consistent with the natural interpretation of the words of the s. 4 of the Statute of Frauds, which only required that there should be some "*memorandum or note*" in writing of the agreement of guarantee) was thus altered by the legislature, because it was found, in practice, that it led to many unjust and merely technical defences to actions upon guarantees.

Subject of note.

The note to this case deals with questions arising upon that portion of s. 4 of the statute which provides that a guarantee must be signed *by or on behalf of the party to be charged*; and as this provision is still in force, the note is still retained.

What sufficient signature by party to be charged.

It will be recollected that, according to the statute, the agreement, or some memorandum or note thereof, is to be in writing, *signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.* The question to be considered is what can be deemed a sufficient signature to meet these words.

Place of signature.

It is clear that the signature need not be placed in any particular part of the instrument or memorandum, either under the 4th or the 17th section.

Durrell v. *Evans.*

In *Durrell* v. *Evans*, 1 H. & C. 174, a factor, who was the agent of both parties to a sale for the purpose of drawing up a record of the contract binding on them, wrote the name of the buyer at the head of a memorandum of the sale, and the court held that this was a sufficient signature. "Noakes" (the factor), said Crompton, J., "drew out a note of the contract with the names of both buyer and seller upon it, but it contained nothing which could ordinarily be called a signature, for the defendant's (the buyer's) name was written at the head of the document; and if this had been the first case on the subject I should have doubted whether the placing a name at the top of a document could fairly be called a signature; but that is now past discussion, for the cases have decided that it does not signify where the name is placed, if it is put there by the party sought to be charged or some person deputed by him. It may be at the head, the middle, at the end, or in any part of the document." See also *Simmonds* v. *Humble*, 13 C. B. N. S. 258.

Johnson v. *Dodgson.*

In *Johnson* v. *Dodgson*, 2 M. & W. 653, Lord Abinger said:—"The Statute of Frauds requires that there should be a note or memorandum of the contract in writing *signed by the party to be charged*. And the cases have decided that, although the signature be in the beginning or middle of the instrument, it is as binding as if at the foot of it, *the question being always open to the jury whether the party, not having signed it regularly at the foot, meant to be bound by it as it then stood, or whether he left it so unsigned because he refused to complete it.*" In that case a memorandum of sale written by J. D., the buyer, began "sold J. D." etc., and was signed by the sellers, and this was held to be sufficiently signed by the buyer.

Evans v. *Hoare.*

In *Evans* v. *Hoare*, (1892) 1 Q. B. 593, the agent of the defendants wrote a memorandum of a contract in the form of a letter to them, with their names written at the beginning, and commencing "Dear Sirs"; and this was signed by the plaintiff. It was held to be sufficiently signed by the defendants. See *Saunderson* v. *Jackson*, 2 B. & P. 238; *Schneider* v. *Norris*, 2 M. & S. 286; *Sarl* v. *Bourdillon*, 26 L. J. C. P. 78.

Other instances.

A letter written by the defendant, commencing "Mr. Stanley begs to inform," though not otherwise signed by him, was held to be sufficiently signed; *Lobb* v. *Stanley*, 5 Q. B. 574. So also an agreement written by the defendant, commencing "Mr. Wilmot Parker has agreed;" *Propert* v. *Parker*, 1 Russ. & M. 625; and an agreement written by Bridges, commencing "John Bleakley agrees with J. R. Bridges;" *Bleakley* v. *Smith*, 11 Sim. 150. See also *Knight* v. *Crockford*, 1 Esp. 190; *Morison* v. *Turnour*, 18 Ves. 175.

Signature must govern the whole memorandum;

However, the mere circumstance of the name of a party being written by himself or his agent in the body of a memorandum will not of itself constitute a signature of the *whole* memorandum. In order to do that, it must govern or authenticate every material part of the document. If a signature occur in a document incidentally only, or with reference to a portion only of the document, it cannot have the legal effect and force which it must have in order to comply with the statute and to give authenticity to the whole of the memorandum; *Caton* v. *Caton*, L. R. 2 H. L. 127, 139, 143. Further, it may appear, upon the face of the instrument itself, that the parties contemplated a further signature in order to complete the instrument;

and must be intended to be a signature.

in which case it is a question of law upon the construction of the instrument, whether there is a sufficient signature; or it may appear, from parol evidence, that a further signature was intended; in which case the same question is one of fact; see *Hubert* v. *Treherne*, 3 M. & Gr. 755, where an agreement containing the names of the parties, and concluding with the words "as witness our hands" without any other signature, was held not to be sufficiently signed; *Johnson* v. *Dodgson*, *supra*.

Coles v. *Trecothick*, principal signing as witness.

In *Coles* v. *Trecothick*, 9 Ves. 234, 251, Lord Eldon said that "where a party, or principal, or person to be bound, signs as what he cannot be, a witness, he cannot be understood to sign otherwise than as principal." But in *Gosbell* v. *Archer*, 2 A. & E. 500, where the purchaser affixed his signature to an agreement for the sale of land, and underneath was written, "Witness, J. Newman," in the usual place for a witness's signature, Newman being the clerk of the auctioneer employed to sell, it was urged that Newman must be taken to have signed as agent for the vendor, and it was attempted to show a ratification of his agency. But the court was of opinion, that he signed simply as a witness; and Lord Denman said that he thought the above remark of Lord Eldon open to much observation; that no such decision had been actually made; and that, if it had, he should pause, unless he found it sanctioned by the very highest authority, before he held that a party attesting was bound by the instrument. See also *Doe* v. *Burdett*, 9 A. & E. 971, *per* Parke, B., 6 M. & Gr. 386, in H. L. See, however, the observations of Sir Edward Sugden, 1 *Vend. and P.*, 14th ed., 143, where he vindicates the remarks made by Lord Eldon in *Coles* v. *Trecothick*.

Gosbell v. *Archer*.

Signature by auctioneer.

It has been settled ever since *Simon* v. *Metivier*, 1 W. Bl. 599, that the auctioneer is the agent of both buyer and seller, and that a memorandum made by him of the bargain is a sufficient compliance with the terms of the statute; see *Beer* v. *London Co.*, 20 Eq. 412, 426; but the agency of the auctioneer exists only at the time of the sale, and he cannot, at a subsequent day, bind the parties by his signature; *Mews* v. *Carr*, 1 H. & N. 484. On a sale of land subject to conditions, the entry in the auctioneer's book must refer to the conditions of sale so as to identify them; *Rishton* v. *Whatmore*, 8 Ch. D. 467. An auctioneer's clerk may be, and very often is, the agent of the purchaser to sign his name; *Bird* v. *Boulter*, 4 B. & Ad. 443; *Sims* v. *Landray*,

(1894) 2 Ch. 318; see *Peirce* v. *Corf*, L. R. 9 Q. B. 210. An estate agent who is instructed to find a purchaser for property has, *primâ facie*, no authority to sign a contract for sale as agent; *Chadburn* v. *Moore*, 67 L. T. 257. One of the parties to the contract cannot sign the name of the other, as his agent, so as to bind him; *Sharman* v. *Brandt*, L. R. 6 Q. B. 720.

By party to contract.

By "traveller."

In *Murphy* v. *Boese*, L. R. 10 Ex. 126, the plaintiff's traveller, on taking an order from the defendant, wrote down in his presence the defendant's name, and the description and price of the goods in a partly printed form, and gave the defendant a copy of what he had written; the court, distinguishing *Durrell* v. *Evans*, 1 H. & C. 174, *supra*, held that there was no evidence of signature by an agent within the statute. A signed entry in a broker's book may be sufficient to bind both parties; *Thompson* v. *Gardner*, 1 C. P. D. 778.

By broker

By solicitor.

A solicitor, who is instructed by a client to prepare a draft contract and send it to a person with whom the client has made a verbal arrangement for a sale, has no authority to sign a memorandum of the contract; *Smith* v. *Webster*, 3 Ch. D. 49. The signature by the chairman of a company to the minute book may be sufficient to bind the company within the statute; *Jones* v. *Victoria Graving Dock*, 2 Q. B. D. 314. As to signature by the secretary of a company, see *Beer* v. *London Co.*, 20 Eq. 412.

By chairman of company.

It is not necessary, when an agent signs, that he should sign the name of his principal; if he signs in his own name, parol evidence is admissible to show the agency, and charge the principal on the contract; see notes to *Thomson* v. *Davenport*, *post*, vol. ii.

Initials.

It seems clear that the *initials* of the party to be charged are a sufficient signature within this statute. It was stated in Mr. Roscoe's work upon *Evidence*, 6th ed., p. 265, that a signature by initials is *not* sufficient within the meaning of the statute, and *Jacob* v. *Kirk*, 2 M. & Rob. 221, and *Sweet* v. *Lee*, 3 M. & Gr. 452, were cited as authorities for that position, whilst Sir Edward Sugden cites those two cases in support of the statement, that "it is sufficient, it seems, if the initials of the name are set down;" 1 *Vend. & P.*, 14th ed., 144; and in *In the Goods of Blewitt*, 5 P. D. 116, it was decided that a signature by initials is a sufficient signature under the Wills Act. A *mark* seems clearly to be a sufficient signature within the statute, and the Q. B. decided, on the 5th and 6th sections of the statute, that no inquiry

Mark.

ought to be allowed as to whether the party making the mark could write; *Baker* v. *Dening*, 8 A. & E. 94; and if, as was in effect decided in that case, a mark made by a person who can write be a sufficient signature, it would be strange that it should cease to be so when the mark assumes the shape of the maker's initials; see *Hubert* v. *Moreau*, 2 C. & P. 528, 12 Moore 216, *in banc*; and also the cases cited in *Trotter* v. *Walker*, 13 C. B. N. S. 30. In the latter case a notice of objection to the name of a voter was held sufficient, although the objector's surname (being his usual mode of signing) was wholly illegible, so that an ordinary person unacquainted with the signature could not, by perusing it with ordinary skill and diligence, find out what name it was intended to designate. Surname illegible.

In *Bennett* v. *Brumfit*, L. R. 3 C. P. 28, a notice impressed by the objector himself with a stamped *fac-simile* of his signature was held to be sufficiently signed; see, as to a will, *In the goods of Jenkyns*, 3 Sw. & Tr. 93, 32 L. J. Prob. 71; and in *Tourret* v. *Cripps*, 48 L. J. Ch. 567, a letter containing the sender's name, printed at the top, but not signed in writing, was held to be sufficiently signed; see *Schneider* v. *Morris*, 2 M. & S. 286. A lithographed statement of particulars, with the solicitor's name lithographed at the end, was held not to be signed by the solicitor, under the County Court Rules, 1889, O. vi., r. 10; *R.* v. *Cowper*, 24 Q. B. D. 60, 533, Lord Esher dissenting. Stamped *fac-simile*. Print.

Where an agent who made the agreement, not being able to write, held the top of the pen, whilst another person wrote his name, the agreement was held to be sufficiently signed; *Helsham* v. *Langley*, 11 L. J. Ch. 17. Tracing over a signature with a dry pen by a testator or a witness to a will has been held not to be a signature; *In the goods of Cunningham*, 29 L. J. Prob. 71; *In the goods of Maddock*, L. R. 3 P. & D. 169. Where hand of person signing guided by another.

The Wills Act requires that two witnesses "shall attest and shall subscribe the will in the presence of the testator." In *Harrison* v. *Elwin*, 3 Q. B. 117, the name of one witness, who could not write, was traced by the other witness holding his hand, and guiding the pen. It was contended that, assuming a mark to be sufficient, this was not even the mark of the witness, but the court held that it was *the signature* of the witness and a sufficient attestation. Wills Act, s. 9.

A mark at the foot of a will with a wrong Christian name written against it, the testator being also described by the Mark with wrong Christian name.

wrong Christian name in the will itself, has been held to be sufficient under the Wills Act, the court being satisfied that the mark was that of the testator, and that it was made *animo testandi*; *In the goods of Douse*, 31 L. J. Prob. 172.

Will terminating with testator's name sufficient.

In *Trott* v. *Trott*, 29 L. J. Prob. 156, a holograph will began, "I, Joseph Skidmore," and ended "all of which to be paid . . . and a receipt, to be provided by the receiver, from all further claim upon the estate of their departed brother Joseph Skidmore." The last words "Joseph Skidmore" were written on the same line with the preceding words, without any interval between them and the word "brother." The will was not otherwise signed, but underneath the last words appeared the names of two witnesses. The court granted probate, holding that, from the mode in which the document was framed, the testator must have intended the words "Joseph Skidmore" at the end of the will to be his signature.

Acknowledgment by witness of previously written signature.

It is not a sufficient signature by a witness under the Wills Act that one of the witnesses should acknowledge his previously written signature in the presence of the other, even although he, at the same time, corrects an error in it, and adds the date; *Hindmarsh* v. *Charlton*, 8 H. L. C. 160.

CUMBER *v.* WANE.

TRINITY.—5 *GEO.* 1.

[REPORTED 1 STRANGE, 426.]

Giving a note for 5*l.* cannot be pleaded as a satisfaction for 15*l.*
If one party die during a "curia advisari vult," judgment may be entered nunc pro tunc.

ERROR *e* C. B. in an *indebitatus assumpsit* for 15*l.* The defendant pleads, that he gave the plaintiff a promissory note for 5*l.* in satisfaction, and that the plaintiff received it in satisfaction. The plaintiff put in an immaterial replication, to which the defendant demurred. And, after judgment for the plaintiff, it was objected on error, that the plea was ill, it appearing that the note for 5*l.* could not be a satisfaction for 15*l.*, and that where one contract is to be pleaded in satisfaction of another, it ought to be a contract of a higher nature; Hob. 68; 2 Keb. 804. One bond cannot be pleaded in satisfaction of another; 1 Mod. 225; 2 Keb. 851. Even the actual payment of 5*l.* would not do, because it is a less sum; 5 Co. 117; 1 Leon. 19. Much less shall a note payable at a future day.

E contra. It was argued that, the plaintiff's demand consisting only in damages, it was for his benefit to have it reduced to a certainty, and *to have the security for it made negotiable* (*a*). A stated account may be pleaded in bar of an action of covenant; 4 Mod. 43; 1 Mod. 261; 1 Roll. Abr. 122. Formerly indeed executory promises were not held a satisfaction, but the contrary has been since adjudged; Raym. 450; Salk. 76. And now it is held that an award before performance is a bar of the former action (*b*).

Et per PRATT, L.C.J. (on consideration): We are all of opinion

(*a*) This argument was considered valid in *Sibree* v. *Tripp*, 15 M. & W. 23.

(*b*) See *Crofts* v. *Harris*, Carth. 187; *Parsloe* v. *Baily*, Salk. 76; *Freeman* v. *Bernard*, Salk. 69; but see *Allen* v. *Milner*, 2 Tyrwh. 113, 2 C. & J. 47.

that the plea is not good, and therefore the judgment must be affirmed. As the plaintiff had a good cause of action, it can only be extinguished by a satisfaction he agrees to accept; and it is not his agreement alone that is sufficient, but it must appear to the court to be a reasonable satisfaction; or at least the contrary must not appear, as it does in this case (*c*). If 5*l.* be (as is admitted) no satisfaction for 15*l.*, why is a simple contract to pay 5*l.* a satisfaction for another simple contract of three times the value? In the case of a bond, another has never been allowed to be pleaded in satisfaction, without a bettering of the plaintiff's case, as by shortening the time of payment. Nay, in all instances the bettering his case is not sufficient, for a bond with sureties is better than a single bond, and yet that will not be a satisfaction; 1 Brownl. 47, 71; 2 Roll. Abr. 470. The judgment therefore must be affirmed (*d*).

Then it was alleged that, since the time when the court took to advise, the defendant in error was dead; and therefore they prayed, that they might enter the judgment *nunc pro tunc*, as was done in the case of *Baller* v. *Delander*, Trin. 1 Geo. in B. R., which was ordered according (*e*).

(*c*) See *Pritchard* v. *Hitchcock*, 6 Scott, N. R. 851, 6 M. & Gr. 151, where an issue joined upon the plea of payment in satisfaction was sustained by evidence that the payment relied upon was void, as being a fraudulent preference, and that the assignees had recovered the amount. And see *Bell* v. *Buckley*, 11 Exch. 631.

(*d*) *Tayler* v. *Baker*, 5 Mod. 136. The present case was denied to be law in *Hardcastle* v. *Howard*, H. 26 Geo. 3; see 2 T. R. 28. But see the notes below. See also *Kearslake* v. *Morgan*, 5 T. R. 513.

(*e*) *Craven* v. *Henley*, Barnes, 255; *Astley* v. *Reynolds*, Str. 917; *Tooker* v. *Duke of Beaufort*, 1 Burr. 147; *Sir John Trelawny* v. *Bishop of Winchester*, ib. 226, S. P. See also 1 Leon. 287; 1 Sid. 462; 1 Vent. 58, 90. But *Blackall* v. *Heal*, Com. Rep. 13, *contra*.

Doctrine of principal case.

The main point in this case, *viz.*, that a security of equal degree for a smaller sum, if it present no easier or better remedy, cannot be pleaded in an action for the larger one, has frequently been affirmed since the decision of *Cumber* v. *Wane*; although the doctrine there laid down by Pratt, C.J., has not been to its full extent sustained; see *Sibree* v. *Tripp*, 15 M. & W. 23; *Bidder* v. *Bridges*, 37 Ch. D. 406.

Fitch v. *Sutton.*

In *Fitch* v. *Sutton*, 5 East, 230, the action was *indebitatus assumpsit* for goods sold and delivered. *Plea, non assumpsit.*

The defendant, who owed the plaintiff 50*l.*, had compounded with his creditors, and paid them seven shillings in the pound; at the time of such payment to the plaintiff he promised to pay him the residue of his debt when he should be able so to do; he was so able before action brought. On the other hand, the defendant produced a receipt, signed by the plaintiff, for the composition, purporting to be in full of all demands; and it was urged that either the receipt was a discharge of the promise, or the promise itself was void, as a fraud upon his other creditors, or, at all events, the plaintiff ought not to have declared upon the original cause of action, but specially upon the new promise to pay when able. But the court, after a verdict for the defendant, made a rule for a new trial absolute on the express grounds that the acceptance of 17*l.* 10*s.* could not be a satisfaction for a debt of 50*l.* "There must be some consideration," said Lord Ellenborough, "for the relinquishment of the residue, something collateral to show the possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*. But the mere promise to pay the rest, when of ability, puts the plaintiff in no better condition than he was before. It was expressly determined, in *Cumber* v. *Wane*, that acceptance of a security for a lesser sum cannot be pleaded in satisfaction of a similar security for a greater. And though that case was said by me, in argument in *Heathcote* v. *Crookshanks*, to have been denied to be law, and in confirmation of that Buller, J., afterwards referred to a case, stated to be *Hardcastle* v. *Howard*, H. 26 G. 3, yet I cannot find any case of that sort, and none has been now referred to. On the contrary, the authority of *Cumber* v. *Wane* is directly supported by *Pinnel's Case* which never appears to have been questioned." The other judges concurred, and Lawrence, J., referred to Co. Litt. 212 b, and to *Adams* v. *Tapling*, 4 Mod. 88, as confirmatory of the same doctrine. In Co. Litt. 212 b, it was laid down that "where the condition is for payment of 20*l.*, the obligor or feoffor cannot, at the time appointed, pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum cannot be a satisfaction of a greater. But if the obligee or feoffee do at the day receive part, and thereof make an acquittance, *under his seal*, in full satisfaction of the whole, it is sufficient by reason the *deed* amounteth to an acquittance of the whole. If the obligor or feoffor

A similar security for a smaller sum not pleadable in satisfaction of larger sum.

pay a lesser sum, either *before the day*, or at *another place*, than is limited by the condition, and the obligee or feoffee receiveth it, this is a good satisfaction." See the cases on this point collected, Selw. N. P., *Debt on Bond*; and see *Worthington* v. *Wigley*, 3 B. N. C. 454.

The doctrine laid down in *Fitch* v. *Sutton*, that a similar security for a smaller debt cannot be pleaded in satisfaction of a larger one, has been frequently affirmed, both before and since; see *Heathcote* v. *Crookshanks*, 2 T. R. 24; *Pinnel's Case*, 5 Rep. 117; *Lynn* v. *Bruce*, 2 H. Bl. 317; *Thomas* v. *Heathorn*, 2 B. & C. 477; *Mitchell* v. *Cragg*, 10 M. & W. 367, where to a demand for 16*l.* a plea, stating an agreement to set off 4*l.* *and the price of a horse* in satisfaction, was considered bad because the price of the horse might have been less than the difference. And though it was once ruled, at *nisi prius*, that a creditor who had given a receipt in full of all demands would be thereby precluded from insisting afterwards upon any demand prior to such receipt; *Alner* v. *George*, 1 Camp. 392; yet it is clear, both upon general principle, and from the decisions in *Fitch* v. *Sutton*, and other cases, that such an instrument, not being an estoppel, cannot prevent the plaintiff from insisting that part of his demand remains unsatisfied; see *Graves* v. *Key*, 3 B. & Ad. 313; *Skaife* v. *Jackson*, 3 B. & C. 421; *Stratton* v. *Rastall*, 2 T. R. 366; and the explanation of *Alner* v. *George* in *Bowes* v. *Foster*, 2 H. & N. 779.

A receipt given by plaintiff whose claim is unsatisfied works no estoppel.

Foakes v. *Beer*.

The question discussed in this note was much considered in *Foakes* v. *Beer*, 9 App. Cas. 605, where a vigorous attack was made upon the principle for which *Cumber* v. *Wane* is generally cited as an authority, with the result that it was re-affirmed by the highest tribunal, though with considerable hesitation on Lord Blackburn's part. There a judgment creditor agreed, in consideration of payment down of a portion of the judgment debt, and on condition of the residue being paid off by instalments on certain days, to take no proceedings to enforce the judgment. The principal sum due on the judgment was wholly paid off as provided by the agreement. The creditor sought to recover interest, and the question was whether the agreement barred her claim. The decision of Cave, J., that it did, was upheld by the Divisional Court, but was reversed by the C. A. on the ground that the agreement was *nudum pactum*, and afforded no answer to proceedings upon the judgment. The decision of the C. A. was affirmed in the H. L.

In moving to dismiss the appeal Lord Selborne said: Lord Selborne.
" The question is nakedly raised by this appeal, whether your lordships are now prepared not only to overrule as contrary to law the doctrine stated by Sir E. Coke to have been laid down by all the judges of the Common Pleas in *Pinnel's Case*, in 1602, and repeated in his note to Littleton, sect. 344, but to treat a prospective agreement, not under seal, for satisfaction of a debt by a series of payments on account to a total amount less than the whole debt, as binding in law, provided those payments are regularly made ; the case not being one of composition agreed to *inter se* by several creditors. I prefer so to state the question instead of treating it, as it was put at the bar, as depending on the authority of the case of *Cumber* v. *Wane*, decided in 1718. It may well be that distinctions which have been held in later cases to exclude the application of that doctrine existed, and were improperly disregarded, in *Cumber* v. *Wane*, and yet that the doctrine itself may be rightly recognised in *Cumber* v. *Wane*, and not really contradicted by any later authorities. And this appears to me to be the true state of the case. The doctrine itself, as laid down by Sir E. Coke, may have been criticised as questionable in principle by some persons whose opinions are entitled to respect, but it has never been judicially overruled ; on the contrary, I think it has always, since the sixteenth century, been regarded as law. If so, I cannot think that your lordships would do right if you were now to reverse as erroneous a judgment of the Court of Appeal proceeding upon a doctrine which has been accepted as part of the law of England for 280 years.

" The doctrine as stated by *Pinnel's Case* is, 'that payment *Pinnel's Case.*
of a lesser sum on the day' (it would of course be the same after the day) 'in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum.' . . . If the question be (as in the actual state of the law I think it is) whether consideration is or is not given in a case of this kind by the debtor, who pays down part of the debt presently due from him, for a promise by the creditor to relinquish, after certain further payments on account, the residue of the debt, I cannot say that I think consideration is given, in the sense in which I have always understood that word as used in our law."

In *Underwood* v. *Underwood*, (1894) P. 204, the principle

of *Cumber* v. *Wane* and *Foakes* v. *Beer* was applied to an agreement to forego all claims under an alimony order in consideration of 10*l.* paid down. At the date of the agreement the arrears due under the order amounted to 16*l.*, and the agreement was therefore held to be *nudum pactum*.

Distinction where claim is unliquidated.

Later cases have engrafted on the doctrine, that a smaller sum can be no satisfaction for a larger one payable in the same manner, this distinction, that, although, where there is a liquidated debt, the rule laid down in *Cumber* v. *Wane* prevails, yet, if there be not a liquidated debt, but an unliquidated demand, in that case the acceptance of a smaller sum than the plaintiff may have originally claimed will be a satisfaction of his whole demand, and a good answer to an action in respect of it.

Acceptance of a sum smaller than that claimed, a satisfaction.

This distinction seems to have originated in *Longridge* v. *Dorville*, 5 B. & Ald. 117. It was discussed in *Watters* v. *Smith*, 2 B. & Ad. 889, and *Haigh* v. *Brookes*, 10 A. & E. 309, and approved in *Wilkinson* v. *Byers*, 1 A. & E. 106. That was an action of *assumpsit*. R., as the defendant's attorney, having sued the plaintiff in the Palace Court for 13*l.* 10*s.* on a *quantum meruit* for work done, the plaintiff, while that action was pending, paid the 13*l.* 10*s.* to the defendant himself, who promised that, in consideration of such payment, he would settle with R. for the costs of the action and indemnify the plaintiff against them; but the defendant neglected to settle with R., who proceeded with the action and signed judgment against the plaintiff, who was obliged to pay 7*l.* 10*s.* costs, and 3*l.* in endeavouring to set aside the judgment. A verdict was found for the plaintiff, subject to the opinion of the court upon the question whether the payment of 13*l.* 10*s.* could be any consideration for the defendant's promise to indemnify the plaintiff against the costs of the Palace Court action. The court upheld the verdict. "The case," said Parke, J., "may be decided shortly on this ground. If an action be brought on a *quantum meruit*, and the defendant agree to pay a less sum than the demand in full, that is a good consideration for a promise by the plaintiff to pay his own costs, and proceed no further. Payment of a less sum than the demand has been held to be no satisfaction in the case of a liquidated debt; but where the debt is unliquidated, it is sufficient. Now, here we cannot say that there was originally any certain demand. A jury, if asked, could not, in my opinion, have said so. In the great majority of

Wilkinson v. *Byers*.

actions of this nature, for work, labour, and goods sold, it is not a specific sum that forms the subject matter of the action; and, unless that could have been shown in the present case, there was a good consideration for the promise."

The principle laid down in *Longridge* v. *Dorville* was approved in *Atlee* v. *Backhouse*, 3 M. & W. 651, *per* Parke, B.; and in *Sibree* v. *Tripp*, 15 Id. 23. In *Down* v. *Hatcher*, 10 A. & E. 121, a plea of payment of 6*l.* 10*s.* in satisfaction of 200*l.* was held bad after verdict. No reason is assigned for the decision, but probably it may have proceeded on the ground that the plaintiff's demand (which was for use and occupation, agistment, and on an account stated), was, *primâ facie*, to be considered liquidated, and that, if the amount was in dispute at the time of the accord, that ought to have been pleaded specially. In *Wilkinson* v. *Byers*, the special matter appeared on the declaration. *Down* v. *Hatcher* was doubted by Parke, B., in *Cooper* v. *Parker*, 15 C. B. 822.

Where claim *primâ facie* liquidated.

In *Edwards* v. *Baugh*, 11 M. & W. 641, the declaration stated that disputes were pending between plaintiff and defendant as to whether defendant was indebted to plaintiff in 173*l.* for money lent, and that, in consideration that the plaintiff would promise the defendant not to sue him for it, and would accept 100*l.* in satisfaction, the defendant promised to pay him 100*l.* This was held bad on general demurrer, Lord Abinger saying that it might have been sufficient had the declaration shown some debt due and a dispute as to the amount: see *per* Parke, B., *Sibree* v. *Tripp*, 15 M. & W. 36. Accordingly, where the declaration stated unsettled accounts and disputes concerning them, and mutual claims to the balance, and that, in consideration that the plaintiff would relinquish all claims against the defendant, he promised, &c., it was held sufficient; *Llewellyn* v. *Llewellyn*, 3 D. & L. 318, Patteson, J.; and in *Cook* v. *Wright*, 1 B. & S. 559, where the plaintiffs, *bonâ fide* believing the defendant to be liable to pay them certain expenses, for which he was not, and believed himself not to be, liable, threatened him with legal proceedings, and he, by way of compromise, before any actual litigation, gave him some promissory notes, there was held to be sufficient consideration for the notes; see also *Callisher* v. *Bischoffsheim*, L. R. 5 Q. B. 449, and *Ockford* v. *Barelli*, 20 W. R. 116, cases which were questioned by Brett, L.J., in *Ex p. Banner*, 17 Ch. D. 480, but approved by the L.JJ. in *Miles* v. *New Zealand Co.*, 32 Ch. D. 266; *Harris* v. *Venables*, L. R. 7

Abandonment of disputed claim, a good consideration for promising to pay fixed sum.

So of claim made *bonâ fide* but in fact unfounded.

So of a suit commenced.

Withdrawal of a plea.

Statement of account.

Ex. 235. The suspension or abandonment of an *action* or *suit* is presumed to be a good consideration, unless the contrary distinctly appear; *Smith* v. *Monteith*, 13 M. & W. 427; and so is the withdrawal of a plea, according to *Cooper* v. *Parker*, 15 C. B. 822. As to the effect of a statement of an account, see *Callender* v. *Howard*, 10 C. B. 290; *Bridgman* v. *Dean*, 7 Exch. 199; *Laycock* v. *Pickles*, 4 B. & S. 497; *M'Kellar* v. *Wallace*, 8 Moore, P. C. 378, 401; and *Perry* v. *Attwood*, 6 E. & B. 691.

Sibree v. *Tripp*.

A negotiable security may be taken in satisfaction of a debt of greater amount.

In *Sibree* v. *Tripp*, 15 M. & W. 23, the case of *Cumber* v. *Wane* was much observed upon, and the decision qualified to this extent, that a negotiable security may operate, if so given and taken, in satisfaction of a debt of greater amount, the circumstance of negotiability making it, in fact, a different thing, and more advantageous than the original debt, which was not negotiable. And Parke, B., observed upon *Cumber* v. *Wane* and *Thomas* v. *Heathorn*, 2 B. & C. 477, that "the reasoning of Pratt, C.J., in the former case is certainly not correct, for we cannot inquire into the *reasonableness* of the satisfaction. But there it did not appear that the note was a negotiable one" (*quære*, see the argument); "and the point now before the court was not made. In *Thomas* v. *Heathorn* it does not appear to have been a case of accord and satisfaction; although the bill accepted by the defendant was a negotiable security, it does not appear that it was given by way of accord and satisfaction." In *Goddard* v. *O'Brien*, 1 Q. B. D. 37, a cheque given by the debtor himself, and in *Bidder* v. *Bridges*, 37 Ch. D. 406, a cheque given by the debtor's solicitor, were held to be a good accord and satisfaction.

The negotiable instrument must have been given and taken as an accord and satisfaction, and it is a question of fact to be determined in each case whether it has been so given and taken, and to what extent; *Foakes* v. *Beer*, 9 App. Cas. 605; *Bidder* v. *Bridges*, *supra*; *Day* v. *McLea*, 22 Q. B. D. 610. The mere fact that the creditor keeps a cheque which has been sent to him in full satisfaction of all demands is not conclusive that there has been an accord and satisfaction, but is only evidence thereof; *Day* v. *McLea*, *supra*: see *Ackroyd* v. *Smithies*, 54 L. T. 130; *Henderson* v. *Underwriters' Ass.*, 65 Id. 616.

Old opinion that liability of one partner could not be

It was once thought that when, upon the dissolution of a firm, the partner who remained in trade agreed, as generally happens, to take upon himself the debts of the late firm, a

creditor of the whole body would not, by assenting to this arrangement, discharge the retiring partner from liability, a notion principally founded on the decisions in *David* v. *Ellice*, 5 B. & C. 196, and *Lodge* v. *Dicas*, 3 B. & Ald. 611; by which, however, it was not perhaps warranted to its full extent. This doctrine, which was based on a ground similar to that on which *Cumber* v. *Wane* was decided, *viz.*, that there would be no consideration to the creditor for such an arrangement, had been much complained of, and at last came to be canvassed solemnly in *Thompson* v. *Percival*, 5 B. & Ad. 925. That was an action against J. & C. Percival, for goods sold and delivered. J. pleaded bankruptcy, on which the plaintiff as to him entered a *nolle prosequi*. C. pleaded the general issue, and at the trial it appeared that J. and C. had been in partnership, which was dissolved in the usual way, J. to continue in the business, and to receive and pay all debts. At the time when notice of the dissolution was first given to the plaintiff, he had a demand on the firm, for which J. told him he must look to him alone. He afterwards drew a bill on J. for its amount, which was dishonoured. Upon these facts, a verdict being found for the plaintiff, the court granted a new trial, in order that the jury might be asked whether the plaintiff had agreed to accept the individual liability of J., instead of the joint liability of J. and C.; and it was held that, if that question should be answered in the affirmative, the defendant would be entitled to a verdict. "Many cases," said Denman, C.J., delivering the judgment of the court, "may be conceived, in which the sole liability of one of two debtors may be more beneficial than the joint liability of two, either in respect of the solvency of the parties or the convenience of the remedy, as in cases of bankruptcy, survivorship, or in various other ways; and whether it was actually more beneficial in each particular case cannot be made the subject of inquiry." *Acc. Winter* v. *Innes*, 4 Cr. & M. 109. In *Kirwan* v. *Kirwan*, 4 Tyr. 491, a similar point occurred. That case was decided upon special circumstances; but from it, as well as from *Thompson* v. *Percival*, the following rule may be collected: *viz.*, that mere knowledge of such an arrangement amongst members of a partnership about to be dissolved will not bind the creditor of the firm, but that his own agreement to accept the transfer of liability will; and that the question, whether he has or has not entered into such an agreement, is a question proper to be decided by a jury. See *Hart* v.

taken in satisfaction of debt due from firm,

because no consideration to creditor.

Secus, since *Thompson* v. *Percival*.

Rule of cases.

Alexander, 2 M. & W. 484; *Powles* v. *Page*, 3 C. B. 16; *Lyth* v. *Ault*, 7 Exch. 669; *Re Head*, (1893) 3 Ch. 426, (1894) 2 Ch. 236; *Rouse* v. *Bradford Bank*, (1894) 2 Ch. 32, (1894) A. C. 586.

Compositions with creditors, when valid.

There is another class of cases which are exempted from the general doctrine laid down in *Cumber* v. *Wane*, though once supposed to fall within it: *viz.*, cases where two or more creditors agree with one another and with their debtor that each of them will accept a composition amounting to less than his entire demand, or will forbear to enforce his claim. Such an agreement, if made by a number of creditors, each acting on the faith of the engagement of the others, is binding upon them, for each has the undertakings of the rest as a consideration for his own undertaking; *Good* v. *Cheesman*, 2 B. & Ad. 328; *Reay* v. *White*, 1 C. & M. 748; *Boyd* v. *Hind*, 1 H. & N. 938, 947; see *Slater* v. *Jones*, L. R. 8 Ex. 186. But if one of the creditors be afterwards refused the benefit held out to him by the arrangement, it ceases to be binding on him; *Garrard* v. *Woolner*, 8 Bing. 258. And if the consideration in any manner fails, the agreement is at an end. Thus creditors, who sign on the faith that other creditors will do so, are not bound if the others hold out; *Reay* v. *Richardson*, 2 C. M. & R. 422. The agreement, if it purports to pass an interest in lands, but wants the formalities required by the Statute of Frauds, does not bind the creditors; *Alchin* v. *Hopkins*, 1 B. N. C. 99. Nor is the debtor entitled to the benefit of it, if he neglect to perform accurately what is to be done on his part. Thus he must tender the composition money on the appointed day; for, as Lord Ellenborough said, in *Cranley* v. *Hillary*, 2 M. & S. 120, the party to be discharged is bound to do the act which is to discharge him; *accord. Shipton* v. *Casson*, 5 B. & C. 378; *Wenham* v. *Fowle*, 3 Dowl. 43; *Rosling* v. *Muggeridge*, 16 M. & W. 181; *Evans* v. *Powis*, 1 Exch. 601; *Ex p. Peacock*, 8 Ch. 682; unless, indeed, the creditor has positively refused to accept less than his original demand, in which case he is taken to have waived a tender; *Reay* v. *White*, 1 C. & M. 748; see *Cooper* v. *Phillips*, 5 Tyr. 170; and *Hazard* v. *Marc*, 6 H. & N. 434.

Debtor must perform his part accurately.

Must tender composition on day.

Unless creditor has refused to take less than his demand.

Compositions under Bankruptcy Acts.

Provisions for compositions by debtors were contained in the Bankruptcy Acts, 1849-1869, and are now contained in the Acts of 1883 (s. 23), and 1890 (s. 3). Such a composition is a bar to any proceeding by a creditor, who is bound by the composition, until default by the debtor;

Slater v. *Jones*, L. R. 8 Ex. 186; *Campbell* v. *Im Thurm*, 1 C. P. D. 267; *Seaton* v. *Deerhurst*, (1895) 1 Q. B. 853. Upon default by the debtor, a creditor might, under the earlier Acts, use all his former remedies to recover the whole amount remaining due of the original debt; even if the Act provided a summary remedy; *Edwards* v. *Coombe*, L. R. 7 C. P. 519; *Re Hatton*, 7 Ch. 723; *Ex p. Peacock*, 8 Id. 682; *Goldney* v. *Lording*, L. R. 8 Q. B. 182; *Newell* v. *Van Praagh*, L. R. 9 C. P. 96; *Edwards* v. *Hancher*, 1 C. P. D. 111. Now, by the rules made under the Acts of 1883 and 1890, the only remedy of a creditor, upon default, is by application to the bankruptcy court; B. R., r. 210 (1890, r. 33).

Acceptance in satisfaction implied.

In *London and County Bank* v. *London and River Plate Bank*, 21 Q. B. D. 535, where A. had stolen negotiable bonds belonging to the defendants, and had, subsequently, without the defendant's knowledge, replaced them by other like bonds of equal value belonging to the plaintiffs, it was held that the defendants ought to be presumed to have accepted the bonds in discharge of A.'s obligation to them, which obligation existed to A.'s knowledge though not to theirs, because they probably would have so accepted the bonds if they had known of the theft and the restitution.

General doctrine of case and distinctions.

The general doctrine in *Cumber* v. *Wane*, and the reason of all the exceptions and distinctions which have been engrafted on it, may perhaps be summed up as follows: *viz.*, that a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being *nudum pactum*. But if there be any benefit, or even any legal possibility of benefit, to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement. See *Steinman* v. *Magnus*, 11 East, 390; *Bradley* v. *Gregory*, 2 Camp. 383; *Wood* v. *Roberts*, 2 Stark. 417; *Boothbey* v. *Sowden*, 3 Camp. 175; *Sibree* v. *Tripp*, 15 M. & W. 23; and *Goddard* v. *O'Brien*, 9 Q. B. D. 37, where the above passage was cited with approval. This benefit, however, or possibility of benefit, as pointed out by Lord Selborne in *Foakes* v. *Beer*, "is not that sort of benefit which a creditor may derive from getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length, or possibly become insolvent, but is some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration for any other sort of agreement not under seal."

Accord must be executed.

It is laid down in most of the earlier authorities, that an accord to avail *must be executed*; and that doctrine is affirmed by *Bayley* v. *Homan*, 3 B. N. C. 915; see *Allies* v. *Probyn*, 5 Tyr. 1079; *Edwards* v. *Chapman*, 1 M. & W. 231; *Reeves* v. *Hearne*, Id. 326; *Collingbourne* v. *Mantell*, 5 Id. 292; *Lynn* v. *Bruce*, 2 H. Bl. 317; *Gabriel* v. *Dresser*, 15 C. B. 622; *Brown* v. *Perkins*, 1 Hare, 564. On the other hand, it is said in Com. Dig., *Accord*, B. 4, "An accord with mutual promises to perform is good, though the thing be not performed at the time of action, for the party had a remedy to compel the performance;" see *Good* v. *Cheesman*, 2 B. & Ad. 328. The rational distinction seems to be, that if the *promise* be received *in satisfaction*, it is a good satisfaction; but if the *performance*, not the *promise*, is intended to operate in satisfaction, there will be no satisfaction without performance; see *Reeves* v. *Hearne*, *supra*; *Buttigieg* v. *Booker*, 9 C. B. 689; *Evans* v. *Powis*, 1 Exch. 601; *Edwards* v. *Hancher*, 1 C. P. D. 111. The same distinction is made in the cases, cited in the notes to *Cutter* v. *Powell*, *post*, vol. ii., where it is held that, where the *promise* on one side is the consideration for that on the other, *performance* is not a condition precedent to the right of action. As to the distinction between the terms "discharge," "satisfaction," and "payment," see the cases cited in *Bottomley* v. *Nuttall*, 5 C. B. N. S. 134, 135; and *Cannan* v. *Wood*, 2 M. & W. 465.

Unless the promise itself be received in satisfaction.

Vicious reasoning of principal case.

It can hardly have failed to occur to the observant reader of the principal case that its doctrine is founded upon vicious reasoning and false views of the office of a court of law, which should rather strive to give effect to the engagements which persons have thought proper to enter into, than cast about for subtle reasons to defeat them upon the ground of being unreasonable. Carried to its full extent, the doctrine of *Cumber* v. *Wane* embraces the exploded notion, that, in order to render valid a contract not under seal, the adequacy as well as the existence of the consideration must be established. Accordingly, in modern times, it has been, as appears by the preceding part of the note, subjected to modification in several instances. The following is an attempt to exhibit an outline of the present state of the law as to the exoneration, satisfaction, or discharge of debts or demands, and particularly of those not under seal:—

Adequacy of consideration.

Conclusions from cases.

1. A person bound by a contract not under seal may, before breach, be exonerated from its performance by word

of mouth, without any value or consideration; Com. Dig., *Action on the case upon assumpsit*; *Dobson* v. *Espie*, 2 H. & N. 79. *A fortiori*, it seems that such exoneration may be bought for a less sum than that which would have become payable under the contract.

Exoneration before breach.

2. An unliquidated or uncertain and disputed demand overdue may be discharged by payment of any agreed sum.

Unliquidated demands discharged by payment of fixed sum.

3. An overdue demand, whether liquidated or unliquidated, may by agreement be discharged by payment of a thing different from that contracted to be paid, though of less pecuniary value; *e.g.*, 1,000*l.* by payment of a peppercorn; *Pinnel's Case*, 5 Rep. 117; *Andrew* v. *Boughay*, Dyer, 75; or by a negotiable instrument binding the debtor, or a third person, to pay a smaller sum; *Curlewis* v. *Clark*, 3 Exch. 375; *Goddard* v. *O'Brien*, 9 Q. B. D. 37; *Bidder* v. *Bridges*, 37 Ch. D. 406; and part of a claim may be satisfied by the withdrawal of defence as to the residue; *Cooper* v. *Parker*, 15 C. B. 822. Even a new binding contract entered into by the debtor with the creditor for a new consideration (see *Lynn* v. *Bruce*, 2 H. Bl. 317), to do something different from what the debtor was bound to do by his original broken contract, *e.g.*, a contract that one of two joint debtors shall alone remain liable and pay the debt (*Lyth* v. *Ault*, 7 Exch. 669), may, if the new contract itself, not merely the performance of it, be agreed to be taken in satisfaction and discharge of the breach, operate according to the intention of the parties in such discharge, whether performed or not; the remedy for its breach being a thing of some value, and being different from the original debt; *Evans* v. *Powis*, 1 Exch. 601; *Curlewis* v. *Clark*, 3 Id. 375; *Flockton* v. *Hall*, 16 Q. B. 1039.

Liquidated or unliquidated, if overdue, by payment of a thing different.

By binding contract for new consideration to do something different, whether performed or not.

4. There is authority for saying that, at common law, a liquidated demand, founded upon a bill of exchange or promissory note, even though overdue, might be forgiven by word of mouth; and if so, *a fortiori*, such a demand might be forgiven upon payment of a less sum than that secured by the bill or note; see *Foster* v. *Dawber*, 6 Exch. 839 (in the marginal note of which, for "before" read "after"), and *Cook* v. *Lister*, 13 C. B. N. S. 543, 593, *per* Willes, J.; but see *Smith* v. *Gordon*, C. & E. 105.

Demands on bills of exchange waived by word of mouth.

By s. 62 of the Bills of Exchange Act, 1882, a bill or note is discharged, if the holder, at or after maturity, *absolutely and unconditionally* renounces his rights against the acceptor or maker either in writing or by delivering up the

Bills of Exchange Act, 1882, s. 62.

instrument; and in the same way the holder may renounce his rights against any party to the instrument before, at, or after maturity. But it seems that a bare agreement, even in writing, to take payment otherwise than as provided by the bill or note, is no answer to a claim thereon; *McManus* v. *Bark*, L. R. 5 Ex. 65.

Where act of third person new consideration.

5. The contract or other act of a third person, *introducing a new consideration*, may operate in discharge of a demand arising out of any sort of contract not under seal, whether liquidated or unliquidated, if so agreed between such third person and the debtor and creditor; see *Kemp* v. *Watt*, 15 M. & W. 672; *Henderson* v. *Stobart*, 5 Exch. 99; but it must be clear that the creditor agreed to accept the contract or act of the third person in satisfaction of the liability of his debtor; see *Cochrane* v. *Green*, 9 C. B. N. S. 448; *Liversedge* v. *Broadbent*, 4 H. & N. 603. Upon this rests the validity at common law of a composition with creditors, by which two or more creditors agree with one another and the debtor to take less than the full amount of their respective debts in discharge of all. In like manner it seems that payment by a third person, not bound by the contract, with the assent of the debtor, of the amount due, or even less (see *Welby* v. *Drake*, 1 C. & P. 557), may operate to discharge the whole debt, if so intended. It is said, "with the assent of the debtor," because, although by the civil law a stranger might discharge a debt by payment without the knowledge and even against the wish of the debtor, yet, according to the authorities, it seems that, by the law of England, the precedent or subsequent assent of the debtor (if capable of assenting) is necessary to the discharge of the debt; see *Jones* v. *Broadhurst*, 9 C. B. 173; *Belshaw* v. *Bush*, 11 Id. 191; *James* v. *Isaacs*, 12 Id. 791; *Goodwin* v. *Cremer*, 18 Q. B. 757; *Simpson* v. *Eggington*, 10 Exch. 845; and *Walter* v. *James*, L. R. 6 Ex. 124. *Quære*, whether such assent of the debtor ought not to be presumed, the act of payment being for his benefit; see *Cook* v. *Lister*, 13 C. B. N. S. 543, *per* Willes, J.; *Pellatt* v. *Boosey*, 31 L. J. C. P. 281; and *London and County Bank* v. *London and River Plate Bank*, 21 Q. B. D. 535, cited *ante*, p. 335. At any rate the debtor may generally ratify the payment as made on his behalf; *Simpson* v. *Eggington*, *supra*; but see *Lucas* v. *Wilkinson*, 1 H. & N. 420.

Payment by third person with *consent* of debtor.

Liquidated demand overdue cannot be

6. A liquidated and undisputed money demand, of which the day of payment is past, not founded upon a bill of ex-

change or promissory note, cannot, even with the consent of the creditor, be discharged by mere payment by the debtor of a smaller amount in money in the same manner as he was bound to pay the whole; *Foakes* v. *Beer*, *ante*, p. 328.

satisfied by payment of smaller sum in same manner.

7. A contract to do an act *in futuro*, in satisfaction of a past breach of contract resulting in damages, whether liquidated or unliquidated, is revocable, and indeed inoperative, until actual performance, unless the contract itself, and not merely the performance of it, is agreed to be accepted in satisfaction; *Lynn* v. *Bruce*, 2 H. Bl. 317; *Bayley* v. *Homan*, 3 B. N. C. 915; *Graham* v. *Gibson*, 4 Exch. 768. Yet such a contract may be enforced by action, where there is a new consideration, such as staying an action brought; *Crowther* v. *Farrer*, 15 Q. B. 677; see *Jonassohn* v. *Ransome*, 3 C. B. N. S. 779, where the court allowed an executory accord to be pleaded as an equitable defence.

Promise revocable when not itself taken in satisfaction.

Enforceable by action where new consideration for it.

8. A contract, though for valuable consideration, to suspend for a time rights of action once vested, is not a defence at common law, but only ground for a cross action; for since a right of action if barred for however short a period is in law extinguished, to give effect to this defence would be to hold the right of action wholly destroyed contrary to the intention of the parties; *Ford* v. *Beech*, 11 Q. B. 852; *Webb* v. *Salmon*, 13 Id. 886, 894, 3 H. L. C. 510; *Frazer* v. *Jordan*, E. B. & E. 8; *Ray* v. *Jones*, 19 C. B. N. S. 416. *Semble*, such a contract would have been a defence on equitable grounds, under the C. L. P. Act, 1854, s. 83, to an action brought in violation of it; for in Chancery the breach of an express negative promise is usually restrainable by perpetual injunction; see *per* Crompton, J., *Keyes* v. *Elkins*, 5 B. & S. 240; *Lumley* v. *Wagner*, 1 De G. M. & G. 604; *Peto* v. *Brighton R. Co.*, 32 L. J. Ch. 677; *Norton* v. *Wood*, 1 Russ. & M. 178; but in cases in which the injunction would only be granted conditionally, on terms which a court of law had not jurisdiction to enforce in the action, such a contract was not an equitable defence; see *Flight* v. *Grey*, 3 C. B. N. S. 320. It is, however, a good defence now under the Judicature Act, 1873, s. 24, sub-s. 5 of which expressly provides that every matter of equity, on which an injunction against the prosecution of proceedings might have been obtained, before that Act, either unconditionally, or on any terms or conditions, may be relied on by way of defence thereto. Even at common law, if the parties by their own covenant stipulate that such a contract may be pleadable in

Contract to suspend vested right of action formerly ground only for cross action.

Common Law Procedure Act, 1854.

Judicature Act, 1873.

Pleadable in bar by covenant of party.

bar in the event of an action being brought, it then operates as a defeasance; see *Gibbons* v. *Vouillon*, 8 C. B. 483; *Legg* v. *Cheesebrough*, 28 L. J. C. P. 209; *Walker* v. *Nevill*, 3 H. & C. 403; and the distinction is to be observed between contracts to suspend and thereby extinguish rights of action, and those which operate only as releases with a condition subsequent, by which latter the right of action is not extinguished, but may be put in force on failure of the condition; see *Newington* v. *Levy*, L. R. 5 C. P. 607, 6 Id. 180; *Slater* v. *Jones*, L. R. 8 Ex. 186; *Jeffs* v. *Day*, L. R. 1 Q. B. 372; *Edwards* v. *Coombe*, L. R. 7 C. P. 519; *Edwards* v. *Hancher*, 1 C. P. D. 111. Such was the effect of the statutory accord in cases of composition under the Bankruptcy Act, 1869, s. 126, which differed from a common law accord and satisfaction in that the right of action was barred by the agreement until default, and yet revived upon default; *Ibid.*; see *per* Lord Blackburn, *Breslauer* v. *Brown*, 3 App. Cas. 705; and *ante*, p. 334. An absolute covenant not to sue is, in order to avoid circuity of action, pleadable as a release; see 2 Wms. Saund. 140, 447, ed. 1871; *Willis* v. *De Castro*, 4 C. B. N. S. 216. As to stipulations which do not suspend the remedy, but qualify the original rights, see *Foley* v. *Fletcher*, 28 L. J. Ex. 100; or suspend the operation of agreements, *Wallis* v. *Littel*, 11 C. B. N. S. 369.

Release with conditions subsequent.

Distinction where stipulations qualify original right.

The rule above mentioned, that a cause of action once barred is extinguished, does not apply to the right of a landlord, who has distrained, to sue for rent remaining unsatisfied after the distress has been realised, though he can bring no action while he holds the distress; *Lehain* v. *Philpott*, L. R. 10 Ex. 242; *Philpott* v. *Lehain*, 35 L. T. 855. So also in the case of distress damage feasant; see *Boden* v. *Roscoe*, (1894) 1 Q. B. 608.

In *Scott* v. *Avery*, 5 H. L. C. 811, a proviso that the assured should not be entitled to sue on his policy until the amount of his claim was ascertained by arbitration, was held valid; for though parties cannot by mere agreement oust the jurisdiction of the courts, it is nevertheless competent for them to agree that a reference to arbitration and an award thereunder shall be a condition precedent to a right of action. Whether or no a particular agreement creates such a condition precedent is always a question of construction; *Collins* v. *Lock*, 4 App. Cas. 674, 689. For instances of agreements held to create a condition precedent

Where ascertainment of claim by arbitration a condition precedent to suit.

see *Scott* v. *Liverpool*, 3 De G. & J. 334; *Braunstein* v. *Accidental Co.*, 1 B. & S. 782; *Tredwen* v. *Holman*, 1 H. & C. 72; *Sharpe* v. *San Paulo*, 8 Ch. 597; *Viney* v. *Bignold*, 20 Q. B. D. 172; *Tranior* v. *Phœnix Co.*, 65 L. T. 825; *Scott* v. *Mercantile Accident Ins. Co.*, 66 Id. 811; *Caledonian Ins. Co.* v. *Gilmour*, (1893) A. C. 85. For instances of agreements held not to do so, on the ground that they were void, as attempts to absolutely oust the jurisdiction of the courts, see *Horton* v. *Sayer*, 4 H. & N. 643; *Lee* v. *Page*, 30 L. J. Ch. 857; *Edwards* v. *Aberayron Soc.*, 1 Q. B. D. 563: or on the ground that they were merely collateral agreements, see *Roper* v. *Lendon*, 1 E. & E. 825; *Alexander* v. *Campell*, 41 L. J. Ch. 478; *Dawson* v. *Fitzgerald*, 1 Ex. D. 257; *Collins* v. *Lock*, *supra*. An action lies for breach of a collateral agreement to refer; *Livingston* v. *Ralli*, 5 E. & B. 132; but only nominal damages are recoverable if the plaintiff would not have been entitled to succeed on the reference; *Brunsden* v. *Staines L. B.*, C. & E. 272.

Staying proceedings, under Arbitration Act, 1889.

However, the courts have power, under the Arbitration Act, 1889, to stay the proceedings, where a party to a written agreement to refer commences any proceedings in respect of any matter agreed to be referred, if prompt application is made for that purpose; see s. 4.

Contracts under seal.

9. With respect to contracts under seal, they in this respect differ considerably from those not under seal. Generally speaking, a liability under them could not at the common law be discharged by a mere licence not under seal though for valuable consideration, or even by accord and satisfaction before breach; *Berwick* v. *Oswald*, 1 E. & B. 295; *Spence* v. *Healey*, 8 Exch. 668; and after breach, only those claims arising out of them which sounded in damages, and not debts accruing merely by the execution of the deed, could be the subject of accord and satisfaction; *Blake's Case*, 6 Rep. 44; Selw. N. P., *Covenant*, vii. 1; Bac. Abr., *Accord*. (B.). Contracts under seal, to pay liquidated amounts in money, before 4 Anne, c. 16, s 12, could only be satisfied, so as to enable the debtor to defend himself in a court of common law, by payment on the day and an acquittance under seal, which, if tendered by the debtor, the creditor was bound to execute; see *Husband* v. *Davis*, 10 C. B. 645, as to the effect of that statute. Payment in part after the day, or in accord and satisfaction, was only a ground of equitable relief; *Steeds* v. *Steeds*, 22 Q. B. D. 537. The case of *Smith* v. *Trowsdale*, 3 E. & B. 83, in which an

extension by parol of the time stipulated for the performance of a contract under seal was upheld upon peculiar grounds, seems to touch the extreme limit of the common law.

Judicature Act.

However, under the Judicature Act, 1873, s. 24, if a defendant claims relief upon any equitable ground against any deed, instrument or contract, or alleges any ground of equitable defence to the plaintiff's claim, all branches of the High Court must now give to such ground of relief so claimed, or such equitable defence so alleged, the same effect, by way of defence to the plaintiff's claim, as the Court of Chancery ought to have given to it; see *Steeds* v. *Steeds*, 22 Q. B. D. 537.

Actus curiæ nemini facit injuriam.

The second point decided in this case is an exemplification of that maxim of law—*Actus curiæ nemini facit injuriam*; for the delay is the act of the court, therefore the parties should not suffer by it. *Acc. Toulmin* v. *Anderson*, 1 Taunt. 385. See *Lanman* v. *Audley*, 2 M. & W. 535; *Vaughan* v. *Wilson*, 4 B. N. C. 116; *Evans* v. *Rees*, 12 A. & E. 167; *Miles* v. *Bough*, 3 D. & L. 105; *Harrison* v. *Heathorn*, 6 Scott, N. R. 794; *Miles* v. *Williams*, 9 Q. B. 47; *Moore* v. *Roberts*, 3 C. B. N. S. 844. The practice only prevails in cases of delay by the act of the court; *Wilkes* v. *Perks*, 5 M. & Gr. 376; *Fishmongers' Co.* v. *Robertson*, 3 C. B. 970; *Seymour* v. *Greenwood*, 30 L. J. Ex. 189; *Heathcote* v. *Wing*, 25 L. J. Ex. 23; *Turner* v. *L. & S. W. R. Co.*, 17 Eq. 561.

ARMORY *v.* DELAMIRIE.

HILARY, 8 *G.* 1.—*IN MIDDLESEX, CORAM PRATT, C.J.*

[REPORTED 1 STRANGE, 504.]

The finder of a jewel may maintain trover for a conversion thereof by a wrong-doer.

A master is answerable for the loss of a customer's property intrusted to his servant in the course of his business as a tradesman.

Where a person who has wrongfully converted property will not produce it, it shall be presumed, as against him, to be of the best description.

THE plaintiff, being a chimney-sweeper's boy, found a jewel, and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who, under a pretence of weighing it, took out the stones, and calling to the master to let him know it came to three-halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled:—

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover (*a*).

2. That the action well lay against the master, who gives a credit to his apprentice, and is answerable for his neglect.

3. As to the value of the jewels, several of the trade were examined to prove what a jewel of the finest water that would fit the socket should be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages, which they accordingly did.

(*a*) 1 Com. Dig., *Action upon Trover*, (B) 310.

Bare possession is sufficient title against a wrong-doer.

This is the case usually referred to for the purpose of illustrating that leading principle of law, that bare possession constitutes a sufficient title to enable the party enjoying it to obtain legal remedy against a mere wrong-doer. It would be almost a waste of time to enumerate the decisions by which this proposition is enforced and explained. Two of the most remarkable are, *Sutton* v. *Buck*, 2 Taunt. 302; and *Burton* v. *Hughes*, 2 Bing. 173, where, property having been lent to the plaintiff under a written agreement, it was nevertheless held that he might maintain trover for it without producing that agreement; for though, if it had been necessary to prove the nature of his interest in it, the rules of evidence would have rendered the production of the writing indispensable, still as possession is a sufficient title against a wrong-doer, it was sufficient to show his possession without inquiring into the terms of it. The qualified right of a bankrupt to *after-acquired* property also strikingly illustrates this position; see *Herbert* v. *Sayer*, 5 Q. B. 965; *Cohen* v. *Mitchell*, 25 Q. B. D. 263; *Re Clark*, (1894) 2 Q. B. 393. On the general question, see also *Matson* v. *Cook*, 4 B. N. C. 392; *Elliott* v. *Kemp*, 7 M. & W. 306; *Bridges* v. *Hawkesworth*, 21 L. J. Q. B. 75; *Harper* v. *Charlesworth*, 4 B. & C. 574; *Northam* v. *Bowden*, 11 Exch. 70; *Every* v. *Smith*, 26 L. J. Exch. 344; *Jeffries* v. *G. W. R. Co.*, 5 E. & B. 802; *Buckley* v. *Gross*, 3 B. & S. 566; *Bourne* v. *Fosbrooke*, 18 C. B. N. S. 515.

Plea of no property in plaintiff means none as against defendant.

For the effect of the plea denying plaintiff's title in actions of trover and trespass, under the system of pleading abolished by the Judicature Act, 1873, see *Nicholls* v. *Bastard*, 2 C. M. & R. 662; *Howell* v. *White*, 1 M. & Rob. 400; *Leake* v. *Loveday*, 4 M. & Gr. 980; *Mayhew* v. *Herrick*, 7 C. B. 229; *Jones* v. *Chapman*, 2 Exch. 803.

Origin of doctrine that a command alleged in pleading is traversable.

It was in consequence of the doctrine thus affirmed in *Armory* v. *Delamirie*, that *mere possession is sufficient against a wrong-doer*, that it was decided in *Trevelian* v. *Pyne*, 1 Salk. 107, and *Chambers* v. *Donaldson*, 11 East, 65, in opposition to several old authorities, that a *command*, alleged in pleading, is traversable. In *Trevelian* v. *Pyne*, the action was replevin for cattle. *Cognizance*, by defendant as bailiff to S. *Plea in bar*, that defendant was not bailiff to S., and held good on demurrer; for though S. had a right to take the cattle, yet a stranger without his authority could not. *Acc. Robson* v. *Douglas*, Freem. 536; *George* v. *Kinch*, 7 Mod. 481. It was thought, indeed,

long after the decision in *Trevelian* v. *Pyne*, that in trespass *quare clausum fregit*, if the defendant justified under the command of A., in whom he alleged the freehold to be, the plaintiff could not in his replication traverse the command, because that would admit the freehold to be in A.: and if the freehold were in A., the plaintiff ought not to maintain his action. But this distinction is now completely exploded, for in *Chambers* v. *Donaldson*, 11 East, 65, the defendants to an action of trespass *quare clausum fregit*, pleaded that the *locus in quo* was the freehold of P., and that they by his command broke and entered the same. The plaintiff traversed the command, and on demurrer the replication was held good upon the express ground that the defendant, if he had not the command of P., was a wrong-doer, and that as against a wrong-doer the plaintiff's possession, even supposing him to have no title, would be sufficient to maintain the action. See *Heath* v. *Milward*, 2 B. N. C. 98; *Carnaby* v. *Welby*, 8 A. & E. 872; *Brest* v. *Lever*, 7 M. & W. 594.

That plaintiff in ejectment must recover by strength of his own title.

On the same principle rests the well-known rule in actions of ejectment, *that the plaintiff must recover by the strength of his own title, not the weakness of his antagonist's*; for no one can recover in ejectment, who would not be entitled to enter without bringing ejectment, and any person entering on the possession of the tenant, unless he have a better title, is a wrong-doer.

Possessory title of licensee.

It has been suggested that the doctrine that possession is sufficient title as against a wrong-doer has no application to cases in which things lying in grant are claimed under the mere possessory title of a licence; and that, consequently, a mere licensee, who, according to the rule of *Wood* v. *Leadbitter*, 13 M. & W. 838, has no title as against his licensor, cannot maintain an action against a wrong-doer for an interruption to his enjoyment under his licence. See Gale on Easements, 411. The cases of *Whaley* v. *Laing*, 2 H. & N. 476, and *Hill* v. *Tupper*, 2 H. & C. 121, have been cited in support of this view. In the former case, the declaration alleged that the plaintiffs were possessed of mines, and of engines for working them, and had and enjoyed the benefit of the waters of a canal near the engines to supply them with water for working them, and *that the water used and ought to run and flow without being polluted*, but that the defendant wrongfully polluted the water near the place at which the supply of it for the engines was

Whaley v. *Laing*

drawn, and thereby damaged the engines, and interrupted the working of the mines. The pleas were (1) not guilty, and (2) a traverse of the allegation printed above in italics. The Court of Exch. gave judgment for the plaintiff. The case was taken up to the Court of Error, and there the judgment was ultimately reversed by four judges against two, on the ground that the declaration was bad, in arrest of judgment, for want of any allegation to the effect that the plaintiffs were entitled to the flow or enjoyment of the benefit of the water; see 3 H. & N. 675, 901, note (*a*). This case does not decide the point in question, as, in the opinion of one judge at least of the majority—Williams, J., —it was consistent with the declaration that the plaintiff was a wrong-doer himself, there being no averment of right. Upon this point it did not in effect decide more than that the mere fact of taking the water did not give the plaintiffs a *primâ facie* title. (See *per* Bramwell, B., *Stockport* v. *Potter*, 3 H. & C. 300.)

Hill v. *Tupper.*

In *Hill* v. *Tupper*, it was held that the grant by the proprietors of a canal of an exclusive right to let boats for hire on it, did not confer on the grantee a right of action against other persons using the canal for the same purpose. The ground of the decision was that it is not competent for a grantor of land to create novel and extraordinary incidents unconnected with the enjoyment of the land, and annex them to it so as to constitute a property in the grantee. (See *Acroyd* v. *Smith*, 10 C. B. 164.) But the case is very far from deciding that, assuming the right claimed to have been one capable of existence in law, the licensee of such a right would have no action against a wrong-doer for infringing it. It is submitted that, wherever the right claimed is one which may by law be made the subject matter of property, then enjoyment of such a right, though only under a licence revocable by the grantor, is as against a wrong-doer a sufficient title to enable the licensee to maintain an action upon it. See *Nuttall* v. *Bracewell*, L. R. 2 Ex. 1. But when the right claimed is one which the law does not recognize as capable of existence, then the grant of such a right can operate only as a licence between grantor and grantee, and can confer no property as against third persons. See further, *Stockport* v. *Potter*, 3 H. & C. 300.

Primâ facie right as against wrong-doers

So when the right claimed is one in itself capable of being attached by grant or prescription to property, mere possession of the property gives a *primâ facie* title sufficient to

found an action against a wrong-doer for an infringement of the right. In *Jeffries* v. *Williams*, 5 Exch. 792, a declaration for injury to the reversion in houses, by negligently working mines near them without leaving proper support, was held to be good, although it did not allege a right to the support, because *primâ facie* the defendant was a wrong-doer. Acc. *Bibby* v. *Carter*, 4 H. & N. 153.

of persons in possession of house to support of adjoining land.

In *Corby* v. *Hill*, 4 C. B. N. S. 556, a wrong-doer was held liable to a person whose horse, while being driven along a private road, with the leave of the owners of the road, was injured by running against a dangerous obstruction, placed on the road by the wrong-doer; see further upon this question, *Bolch* v. *Smith*, 7 H. & N. 736; and *Robbins* v. *Jones*, 15 C. B. N. S. 221; Gale on Easements, 411; 2 Wms. Saund. 113 (a); *Stocks* v. *Booth*, 1 T. R. 428; *Griffith* v. *Matthews*, 5 T. R. 296; Bac. Abr., *Action on the case*, F.

Action by licensee of right of way against wrong-doer.

In *Dobree* v. *Napier*, 2 B. N. C. 781, a distinction was engrafted upon the general rule that a command is traversable. This was an action of trespass for seizing a ship. The defendant pleaded a seizure of the ship as a prize, by command of the Queen of Portugal. The plaintiff replied facts, showing that the defendant was prohibited by the Foreign Enlistment Act from entering the Queen of Portugal's service. Upon demurrer, judgment was given for the defendant. "The only ground," said Tindal, C. J., "on which the authority of the servant is traversable at all in an action of trespass, is to protect the person or property of a party from the officious or wanton interference of a stranger, where the principal might have been willing to waive his rights. It is obvious that the full benefit of this principle is secured to the plaintiffs, by allowing a traverse of the authority *de facto*, without permitting them to impeach it by a legal objection to its validity in another and foreign country."

Rule of *Dobree* v. *Napier*. Traverse only of command *de facto* allowed.

On similar reasoning seems to rest the well-known doctrine that a subsequent ratification of an act done in the name of the party who ratifies is tantamount to a prior command, nay, that it has relation back to the time of the act done, and is in point of law, and may be described in pleading as, *a command*. So that, where a person, if present at the time, could lawfully command any act to be done, any other person, though either wholly without authority, or exceeding the limits of his authority, would be justified in doing

Doctrine that ratification is equivalent to a prior command.

that act, provided he did it in the name, or as one acting by the authority, of the person entitled, (whether to his advantage or not), and obtained his subsequent ratification.

Two early cases in which this doctrine was discussed appear to involve nearly all its principles. In an *Anonymous Case* in the K. B., reported in the Year Book, 7 H. 4, Hil., 34 b, "a jury was sworn between two parties in a writ of trespass of certain cattle taken against the peace, in which the defendant had justified as bailiff for services in arrear to his lord; to which the plaintiff replied, that he was not bailiff of the lord at the time of the taking. And the plaintiff gave in evidence, that the defendant took the beasts under a claim of a heriot due to himself; so that he could not at that time have been bailiff to another. And after they were charged, Gascoigne, C. J., directed them, that if the defendant took the beasts under a claim of right to a heriot for himself, although the lord afterwards agreed to this taking as for services due to him, yet he could not be said to be his bailiff for that time; but if he had taken without commandment for services due to the lord, and the lord had afterwards agreed to the taking, he should be adjudged to have acted as bailiff, although he had been on no occasion his bailiff before that taking. *Quod nota.*" So in the *Anonymous Case*, Mich., 28, 29 Eliz., in the C. P., reported Godbolt, 109;—"In trespass the defendant did justify as bailiff unto another; the plaintiff replied that he took his cattle of his own wrong, without that that he was his bailiff. Anderson, C. J.: 'If one have cause to distrain my goods, and a stranger, of his own wrong, without any warrant or authority given him by the other, take my goods not as bailiff or servant to the other, and I bring an action of trespass against him, can he excuse himself, by saying that he did it as bailiff or servant? Can he so father his misdemeanors upon another? He cannot; for once he was a trespasser, and his intent was manifest. But if one distrain as bailiff, although, in truth, he is not bailiff; if after he in whose right he doth it doth assent, he shall not be punished as a trespasser, for that assent shall have relation unto the time of the distress taken, and so is the book of 7 H. 4.' And all that was agreed by Periam. Shuttleworth: 'What if he distrain generally, not showing his intent nor the cause wherefore he distrained?' *Ad hoc non fuit responsum.* Rhodes came to Anderson, and said to him, 'If I having cause to distrain come to the land and dis-

Person doing act on his own behalf cannot justify as bailiff of another.

train, and another ask the cause why I do so, if I assign a cause not true, or insufficient, yet when an action is brought against me, I may avow or justify and assign any other cause.' Anderson: 'That is another case, but in the principal case clearly the taking is not good.' To which Rhodes agreed."

Ratification of act of person intending, but not assuming, to act as agent.

The question to which no response was given in the above case was discussed in the C. A. in *Matheson* v. *Kilburn*, Trinity Sittings, 1877 (not reported). In that case a person intending to buy on behalf of another, but without authority from him, and without avowing that he was acting for another, bought goods in his own name. Lord Cairns and Brett, L.J., were of opinion that a contract so made was incapable of ratification by the person for whom the buyer intended to buy, as the latter did not assume to buy on behalf of another. Cockburn, C.J., was of a different opinion, holding that, if the buyer really intended to act on behalf of another, the fact of his not having avowed his intention could not prevent a ratification by the undisclosed principal who, had he given prior authority, would have been liable whether the agent did or did not disclose the fact that he was an agent. The point, however, was not decided, the court holding that the facts did not show that the buyer really did intend to buy on behalf of another. See *Watson* v. *Swann*, 11 C. B. N. S. 756.

No ratification of act done by person purporting to act for himself.

An execution creditor cannot, by ratification, become liable for the acts of the sheriff done in professed execution of his duty as such, *Wilson* v. *Tummon*, 6 M. & Gr. 236; *Woollen* v. *Wright*, 1 H. & C. 554; and not under the direction of the creditor; see *Morris* v. *Salberg*, 22 Q. B. D. 614. In *Wilson* v. *Tummon*, Tindal, C.J., laid down the general rule thus:—"That an act done for another by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority."

Companies cannot ratify acts

A corporation or company cannot ratify acts done before it was incorporated; *Kelner* v. *Baxter*, L. R. 2 C. P. 174; *Melhado* v. *Porto R. Co.*, 9 Id. 503; *Re Empress Co.*, 16 Ch.

done before incorporation; or *ultra vires*.

D. 125; *Re Northumberland Avenue Hotel*, 33 Id. 16; notwithstanding the observations of Malins, V.-C., in *Spiller* v. *Paris Co.*, 7 Id. 368; and a company is not bound by the ratification by its directors of acts which it would be *ultra vires* in the directors to authorize; nor can the members ratify acts which it would be *ultra vires* in the company to authorize; see *Riche* v. *Ashbury Co.*, L. R. 9 Ex. 224, 7 H. L. 653; *Evans* v. *Smallcombe*, L. R. 3 H. L. 249; *Phosphate Co.* v. *Green*, L. R. 7 C. P. 43; *Irvine* v. *Union Bank of Australia*, 2 App. Cas. 366; and the notes to *Collins* v. *Blantern*, *post*, pp. 378—381.

Ratification by personal representatives.

An executor can ratify an act done by the direction of the testator though done after his death, *Whitehead* v. *Taylor*, 10 A. & E. 210; and an administrator can ratify an act done before letters of administration had been granted to him, *Foster* v. *Bates*, 12 M. & W. 226; see *Rogers* v. *Dejoncourt*, 1 Ir. C. L. R. 482; the trustee of a bankrupt can ratify an act done before his appointment, *Hull* v. *Pickersgill*, 1 B. & B. 282; and a plaintiff can ratify the bringing of an action in his name, *Ancona* v. *Marks*, 7 H. & N. 686.

Rule where rights of third persons affected.

Where the ratification is to affect the interests of third persons, it seems that it ought to take place whilst the principal has power to do the act himself; for instance, in the case of a notice to quit, a landlord should ratify it before the time for giving the notice has expired, *Doe* v. *Goldwin*, 2 Q. B. 143; *Ancona* v. *Marks*, 7 H. & N. 686, *per* Martin, B.; or, in the case of stoppage *in transitu*, before the transit is at an end, *Bird* v. *Brown*, 4 Exch. 786: see *Jardine* v. *Leathley*, 3 B. & S. 700. And it seems that a ratification cannot divest a right vested in possession in a third person before the ratification, *Donelly* v. *Popham*, 1 Taunt. 1; *Holland* v. *King*, 6 C. B. 727; see *Lyell* v. *Kennedy*, 18 Q. B. D. 796; and *quære*, whether it can make the previous act of a third person wrongful; see *Perry* v. *Skinner*, 2 M. & W. 471, and *Bolton* v. *Lambert*, 41 Ch. D. 295, 307, *per* Cotton, L.J.

Ratification, how shown.

The ratification may be by any means showing the election of the principal to treat the act as his, as by receipt of the proceeds of a sale, *Hunter* v. *Parker*, 7 M. & W. 322; *Secretary for India* v. *Kamachee*, 7 Moo. Ind. App. 476; or by express approbation, *Buron* v. *Denman*, 2 Exch. 167; *Haseler* v. *Lemoyne*, 5 C. B. N. S. 530; see *Fitzmaurice* v. *Bayley*, 6 E. & B. 868; *Reuter* v. *Electric Co.*, Id. 346; or, in some cases, even by tacit acquiescence, *The Rolla*, 6 Rob. 364, a

case resting upon peculiar grounds; *Inglis* v. *De Barnard*, 3 Moo. P. C. 425; *Cameron* v. *Kyte*, 3 Knapp, 332; *Wall* v. *Cockerell*, 29 L. J. Ch. 816. In order to make the ratification binding it must be made with full knowledge of the nature of the act committed, or with the intention to adopt that act in any event, *Freeman* v. *Rosher*, 13 Q. B. 780; *Eastern Counties R. Co.* v. *Broom*, 6 Exch. 314; *Roe* v. *Birkenhead R. Co.*, 7 Id. 36; *Gauntlett* v. *King*, 3 C. B. N. S. 59; *Phosphate Co.* v. *Green*, L. R. 7 C. P. 43, 57, *per* Willes, J.; *La Banque Jacques-Cartier* v. *La Banque d'Epargne*, 13 App. Cas. 111.

Must be made with full knowledge; or with intention to ratify in any event.

A startling doctrine as to becoming a felon (not merely an accessory after the fact) by ratification, was laid down by some of the judges in *R.* v. *Woodward*, 31 L. J. M. C. 91; but as there was no complete act of felony before the alleged ratification the case is sustainable upon this ground, which Erle, C.J., and Keating, J., adopted. In *Brook* v. *Hook*, L. R. 6 Ex. 89, a person forged the defendant's name upon a promissory note in favour of the plaintiff; and the defendant, while the note was current, in order to prevent a prosecution of the forger, signed a memorandum to the effect that he held himself responsible for the note, but at the same time denied that the note was his or made by his authority. The Court of Exch., *diss.* Martin, B., held that the memorandum was not a ratification so as to make the defendant liable on the note, since the note being a forgery *was in its inception void, and therefore incapable of being ratified*, and they laid it down that no authority was to be found that an act which is in itself a criminal offence is capable of ratification. See also *per* Burton, J., *Wilkinson* v. *Stoney*, 1 Jebb & S. 509; *per* Crompton, J., *Ashpitel* v. *Bryan*, 32 L. J. Q. B. 95; and the opinions in *Williams* v. *Bayley*, L. R. 1 H. L. 200.

Ratification of criminal act.

The second point in the principal case is that a master is answerable for the act or default of his servant in the course of his employment. The question is in every case one of implied authority. The servant is taken to have the implied authority of his master for every act done in the course of his employment. "The law is clear that where a servant, acting within the scope of his employment, does an act negligently or with excessive violence, the master is answerable for the consequences;" *per* Blackburn, J., *Bayley* v. *M. S. & L. R. Co.*, L. R. 8 C. P. 148; see *Coleman* v. *Riches*, 16 C. B. 104; *Patten* v. *Rea*, 2 C. B. N. S. 606; *Seymour* v. *Greenwood*, 6 H. & N. 359, 7 Id. 355; *Bartons-*

Second point. Liability of master for act of servant.

hill Co. v. *Reid*, 3 Macq. 266; *Walker* v. *S. E. R. Co.*, L. R. 5 C. P. 640; *Bayley* v. *M. S. & L. R. Co.*, L. R. 7 C. P. 415, 8 Id. 148; *Bolingbroke* v. *Swindon L. B.*, 9 Id. 575; *The Apollo*, (1891) A. C. 499; *Ruddiman* v. *Smith*, 60 L. T. 708; *Richards* v. *West Middlesex Co.*, 15 Q. B. D. 660; *Lowe* v. *G. N. R. Co.*, 62 L. J. Q. B. 524; *Dyer* v. *Munday*, (1895) 1 Q. B. 742.

Scope of employment.

The test, therefore, is whether the servant was acting *within the scope of his employment*. If he was, it matters not that the master expressly forbade the servant to do the particular act. "The law casts upon the master a liability for the act of the servant in the course of his employment; and the law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability;" *Limpus* v. *L. G. O. Co.*, 1 H. & C. 526, 539, *per* Willes, J.; see *Betts* v. *De Vitre*, 3 Ch. 429; *Black* v. *Christchurch Finance Co.*, (1894) A. C. 48; but see also *Charleston* v. *London Trams*, 36 W. R. 367.

When master has no power to do act complained of.

A master is not liable for the act of his servant if the master himself had not power to do the act in question, for in that case he cannot be taken to have impliedly authorized his servant to do it; *Poulton* v. *L. & S. W. R. Co.*, L. R. 2 Q. B. 534. This is the governing distinction in cases where the liability of railway and similar companies for acts committed by their servants has to be determined; see *Poulton* v. *L. & S. W. R. Co.*, *supra*; *Goff* v. *G. N. R. Co.*, 3 E. & E. 672; *Furlong* v. *S. London Trams*, 48 J. P. 329; *Charleston* v. *London Trams*, 36 W. R. 367; *Smith* v. *N. Metropolitan Trams*, 55 J. P. 630. If such a company has power to arrest in a particular case, and its servant, acting within the scope of his employment, arrests a person under the mistaken belief that such a case has arisen, the company is liable; *Poulton* v. *L. & S. W. R. Co.*, *supra*; see *Goff* v. *G. N. R. Co.*, *supra*.

Protection of master's property.

A servant has implied authority to do all things necessary to protect his master's property which has been entrusted to his care; but he can have no implied authority to arrest a person upon suspicion of an attempt to steal, such an arrest being made, not to protect property, but to punish the supposed offender; *Allen* v. *L. & S. W. R. Co.*, L. R. 6 Q. B. 65; *Bank of N. S. Wales* v. *Owston*, 4 App. Cas. 270; *Abrahams* v. *Deakin*, (1891) 1 Q. B. 516; *Edwards* v. *L. & N. W. R. Co.*, L. R. 5 C. P. 445; *Stevens* v. *Hinshelwood*, 55 J. P. 341.

It is often a matter of some nicety to determine whether, in doing a particular act, a servant is acting within the scope of his employment, especially in the case of coachmen and carmen; see *Mitchell* v. *Crassweller*, 13 C. B. 237; *Joel* v. *Morison*, 6 C. & P. 503, *per* Parke, B.; *Sleath* v. *Wilson*, 9 C. & P. 607; *Page* v. *Defries*, 7 B. & S. 137; *Whatman* v. *Pearson*, L. R. 3 C. P. 422; *Storey* v. *Ashton*, L. R. 4 Q. B. 476; *Rayner* v. *Mitchell*, 2 C. P. D. 357; *Milner* v. *G. N. R. Co.*, 50 L. T. 367. This question must be determined according to the facts in each case.

Relation of master and servant must exist.

The relation of master and servant must exist between the person whose act or default is complained of and the person sought to be made liable; *Lucas* v. *Mason*, L. R. 10 Ex. 251; *Tucker* v. *Axbridge*, 53 J. P. 87. The question often arises whether the person, whose act or default is complained of, is the servant of the defendant, or of a third person. The general rule is that the master is the person who has the right at the moment to control the manner in which the servant shall act; see *Dalyell* v. *Tyrer*, 28 L. J. Q. B. 52; *Murray* v. *Currie*, L. R. 6 C. P. 24; *Donovan* v. *Laing*, (1893) 1 Q. B. 629, and the cases there collected.

Servant's frauds.

As to the liability of a master in an action of deceit for the fraudulent misrepresentations of his servant, see notes to *Pasley* v. *Freeman*, *post*, vol. ii.

Liability of London cab-owners.

Under the 6 & 7 Vict. c. 86, the registered proprietor of a cab in London is responsible to the public for the acts and defaults of the driver while plying for hire, as if the driver were the proprietor's servant, whatever may in fact be their position towards one another; *Powles* v. *Hider*, 6 E. & B. 207; *Venables* v. *Smith*, 2 Q. B. D. 279; *King* v. *London Cab Co.*, 23 Id. 281; *Keen* v. *Henry*, (1894) 1 Q. B. 292. *King* v. *Spurr*, 8 Q. B. D. 104, must now be taken to have been overruled.

Third point. *omnia presumuntur contra spoliatorem.*

The third point decided in this case is an illustration of that favourite maxim of the law, *omnia presumuntur contra spoliatorem*; which signifies that if a man, by his own tortious act, withhold the evidence by which the nature of his case would be manifested, every presumption to his disadvantage will be adopted. Thus, if a man withhold an agreement under which he is chargeable, it is presumed to have been properly stamped, until the contrary appears; *Crisp* v. *Anderson*, 1 Stark. 35; *Crowther* v. *Solomons*, 6 C. B. 758; see also *A.-G.* v. *Dean of Windsor*, 24 Beav. 679.

So, if goods are sold without any express stipulation as to their price, and the seller refuse to give any express evidence of their value, they are presumed to be worth only the lowest price for which goods of that description usually sell; unless the buyer himself be shown to have suppressed the means of ascertaining the truth, for then a contrary presumption arises, and they are taken to be of the very best description; *Clunnes* v. *Pezzey*, 1 Camp. 8, *et notas*.

Non-production of letters.

In *Braithwaite* v. *Coleman*, 1 Har. & W. 223, the K. B. differed on the application of this principle. It was an action by the indorsee of a bill against the drawer, and the only evidence of notice of dishonour was the following statement made by the drawer:—"I have several good defences to the action; in the first place, the letter" (containing notice of dishonour) "was not sent to me in time." A notice to produce the letter had been given, but it was not produced. Lord Denman thought that, as the drawer withheld the letter, the jury were justified in assuming, as they actually had done, that if produced it would have appeared to have been in time. But Littledale, Patteson, and Coleridge, JJ., thought that the letter might have been dated on the proper day, but sent by private hand, or in some way in which it would not have arrived in proper time; and that the drawer would not be bound to produce a letter which, on the face of it, might make against him, and which he might not have evidence to explain; and a rule for a new trial was made absolute. On the other hand, in *Curlewis* v. *Corfield*, 1 Q. B. 814, where a letter was shown to have been sent to the defendant the day after dishonour, and the defendant, an attorney, afterwards objected the want of due presentment, but not that of notice, the jury, on proof of a notice to produce, was held warranted in inferring that the letter contained due notice of dishonour. See *Bell* v. *Frankis*, 4 M. & Gr. 446; *Lobb* v. *Stanley*, 5 Q. B. 574; and for a further illustration of the same principle, *Mason* v. *Morley*, 34 L. J. Ch. 442.

COLLINS *v.* BLANTERN.

EASTER—7 GEORGE 3. C.B.

[REPORTED 2 WILSON, 341.]

Illegality may be pleaded as a defence to an action on a bond.

SHROPSHIRE *to wit.* Debt upon a bond for 700*l.* dated the 6th day of April, 1765 (*a*).

1st Plea sets forth *oyer* of the obligation, wherein four others with the defendant were jointly and severally bound to the plaintiff in 700*l.* And also *oyer* of the condition for the payment of 350*l.* to the plaintiff on the 6th of May next.

Non est factum pleaded.

2ndly, The defendant pleads, that before and at the time of making the bond, and the note after mentioned, two of the obligors, John and Thomas Walker, and three others, stood indicted by John Rudge, on five indictments, for wilful and corrupt perjury, and had severally pleaded Not Guilty before the making the bond and note. And the several traverses on the indictments, at the time of making the unlawful agreement after mentioned, and the note and the said bond, *viz.*, on the same day the bond was made, were about to come on to be tried at Stafford. Whereupon it was then corruptly agreed between Rudge the prosecutor, the plaintiff, and the five persons indicted, that the plaintiff should give the prosecutor Rudge his note for 350*l.* in consideration for not appearing to give evidence at the trial of the said traverses. And that the obligors should execute the bond to the plaintiff of the same date as the note, as an indemnity to the plaintiff for giving such note. The plaintiff gave to Rudge the prosecutor the note for 350*l.* for not appearing

(*a*) The side notes to the original report which contain an abstract of the pleadings are here printed in lieu of the report itself, in which the pleadings are set out at length.

as prosecutor and giving evidence. And that the obligors on giving the note executed this bond, as an indemnity to the plaintiff for giving such note. An averment that the bond was given for the said consideration, and no other; and that the obligors were not indebted to the plaintiff; and therefore the bond is void in law; *et hoc*, &c.

3rd Plea, that the bond was given by the obligors to indemnify the plaintiff against a note given by him to the prosecutor, and that the plaintiff has not been damnified by the note; *et hoc*, &c.

Replication and issue to the 1st plea

Demurrer to the 2nd plea.

Demurrer to the 3rd plea.

Joinders in demurrer.

COLLINS *v.* BLANTERN.

This case was well argued last *Hilary* term by Serjeant *Nares* for the plaintiff, and Serjeant *Glynn* for the defendant, and in this term by Serjeant *Burland* for the plaintiff, and Serjeant *Jephson* for the defendant.

On the side of the plaintiff it was insisted that, the condition of the bond being singly for the payment of a sum of money, the bond is good and lawful; and that no averment shall be admitted that the bond was given upon an unlawful consideration not appearing upon the face of it, and therefore that the special plea is bad. Upon the first argument these cases were cited for the plaintiff: Carth. 252; Comb. 121, *Thompson* v. *Harvey*; *Lady Downing* v. *Chapman* (*b*), C. B. Mich. 6 Geo. 2 (now depending in error in B. R.); 1 Leon. 73, 203; Jenk. 106; Carth. 300; Comb. 245; *Empson* v. *Bathurst*, 1 Mod. 35, Hutton, 52; Vent. 331; Cro. Jac. 248.

For the defendant it was insisted, that the averment of the wicked and unlawful consideration of giving the bond might well be pleaded, although it doth not appear upon the face of the deed; and that anything which shows an obligation to be void may well be averred, although it doth not appear on the face of the bond: as *duress*; that it was delivered as an *escrow* to be

(*b*) This case will be found reported 9 East, 414, *in notâ*.

delivered upon a certain condition to the obligee; *infancy, coverture*, or upon a *simoniacal contract, maintenance, &c.*; and although it is said there is a difference between bonds being void at common law and by statute, yet it is otherwise, for the common law was originally by statutes which are not now in being. The general rule, that you cannot plead any matter *dehors* the deed, doth not apply to this case; the true meaning of that rule is, that you cannot allege anything inconsistent with and contrary to the deed, but you may allege matter consistent with the deed. The bond in the present case is for the payment of money; the plea admits this, and the averment alleges upon what consideration that money was to be paid, and therefore is not inconsistent or contradictory to the condition of the bond. This rule of pleading, applied to the cases of *simony, duress, coverture, infancy, &c.*, is on the side of the defendant in this case. In bonds not to follow a trade the defendant may aver the consideration to avoid the bond. *Downing* v. *Chapman* is not like this case; that was an averment contradictory to the condition of the bond, and amounted to a defeasance; the present consideration is consistent with the condition, which is for payment of money, and only shows the bad consideration upon which the money was to be paid.

Upon the first argument the Lord Chief Justice broke the case, and said that this was very different from the case of *Lady Downing* v. *Chapman*, and therefore he would consider it wholly independent thereof; and said, as he was then advised, he thought there was no difference between an act being void by statute or the common law; that the principle the judges heretofore have gone upon for making the distinctions (in the books) is not a sound one; for wherever the bond is void at law or by statute, you may show how it is void by plea, and that in truth it never had any legal existence. That the statute law is the will of the legislature in writing; *the common law is nothing else but statutes worn out by time;* all our law began by consent of the legislature, and whether it is now law by usage or writing, it is the same thing; a statute says such a thing shall be avoided by plea, why therefore may not a deed executed upon a consideration against the common law be avoided by plea? In *duress, simony, infancy, coverture, &c.*, the plea discloses that in truth there never was

any obligation. The principle upon which courts of justice must go is, to enforce the performance of contracts not injurious to society; and it would be absurd to say that a court of justice shall be bound to enforce contracts injurious to and against the public good. No man shall come into a court and say, "Give me a sum of money which I desire to have contrary to law;" there can be no doubt but that the compounding a prosecution for wilful and corrupt perjury is a very great offence to the public, and whether it was between some persons who are strangers to this action, it is not material.

Bathurst, Justice, (upon the breaking this case,) said, that the case of *Lady Downing* v. *Chapman* was not like it.

Gould, Justice, (upon the breaking this case,) said that he differed with the rest of the court in the judgment given in *Lady Downing* v. *Chapman*, and that upon the whole of that case he thought the averment, that the bond *there* given was upon a wicked consideration, ought to have been admitted; he said that, if this case at bar had been upon a simple contract, the court would not have hesitated a moment, but would have given judgment that it was bad; and shall the court sanctify a deed made upon a wicked consideration because it is sealed? To have a deed which ought to be to a man's good turned to evil purposes he thought very wrong, and that there was no distinction whether a deed be void at law or by statute.

Upon the second argument of the case at bar in this term, the Lord Chief Justice delivered the opinion of the whole court (and pronounced judgment for the defendant) to the following effect.

Lord Chief Justice WILMOT:—Four questions are to be considered:

1st. Whether it doth not appear, from the facts alleged in the second plea, that the consideration for giving the bond is an illegal consideration?

2nd. Whether a bond given for an illegal consideration is not clearly void at common law *ab initio?*

3rd. Supposing the bond is void, whether the facts disclosed in the plea to show it void can by law be averred and specially pleaded?

4th. If they can be pleaded; then whether this second plea is duly, aptly, and properly pleaded?

1. As to the first question, it hath been insisted for the plaintiff that he was not privy to the bargain and agreement, so as to him there appears to be nothing illegal done by him. But we are all clearly of opinion that the whole of the transaction is to be considered as one entire agreement; for the bond and note are both dated upon the same day, for payment of the same sum of money on the same day; the manner of the transaction was to gild over and conceal the truth; and wherever courts of law see such attempts made to conceal such wicked deeds, they will brush away the cobweb varnish, and show the transactions in their true light. This is an agreement to stifle a prosecution for wilful and corrupt perjury, a crime most detrimental to the commonwealth; for it is the duty of every man to prosecute, appear against, and bring offenders of this sort to justice. Many felonies are not so enormous offences as perjury, and therefore to stifle a prosecution for perjury seems to be a greater offence than compounding some felonies. The promissory note was certainly void; what right then hath the plaintiff to recover upon this bond, which was given to indemnify him from a note that was void? They are both bad, the consideration for giving them being wicked and unlawful.

2. As to the second point, we are all of opinion that the bond is void *ab initio*, by the common law, by the civil law, moral law, and all laws whatever; and it is so held by all writers whatsoever upon this subject, except in one passage in Grotius, lib. 2, cap. 11, sect. 9, where I think he is greatly mistaken, and differs from Puffendorf, lib. 3, cap. 8, sect. 8, who, in my opinion, convicts the doctrine of Grotius. In Justin. Instit. lib. 3, tit. 20, *de turpi causâ*, sect. 23 (*c*):—*Quod turpi ex causâ promissum est, veluti si quis homicidium vel sacrilegium se facturum promittat, non valet.* And Vinnius, in his commentary, carries it so far as to say, you shall not stipulate or promise to pay money to a man not to do a crime, *Si quis pecuniam promiserit, ne furtum aut cædem faceret, aut sub conditione, si non fecerit, adhuc dicendum, stipulationem nullius esse momenti; cum hoc ipsum flagitiosum sit, pecuniam pacisci quo flagitio abstineas.* Dig. lib. 12, tit. 5; Code, lib. 4, tit. 7, to the same point.

This is a contract to tempt a man to transgress the law, to do

(*c*) This is lib. 3, tit. 19, sect. 24, in modern editions of the Institutes.

that which is injurious to the community: it is void by the common law; and the reason why the common law says such contracts are void, is for the public good. *You shall not stipulate for iniquity.* All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again. You shall not have a right of action when you come into a court of justice in this unclean manner to recover it back. *Procul, O! procul este profani.* See Doct. & Stud. fo. 12, and chap. 24.

3. The third point is, Whether this matter can be pleaded? It is objected against the defendant that he has no remedy at law, but must go and seek it in a court of equity: I answer, we are upon a mere point of common law, which must have been a question of law long before courts of equity exercised that jurisdiction which we now see them exercise; a jurisdiction which never would have swelled to that enormous bulk we now see, if the judges of the courts of common law had been anciently as liberal as they had been in later times: to send the defendant in this case into a court of equity, is to say there never was any remedy at law against such a wicked contract as this is: we all know when the equity part of the Court of Chancery began. I should have been extremely sorry if this case had been without remedy at common law. *Est boni judicis ampliare jurisdictionem*: and I say, *est boni judicis ampliare justitiam*; therefore, whenever such cases as this come before a court of law, it is for the public good that the common law should reach them and give relief. I have always thought that formerly there was too confined a way of thinking in the judges of the common law courts, and that courts of equity have risen by the judges not properly applying the principles of the common law, being too narrowly governed by old cases and maxims, which have too much prevented the public from having the benefit of the common law. It is now objected, as a maxim, that the law will not endure a fact *in pais dehors* a specialty to be averred against it, and that a deed cannot be defeated by anything less than a deed, and a record by a record, and that if there be no consideration for a bond it is a gift. I answer, that the present condition is for the payment of a sum of money, but that payment to be

made was grounded upon a vicious consideration, which is not inconsistent with the condition of the bond, but strikes at the contract itself in such a manner as shows that, in truth, the bond never had any legal entity, and, if it never had any being at all, then the rule or maxim that a deed must be defeated by a deed of equal strength does not apply to this case. The law will legitimate the showing it void *ab initio*, and this can only be done by pleading. Nothing is due under such a contract, then the law gives no action, the *debitum* never existed; as much as if it had been said it shall be void because there is no debt; but if this wicked contract be not pleadable, it will be good at law, be sanctified thereby, and have the same legal operation as a good and an honest contract, which seems to be most unreasonable and unrighteous, and therefore, unless I am chained down by law to reject this plea, I will admit it, and let justice take place. What strange absurdity would it be for the law to say that this contract is wicked and void, and in the same breath for the law to say, You shall not be permitted to plead the facts which clearly show it to be wicked and void! I am not for stirring a single pebble of the common law; and without altering the least tittle thereof, I think it is competent, and reaches the case before us. For my own part, I think all the cases upon acts of parliament, with respect to making bonds, &c., void, do warrant the receiving this plea and averment; there is no direction in such acts of parliament given for the form and manner of pleading in those cases; the end directs and sanctifies the means; I think there is no difference between things made void by act of parliament, and things void by the common law: statute law and common law both originally flowed from the same fountain, the legislature: I am not for giving any preference to either, but if to either, I should be for giving it to the common law. If there had ever been any idea or imagination, that such a contract as this could have stood good at common law, surely the legislature would have altered it. There has been a distinction mentioned between a bond being void by statute, and at common law, and it is said that in the first case if it be bad or void in any part, it is void *in toto*, but that at common law it may be void in part, and good in part; (*d*) but this proves nothing in the present case. The

(*d*) See *post in notis*, p. 371.

judges formerly thought an act of parliament might be eluded if they did not make the whole void, if part was void. It is said (*c*), "the statute is like a tyrant, where he comes he makes all void, but the common law is like a nursing father, makes only void that part where the fault is, and preserves the rest;" 1 Mod. 35, 36. The case of a simoniacal contract may be reached by a plea; this proves the contract in the present case is to be avoided at common law. The two cases in Leon. I set one against the other, and lay no stress upon either. *Infancy, coverture, duress, &c.*, apply directly to this case; the plea shows a fact, which if true, the bond never had any legal existence at all. As to a bond being a gift, that is to be repelled by showing it was given upon a bad consideration; you may thereby repel the presumption of donation. It has been objected that the admission of such plea as the present will strike at securities by deed; the answer is, that such a plea in the case of *infancy, gaming, duress, &c. &c.*, is admissible. What is the plea of *non est factum*? Ninety-nine in one hundred of them are false; why then is such a plea to be received, and not the present plea? I see no reason why. I want no case to warrant my opinion, it is enough for me if there be no case against me, and I think there is not. In 1 Hen. 7, 14, 16 b, Brian was then the Chief Justice, and his opinion there is founded upon what I have now said: Brian says, "I do not see in any case in the world how a man can avoid a specialty by a bare matter of fact concerning the same deed, *if so be that the deed was good at the commencement*;" but the present deed was never good. Moor. 564, is a simoniacal contract pleaded to a bond, which was held a bad plea, because *simony* was not *then* considered as contrary to our law, but at this day, *simony* being against our law, such a plea would be good. The case in Comb. 121, is nothing but an *obiter dictum* of a judge, to which I pay very little regard.

4. As to the fourth point, I think the plea is rightly pleaded, and concludes very properly in saying, "And so the said bond is void." It seems to me that *non est factum* could not have been properly said at the conclusion of this plea after the special matter before alleged; *non est factum* means nothing but

(*c*) This saying is ascribed by Twisden, J., to Lord Hobart.

that "I did not seal and deliver the bond;" and why *non est factum* may be pleaded by a *feme covert* I do not clearly see the reason, unless the law unites the husband and wife so closely, that it considers them as one and the same person, so that she, without the husband, cannot execute the deed. If two be jointly bound, and only one sued, he cannot plead *non est factum*, but ought to plead that another was bound with him; 5 Rep. 119, a, b. It is fair to tell the party what is your defence, upon what point you put your case. I think the right way is to conclude the plea as it is, "*And so the said writing obligatory is void, et hoc, &c.*, and so pray judgment if the plaintiff ought to have his action, &c.," and do not see how he could say *non est factum*, when he sealed the deed; but supposing the plea might have been more aptly concluded, yet it is well enough upon a general demurrer, as this is (*f*). And we are all of opinion that judgment may be for the defendant; that the averment pleaded is not contradictory, but explanatory of the condition; that the bond was void *ab initio*, and never had any existence.

Judgment for the defendant *per totam curiam*.

(*f*) By St. 4 Anne, c. 16.

Illegality may be pleaded, whether consistent or not with the condition of the bond.

The principle, established in *Collins* v. *Blantern*, that illegality may be pleaded as a defence to an action on a deed, has been so often recognised, and is so well settled as law, that it would be useless to enter upon any long discussion respecting it. "Since the case of *Pole* v. *Harrobin* in 1732, (9 East, 416, n.), it has been generally understood that an obligor is not restrained from pleading any matter which shows that the bond was given upon an illegal consideration, *whether consistent or not with the condition of the bond*;" *per* Lord Ellenborough, *Paxton* v. *Popham*, 9 East, 408, 421. And this, it will be remarked, carries the doctrine a step further than *Collins* v. *Blantern*, where the illegality averred in the plea was consistent with the condition. So, too, a covenant that lands on which an annuity was secured were worth more than the annuity, did not, whilst the Annuity Act was in force, estop the grantor from showing the reverse; *Doe* v. *Ford*, 3 A. & E. 654. See further *Prole* v. *Wiggins*, 3 B. N. C. 230. In *Paxton* v. *Popham*, *supra*, the condition of

the bond on which the action was brought stated that the defendants had borrowed of the plaintiff a sum, to run at *respondentia* interest, on the security of goods shipped from Calcutta to Ostend, for the repayment of which on the ship's arrival the bond was conditioned. *Plea*, that the bond was given to cover the price of goods sold by plaintiffs to defendants for the purpose of an illegal traffic from the East Indies, and that the plaintiffs knowingly assisted in preparing the goods for carriage upon such illegal voyage. On demurrer the court gave judgment for the defendants. *Accord. Greville* v. *Attkins*, 9 B. & C. 462.

Courts will not enforce illegal contracts if illegality appears.

The court will not "enforce an illegal contract, or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the court ought not to assist him;" *Scott* v. *Brown*, (1892) 2 Q. B. 724, *per* Lindley, L.J.

Two classes of illegality: by common law; and by statute.

With respect to the different species of illegality pleadable to an action on a bond or contract, it is impossible to do more than particularise a few of those which have actually come under discussion in reported cases. They may be divided into two classes, *viz.*, 1. Where the illegality exists at common law; and, 2. Where it is occasioned by the enactment of some statute.

Illegality at common law. Public policy.

Under the first class are comprehended contracts which militate against public policy; see *Egerton* v. *Brownlow*, 4 H. L. C. 1; and *Hilton* v. *Eckersley*, 6 E. & B. 47, 66; for instance, contracts in general restraint of trade, the leading case on which subject is *Mitchell* v. *Reynolds*, *post*, p. 391; and agreements to compromise offences, as in the principal case.

Compromise of pending criminal proceedings.

Any agreement to compromise pending criminal proceedings is illegal; *Ex p. Critchley*, 3 D. & L. 527; *Ex p. Wolverhampton Bank*, 14 Q. B. D. 32; even though sanctioned by the judge at the trial; *Keir* v. *Leeman*, 6 Q. B. 308, 9 Id. 371, 395; *Windhill L. B.* v. *Vint*, 45 Ch. D. 351. With regard to this rule it is laid down in *Keir* v. *Leeman*, 6 Q. B. 308, 321, that a prosecution for an offence which might be made the subject of a civil action, *e.g.*, a common assault, may legally be compromised; but that if the offence be wholly or partly of a public nature, *e.g.*, assault and

Distinction where offences may be subject of civil action.

riot, no agreement to stifle a prosecution for it can be valid.

Agreement not to prosecute.

Any agreement, either express or implied, that there shall be no prosecution, is likewise illegal; *Ward* v. *Lloyd*, 6 M. & Gr. 785; *Williams* v. *Bayley*, L. R. 1 H. L. 200; *Ex p. Caldecott*, 4 Ch. D. 150; *Flower* v. *Sadler*, 10 Q. B. D. 572; *Jones* v. *Merionethshire Soc.*, (1892) 1 Ch. 173. A mere threat of a prosecution, however, does not invalidate securities subsequently given by a debtor to his creditor for the debt, if there be no agreement not to prosecute; *Ward* v. *Lloyd*, *supra*; *Flower* v. *Sadler*, *supra*. There is a distinction in this respect between securities given by the debtor himself and those given by third parties who are under no obligation to the creditor; *Flower* v. *Sadler*, *supra*. As to recovering money paid, or securities given, under such circumstances, see notes to *Merryweather* v. *Nixan*, *post*, p. 384.

Compromise of election petitions; or proceedings against solicitors; or bankrupts.

So also the courts have held to be illegal, agreements to pay money for the withdrawal of an election petition; *Coppock* v. *Bower*, 4 M. & W. 361; or of proceedings to strike a solicitor off the rolls; *Kirwan* v. *Goodman*, 9 Dowl. 330; or of opposition to the discharge of a bankrupt; *Kearley* v. *Thomson*, 24 Q. B. D. 742; also an agreement whereby an indictment for obstructing a highway was compromised; *Windhill L. B.* v. *Vint*, 45 Ch. D. 351; and an agreement to pay money in consideration that, at the trial on the prosecution of a third party, the payer should be exonerated from blame; *Lound* v. *Grimwade*, 39 Id. 605. The courts will not entertain actions for specific performance of agreements to pay money for the withdrawal of divorce suits; *Gipps* v. *Hume*, 31 L. J. Ch. 37; and an agreement not to enforce a bond in consideration of the obligor not publishing the fact of the obligee's adultery with the obligor's wife is no defence to an action on the bond; *Brown* v. *Brine*, 1 Ex. D. 5.

Interference with course of justice.

Withdrawal of divorce suits.

Contracts to indemnify bail.

A contract to indemnify bail against the consequences of the non-appearance of the accused is illegal; and money paid under it to the bail cannot be recovered either before or after forfeiture of the recognizance; *Herman* v. *Jeuchner*, 15 Q. B. D. 561; overruling, on the latter point, *Wilson* v. *Strugnell*, 7 Id. 548.

Agreement to withdraw opposition to railway held good.

In *Howden* v. *Simpson*, 10 A. & E. 793, 9 Cl. & F. 61, an agreement between proprietors of a proposed railway and a peer, that he should withdraw his opposition to their bill in parliament, and that if the bill were passed they should pay him 5000*l.* as compensation for the damage to his lands, was

held valid; it not being shown that the money was promised as a consideration for the peer's vote being given or withheld, or that the parties to the agreement intended to conceal it from other landowners, or from the legislature, or that any fraud was committed or intended. See *Scottish N. E. R. Co.* v. *Stewart*, 3 Macq. 382; *Hare* v. *L. and N. W. R. Co.*, 2 J. & H. 80; *Maunsell* v. *Mid. R. Co.*, 1 H. & M. 130.

For *future* separation void.

A deed made in consideration of a *future* separation between husband and wife is void; *Hindley* v. *Westmeath*, 6 B. & C. 200; *Cocksedge* v. *Cocksedge*, 14 Sim. 244; though it may be otherwise where the consideration is an immediate one; *Jee* v. *Thurlow*, 2 B. & C. 541. In *Jones* v. *Waite*, 5 B. N. C. 341, the Exch. Cham. agreed that a husband cannot legally sell his consent to a separation, though there was a difference of opinion on the question whether the facts stated amounted to such a sale. But, where separation is inevitable, a contract settling the terms on which it is to take place is lawful; *Wilson* v. *Muskett*, 3 B. & Ad. 743; *Jones* v. *Waite*, 2 Cl. & F. 88; *Papps* v. *Webster*, Cam. Scacc. 1848; *Randle* v. *Gould*, 8 E. & B. 457; and specific performance of such a contract may be decreed though there be no covenant by the trustees to indemnify the husband against the wife's debts; *Frampton* v. *Frampton*, 4 Beav. 287; *Clough* v. *Lambert*, 10 Sim. 174; *Jodrell* v. *Jodrell*, 9 Beav. 45; *Wilson* v. *Wilson*, 14 Sim. 405. In the last case part of the consideration was the discontinuance of a suit for nullity of marriage on the ground of the husband's impotency, and Shadwell, V.-C., decreed specific performance, and restrained the husband by injunction from compelling the wife to proceed with the suit in the Ecclesiastical Court, though it was suggested that by the practice of that court no restitution of conjugal rights could be obtained pending the suit for nullity except by a proceeding in that suit. Upon appeal to the H. L., notwithstanding an attack of the most general character, and conducted with consummate ability, upon the policy of separation deeds, the decree was affirmed, and the law, it is to be hoped, at length finally settled; 1 H. L. C. 538; see *Vansittart* v. *Vansittart*, 4 K. & J. 62, *per* Turner, L.J. In *Hunt* v. *Hunt*, 31 L. J. Ch. 161, Lord Westbury restrained a husband from seeking restitution of conjugal rights contrary to a covenant in a separation deed. The case was taken to the H. L., but Mrs. Hunt died during the proceedings, and no judgment

Secus, of contract settling terms where separation inevitable.

was given. See also *Brown* v. *Brown*, 7 Eq. 185; *Rowley* v. *Rowley*, L. R. 1 H. L. Sc. 63. In *Marshall* v. *Marshall*, 5 P. D. 19, Sir James Hannen followed *Hunt* v. *Hunt*, and dismissed a suit brought by *a wife* for restitution of conjugal rights in breach of a covenant in a deed of separation; this case was approved and followed by the C. A. in *Clark* v. *Clark*, 10 P. D. 188; see also *Aldridge* v. *Aldridge*, 13 Id. 210.

Covenants by husband to part with control of children.

Covenants in a separation deed by the husband to give up control over his children were void on the ground of public policy; *Vansittart* v. *Vansittart*, *supra*; *Walrond* v. *Walrond*, 1 Johns. 18; see, however, *Swift* v. *Swift*, 34 L. J. Ch. 394; but it is enacted by 36 Vict. c. 12, s. 2, that no agreement in any separation deed between the father and mother of an infant is to be invalid by reason only of its providing that the father of such infant shall give up control thereof to the mother: provided that no court shall enforce any such agreement, if of opinion that it will not be for the infant's benefit to give effect thereto. A covenant in a separation deed licensing the wife "to live as if sole and unmarried, in such a way as she may think fit, free from all restraint," does not invalidate it; *Kendall* v. *Webster*, 1 H. & C. 440; and a covenant by the husband to pay his wife an annuity, without a *dum casta* clause, is valid; nor will such a clause be implied so as to debar the wife who has subsequently committed adultery from claiming the annuity; *Fearon* v. *Aylesford*, 14 Q. B. D. 792; *Sweet* v. *Sweet*, (1895) 1 Q. B. 12.

To allow wife to live as if unmarried.

Covenant not to marry.

A covenant to marry no one but the covenantee is void; *Lowe* v. *Peers*, 5 Burr. 2225; and so is a condition against marriage generally; see *Morley* v. *Rennoldson*, (1895) 1 Ch. 449; but a condition in restraint of a second marriage, whether of a man or a woman, is valid; *Newton* v. *Marsden*, 31 L. J. Ch. 690; *Allen* v. *Jackson*, 1 Ch. D. 399.

Marriage brocage.

Marriage-brocage bonds and contracts are void; *Hall* v. *Potter*, 3 Lev. 411; see *Cole* v. *Gibson*, 1 Ves. sen. 503.

Other instances of illegality.

A bond conditioned to procure subscriptions for 9000 shares in a patent, which, by its terms, was assignable to no greater number than *five* persons, was void for illegality, before the 15 & 16 Vict. c. 83, s. 36, which made such an assignment lawful; *Duvergier* v. *Fellowes*, 10 B. & C. 826. In *Pole* v. *Harrobin*, 9 East, 416, n., the bond was to secure money agreed to be given for the discharge of a person unlawfully impressed, and it was held void; and so in

Arkwright v. *Cantrell*, 7 A. & E. 565, was a grant conferring a judicial office on a person interested in the matters to be decided.

Rigging the market.

An agreement between two or more persons to buy shares in a company with the sole object of inducing would-be buyers of shares in that company, to believe, contrary to the fact, that there is a market for the shares, and that they are of greater value than they really are, is an illegal agreement, upon which no action can be brought; *Scott* v. *Brown*, (1892) 2 Q. B. 724.

Immoral considerations.

Bonds given on an immoral consideration, *e.g.*, to induce the obligee to live in fornication with the obligor, are void; *Walker* v. *Perkins*, 3 Burr. 1568; see *Re Vallance*, 26 Ch. D. 353; though it is otherwise where the bond is given in consideration of past seduction; *Turner* v. *Vaughan*, 2 Wils. 339; *Nye* v. *Moseley*, 6 B. & C. 133; even though the obligor does not cease to cohabit with the obligee; *Hall* v. *Palmer*, 3 Hare, 532. A mortgage in consideration of a loan made to the mortgagor, whose daughter the mortgagee had seduced, for the purpose of inducing him to allow continuation of the intercourse, was set aside in *Willyams* v. *Bullmore*, 33 L. J. Ch. 461. Where parties who have been living in concubinage execute a *quasi*-separation deed to secure an annuity to the woman, an express provision that the annuity shall cease on resumption of cohabitation is void; *Ex p. Naden*, 9 Ch. 670; and such a provision will not be implied; *Re Abdy*, (1895) 1 Ch. 455.

Past seduction.

Contracts for immoral purposes.

Contracts made for immoral purposes are simply void, and a person who makes a contract of sale or hire, knowing that the subject-matter of the contract is to be applied to an immoral purpose, cannot recover in respect of it; *Pearce* v. *Brooks*, L. R. 1 Ex. 213, where it was held that a coachmaker could not recover for the hire of a brougham let by him to a woman with knowledge that she intended to use it for purposes of prostitution, although there was no evidence that he looked to the proceeds of her prostitution for payment; but compare *Bagot* v. *Bagot*, 2 Ir. L. R. 1. In *Cowan* v. *Milbourn*, L. R. 2 Ex. 230, the defendant contracted to let rooms to the plaintiff. He afterwards discovered that they were intended to be used for a blasphemous purpose, and refused to let the plaintiff use them, though he did not assign that as the ground of his refusal. The court held that the contract could not be enforced.

Illegality by statute.

The illegality is equally fatal when created by statute.

Thus bonds have been held void for contravening the provisions of 9 Ann. c. 14, against gaming; see *Colborne* v. *Stockdale*, 1 Str. 493; *Mazzinghi* v. *Stephenson*, 1 Camp. 291; *Bubb* v. *Yelverton*, 9 Eq. 471 (where doubt was raised whether a bond is affected by 5 & 6 Will. 4, c. 41, and 8 & 9 Vict. c. 109, which repealed the statute of Anne); *Higginson* v. *Simpson*, 2 C. P. D. 76; *Ex p. Pyke*, 8 Ch. D. 754; and *Cohen* v. *Kittell*, 22 Q. B. D. 680: or for contravening the Lottery Act, 1802; see *Barclay* v. *Pearson*, (1893) 2 Ch. 154: or the Sale of Offices Acts, 1551 and 1809; *Layng* v. *Paine*, Willes, 571; *Godolphin* v. *Tudor*, 2 Salk. 468; *Law* v. *Law*, 3 P. Wms. 391; *Hopkins* v. *Prescott*, 4 C. B. 578; *Græme* v. *Wroughton*, 11 Exch. 146; *Eicke* v. *Jones*, 11 C. B. N. S. 631; *Eyre* v. *Forbes*, 12 Id. 191: or the statutes 31 Eliz. c. 6, and 13 Ann. c. 11, against simony; see *Ffytche* v. *Bishop of London*, 1 East, 487; *Fletcher* v. *Sondes*, 3 Bing. 501; *Fox* v. *Bishop of Chester*, 6 Id. 1; *Goldham* v. *Edwards*, 16 C. B. 437, 18 Id. 389; *Sweet* v. *Meredith*, 3 Giff. 610; *Reichel* v. *Bishop of Oxford*, 14 App. Cas. 259; and see 7 & 8 Geo. 4, c. 25, and 9 Geo. 4, c. 94. So a bond not within the protection of 17 & 18 Vict. c. 90, which abolished the usury laws, is void, if it infringe the provisions of the statutes against usury; see notes to *Ferrall* v. *Shaen*, 1 Wms. Saund. 294; *Lane* v. *Horlock*, 5 H. L. C. 580. Those provisions did not apply to cases where the principal is put in jeopardy; *Howkins* v. *Bennet*, 7 C. B. N. S. 507. An action was held to lie on bills, given after the repeal of the usury laws, in renewal of bills made before such repeal in consideration of a loan at usurious interest; *Flight* v. *Reed*, 1 H. & C. 703; *sed quære*.

Gaming. Sale of offices. Simony. Usury.

The price of butter sold in firkins not branded as required by 36 Geo. 3, c. 86 (repealed 7 & 8 Vict. c. 48) was held not recoverable; *Forster* v. *Taylor*, 5 B. & Ad. 887; and so was the cost of erecting a building contrary to 18 & 19 Vict. c. 120; *Stevens* v. *Gourley*, 7 C. B. N. S. 99. A contract to perform at an unlicensed theatre is void; *Levy* v. *Yates*, 8 A. & E. 129; and a contract may be illegal, though not in contravention of the specific directions of a statute, if it be opposed to its general policy and intent; *Staines* v. *Wainwright*, 6 B. N. C. 174; see *Pooley* v. *Quilter*, 2 De G. & J. 327; *Mare* v. *Sandford*, 1 Giff. 288; *Philpot* v. *St. George's Hospital*, 6 H. L. C. 338, 349; *Howkins* v. *Bennet*, 7 C. B. N. S. 507. On the other hand a contract is not

Other instances of illegality by statute.

necessarily illegal because it is unauthorized by the governing statute; and therefore a loan on personal security, though unauthorized by the Friendly Societies Act, 1875, not being illegal, may give the society a right of proof against their debtor's estate; *Re Coltman*, 19 Ch. D. 69. In *Humphreys* v. *Welling*, 1 H. & C. 7, a promissory note given by a debtor in consideration of a creditor withdrawing opposition to the debtor's obtaining a final order for protection in the Insolvent Debtors' Court, was held void; see also *Kearsley* v. *Thomson*, 24 Q. B. D. 742. So, in *Blacklock* v. *Dobie*, 1 C. P. D. 265, was an agreement by a debtor with two of his creditors that in consideration of his assigning and disclosing all his estate to them as trustees for the creditors, they would, on realization of his estate, return to him 50*l*. And generally all secret agreements made with particular creditors, in order to procure their assent or buy off their opposition to a composition or arrangement with the general body of creditors, are void; *McKewan* v. *Sanderson*, 20 Eq. 65; *Re Lenzberg's Policy*, 7 Ch. D. 650; see further as to contracts against the policy of the Bankruptcy Acts, *Ex p. Wolverhampton Bank*, 14 Q. B. D. 32; *Ex p. Barter*, 26 Ch. D. 510. A *bond* given to secure payment of a debt from which the obligor had been discharged by certificate of conformity under the Bankruptcy Act, 1849, was void, being a contract within the meaning of s. 204 of that Act; *Kidson* v. *Turner*, 3 H. & N. 581. So is a policy on an illegal voyage, *Cunard* v. *Hyde*, 2 E. & E. 1; see *Dudgeon* v. *Pembroke*, 22 W. R. 914. Work done by solicitors in the formation of a company illegally constituted does not furnish a legal claim on which an application to wind up the company can be based; *Re South Wales Co.*, 2 Ch. D. 763. An illegally constituted society cannot rank as a creditor, or prove a debt in a liquidation; see *Ex p. Day*, 1 Ch. D. 699; and an association formed for the acquisition of gain, and consisting of more than twenty persons, but unregistered under the Companies Act, 1862, s. 4, cannot sue or be sued upon contracts made with it for the purpose of carrying out its objects; *Jennings* v. *Hammond*, 9 Q. B. D. 763; *Shaw* v. *Benson*, 11 Id. 563; see also *Re Padstow Assoc.*, 20 Ch. D. 137; *Re Bowling and Welby*, (1895) 1 Ch. 663. As to the inability of members of a trades union *inter se*, to enforce its articles, see *Rigby* v. *Connol*, 14 Ch. D. 482; *Wolfe* v. *Matthews*, 21 Id. 194; *Swaine* v. *Wilson*, 24 Q. B. D. 252. Deeds framed to avoid the Mortmain Acts are void; *Jeffries*

Against policy of Bankruptcy Acts.

Policy on illegal voyage.

Work in formation of illegal company.

Trades Union.

Mortmain Acts.

v. *Alexander*, 31 L. J. Ch. 9. Contracts cannot be enforced which infringe the laws or statutes against maintenance or champerty; *Anderson* v. *Ratcliffe*, E. B. & E. 806; *Sprye* v. *Porter*, 7 E. & B. 59; *Hutley* v. *Hutley*, L. R. 8 Q. B. 112; but it is not unlawful maintenance for a person to assist another in his action from motives of charity; *Harris* v. *Brisco*, 17 Q. B. D. 504; or when he has a common interest in the matter of the action; *Guy* v. *Churchill*, 40 Ch. D. 481; see *Bradlaugh* v. *Newdegate*, 11 Q. B. D. 1, 11; *Alabaster* v. *Harness*, (1895) 1 Q. B. 339; and a solicitor cannot resist an application by his client for delivery of a cash account and bill of costs on the ground that his retainer was illegal for maintenance and champerty; *Re Thomas*, (1894) 1 Q. B. 747.

Maintenance and champerty.

Though a contract to do a thing which cannot be performed without violation of the law is void, whether the parties knew the law or not, yet, in order to avoid a contract which *can be performed legally* on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was a wicked intention to break the law; *Waugh* v. *Morris*, L. R. 8 Q. B. 202.

Contracts capable of being legally performed.

It is laid down in some of the older cases, that where there are several conditions to a bond, and any one of them is void by statute, the whole bond is void; *Norton* v. *Syms*, Moore, 856, Hobart, 14; *Lee* v. *Coleshill*, Cro. Eliz. 599; *Layng* v. *Paine*, Willes, 571. In *Norton* v. *Syms*, a distinction was taken in this respect between covenants or conditions void by common law, and those that are void by statute; and it was said that when some covenants in an indenture are void by *common law*, and the others good, a bond for the performance of all the covenants may be good, so far as respects the good covenants; but that if any of the covenants be void by statute, there the bond is void *in toto*; see also 1 Mod. 35, 36; *per* Buller, J., 2 T. R. 139; the expressions of Wilmot, C.J., in the text, p. 361; *Newman* v. *Newman*, 4 M. & S. 68; and 5 Taunt. 746.

Old rule that, when one of several conditions is void by *statute*, whole bond void.

Secus, where a condition void by common law.

However, the expressions used in the books, which lay down that if one of the conditions of a bond be void by statute, the whole bond is void, must be understood to apply only to cases where the statute enacts that all instruments containing any matter contrary thereto shall be void, for otherwise the common law rule will apply, and only that part will be void which contravenes the provisions of the statute; *Gaskell* v. *King*, 11 East, 165; *Wigg* v. *Shuttle-*

Qualification of old rule.

worth, 13 Id. 87; *How* v. *Synge*, 15 Id. 440; provided the good part be separable from, and not dependent on, the illegal part; *Biddell* v. *Leeder*, 1 B. & C. 327; *Kerrison* v. *Cole*, 8 East, 232; *Wood* v. *Benson*, 2 Tyr. 97; *Payne* v. *Brecon*, 3 H. & N. 572, where a municipal corporation was held liable upon its covenant to repay money borrowed on mortgage of its land, although the Municipal Corporation Act, 1835, s. 94, made it unlawful for the corporation to mortgage any of its land without consent of the Treasury, and no consent had, in fact, been obtained.

If one of several *considerations* of contract illegal, whole promise void.

It is indeed clear that if a *contract be made on several considerations, one of which is illegal, the whole promise will be void*; *Featherston* v. *Hutchinson*, Cro. Eliz. 199; *Waite* v. *Jones*, 1 B. N. C. 662; *Shackell* v. *Rosier*, 2 Id. 646; *Howden* v. *Haigh*, 11 A. & E. 1033; *Harrington* v. *Victoria Graving Docks*, 3 Q. B. D. 549: and that whether the illegality be at common law, or introduced by statute; *per* Tindal, C. J., *Shackell* v. *Rosier*. The difference is, that every part of the contract is induced and affected by the illegal consideration; whereas in cases where the consideration is tainted by no illegality, but some of the conditions (if it be a bond), or promises (if it be a contract of any other description), are illegal, the illegality of those which are bad does not communicate itself to, or contaminate, those which are good, except where, in consequence of some peculiarity in the contract, its parts are inseparable or dependent upon one another; see *Mallan* v. *May*, 11 M. & W. 653; *Green* v. *Price*, 13 Id. 695, 16 Id. 346; *Bourke* v. *Blake*, 7 Ir. C. L. R. 348; *Kearney* v. *Whitehaven Co.*, (1893) 1 Q. B. 700. "For the general rule is that where you cannot sever the illegal from the legal part of a covenant the contract is altogether void, but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good;" *per* Willes, J., *Pickering* v. *Ilfracombe R. Co.*, L. R. 3 C. P. 250; *Robinson* v. *Ommanney*, 23 Ch. D. 285; *Re Burdett*, 20 Q. B. D. 310; *Re Isaacson*, (1895) 1 Q. B. 338; *Baker* v. *Hedgecock*, 39 Ch. D. 520. In *Bubb* v. *Yelverton*, 9 Eq. 471, a debtor, in order to avoid proceedings before the Jockey Club, gave a bond to two creditors to secure 10,000*l.* in respect of sums lost in bets on horse races. The debtor having died, Lord Romilly allowed these creditors to prove for the amount against his estate, on the ground that the true consideration for the bond was the abandonment of proceedings before the

Club. The learned judge abstained from deciding that a bond was within 5 & 6 Wm. 4, c. 41, which enacts that certain securities given for gaming debts are to be deemed to be given upon an *illegal* consideration, but except on the hypothesis that the bond was not within that statute, it is, perhaps, doubtful, whether this decision is compatible with the rule above stated that the illegality of one consideration avoids the whole promise, since part of the consideration seems necessarily to have been the debts in respect of betting losses. Of course if 5 & 6 Wm. 4, c. 41, did not apply, the debts in respect of which the bond was given were merely a void and not an illegal consideration; 8 & 9 Vict. c. 109, s. 18.

Sems, where one consideration merely void.

It may be here observed, that though the *illegality* of one of the considerations vitiates the contract, yet it is otherwise if one or more of them be merely void and nugatory, as, for instance, a promise by a man to pay his own just debts; for then the void consideration is a nullity, and the others which remain support the contract; see *Jones* v. *Waite*, 5 B. N. C. 341, and the authorities there cited.

To avoid bond statute need not contain express words of prohibition.

In order that a bond or other contract may be void for disobedience to a statute, it is not necessary that the statute should contain words of positive prohibition. "The principle," said Tindal, C. J., in *De Begnis* v. *Armistead*, 10 Bing. 110, "is very clearly expressed by Holt, C. J., in *Bartlett* v. *Vinor*, Carth. 252: 'Every contract made for or about any matter or thing which is prohibited and made unlawful by statute, is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute.'" *Accord. Ferguson* v. *Norman*, 5 B. N. C. 76; *Cundell* v. *Dawson*, 4 C. B. 376; *Abbott* v. *Rogers*, 16 Id. 277; *Dallax* v. *Jones*, 26 L. J. Ex. 79; *Chambers* v. *Manchester R. Co.*, 5 B. & S. 588; *White* v. *Carmarthen R. Co.*, 1 H. & M. 786; *Re Cork R. Co.*, 4 Ch. 748; *Melliss* v. *Shirley L. B.*, 16 Q. B. D. 446. In *Gas Light Co.* v. *Turner*, 5 B. N. C. 666, 6 Id. 324, it was held that covenants in a lease, expressed to be granted for a purpose forbidden by statute, could not be enforced (see *Smith* v. *White*, 1 Eq. 626); and it was there made a question, whether the landlord could ever recover the land, which, however, it seems that he could; see *Tregoning* v. *Atten-*

Penalty implies prohibition.

borough, 7 Bing. 97; *Feret* v. *Hill*, 15 C. B. 207; but see *Scarfe* v. *Morgan*, 4 M. & W. 270.

No difference whether statute for protection of the subject or of the revenue.

In *Cope* v. *Rowlands*, 2 M. & W. 157, and *Taylor* v. *Crowland Gas Co.*, 10 Ex. 293, the court negatived the idea that there was a difference between the stringency of a statute for the protection of the subject and one for the protection of the revenue. Nice questions of construction, however, sometimes arise in determining whether the intention of a statute prescribing under penalties the mode of carrying on a particular trade according to certain rules for the protection of the revenue is merely to protect and increase the revenue by enforcing the penalties against a trader who does not comply with the rules, or to render the contracts entered into by such trader illegal; see *Johnson* v. *Hudson*, 11 East, 180. In *Smith* v. *Mawhood*, 14 M. & W. 452, it was laid down, in conformity with the cases above cited, that where the intent of a statute is to prohibit a contract, although that be only by the imposition of a penalty and for purposes of revenue, the contract is void and cannot be enforced by action; but upon the construction of the statute then under consideration, the Excise Licences Act, 1825, it was held that ss. 25 and 26 which enforce penalties upon any manufacturer or seller of tobacco, who has not his name painted on his premises, or has not obtained a licence, had not the effect of avoiding a sale made by one who had not conformed to their provisions, or of defeating an action for the price.

Contracts with persons incurring penalties, when illegal.

The imposition (by the 57 Geo. 3, c. lx.) of a penalty on persons acting as brokers in London without licence disabled such person from recovering commission on contracts negotiated by them in defiance of the act, but did not affect their right to recover from their principals money paid at the request of the latter in fulfilment of the contracts; *Smith* v. *Lindo*, 4 C. B. N. S. 395, 5 Id. 587. And notwithstanding the provisions of the Stamp Act, 1867, ss. 7, 9, 13 and 14, a contract of sea insurance, not expressed in a stamped policy, might be a good consideration for a subsequent promise by a member of a Mutual Insurance Association to pay contributions, and such member might by his conduct estop himself from raising the objection of invalidity; *Barrow Mutual Ass.* v. *Ashburner*, 54 L. J. Q. B. 377.

Contracts not illegal by relation

A contract will not become illegal by *relation* which was not so when made, although the party making it was bound by law under a penalty to do a subsequent act, which has

however been neglected; thus an attorney who neglected to enter his certificate was permitted to recover for work done before the expiration of the time allowed for entering it; *Eyre* v. *Shelley*, 6 M. & W. 269; see *Kent* v. *Ward*, 70 L. T. 612.

Contracts, incapable of being enforced while executory sometimes available when executed.

And there may occur cases in which a contract, the performance of which could not have been enforced because the contract itself was forbidden, will become available if executed, because the policy of the statute, which prohibits its enforcement while in an executory state, was to secure its execution; *M'Callan* v. *Mortimer*, 9 M. & W. 640, where the seller of stock recovered the price of stock actually transferred, although at the time of the contract to transfer the seller was not actually possessed of or entitled to the stock, and so the contract, while executory, as it is said, was incapable of being enforced by reason of the provisions of the Stock Jobbing Act, 7 Geo. 2, c. 8 (repealed by 23 Viet. c. 28). Compare *Westlake* v. *Adams*, 5 C. B. N. S. 248, where the plaintiff, a master, had made with the defendant an indenture of apprenticeship, void under 8 Ann. c. 9, s. 39, because only part of the amount of the premium was stated in the instrument, and it was held nevertheless (distinguishing *Jackson* v. *Warwick*, 7 T. R. 121), that the deed having been acted upon, and the boy having served his time under it, the master might recover from the defendant, the father of the boy, the whole amount of the agreed premium; although service under such an indenture would not create the relation of master and apprentice, even against a wrongdoer enticing the latter away from the service; *Cox* v. *Muncey*, 6 C. B. N. S. 375.

Contracts not illegal because consideration breach of private duty.

It seems that a contract is not illegal or void, simply because private rights are interfered with by the act stipulated for; *e.g.*, where the consideration is a breach of contract or of private trust, the contract may be enforced, and the persons injured by its performance are left to the ordinary means of redress; *Walker* v. *Richardson*, 10 M. & W. 284; *per* Parke, B., *Jackson* v. *Cobbin*, 8 Id. 797; *per* Vaughan, C.J., *Rudyard's Case*, 2 Vent. 23. Where, however, money was promised to an agent, partly in consideration of a promise by him to use his influence with his principal to procure the acceptance of the defendant's tender, it was held that the promise could not be enforced; *Harrington* v. *Victoria Docks*, 3 Q. B. D. 549.

Whether ille-

In *Fisher* v. *Bridges*, 2 E. & B. 118, 3 Id. 642, the ques-

gality vitiates subsequent legal contract embraced in terms of illegal contract.

tion arose whether illegality vitiated only the contract in which it existed, or whether its effect was such as also to vitiate any subsequent contract to do an act just in itself and objectionable only for being part of the terms of the original contract, though such subsequent contract were under seal, and for a good consideration, and the illegality wholly past and gone. There, to an action upon a covenant to pay money, the defendant pleaded that the plaintiff agreed to sell him land for the purpose, as the plaintiff at the time of the agreement well knew, that the land should be sold by lottery, contrary to statute; that afterwards, in pursuance of this illegal agreement, the land was assigned; and that the defendant made the covenant to secure payment to the plaintiff of part of the purchase money. The Q. B. held this to be a bad plea, upon the ground that it did not show that the covenant was stipulated for in, or given under, or in furtherance of the illegal contract, and, to use the language of Erle, J., "that whatever is entirely posterior to the illegal act may be supported as not being tainted with the illegality;" and they likened this case to that of a bond to provide an allowance for a woman with whom the obligor had cohabited. The Exch. Cham., however, were of a contrary opinion, saying: "It is clear that the covenant was given for payment of the purchase-money. It springs from and is a creature of the illegal agreement, and as the law would not enforce the original illegal contract, so neither will it allow the parties to enforce a security for the purchase-money, which, by the original bargain, was tainted with illegality." The court then proceeded to deal with the cases respecting provisions in consideration of past cohabitation, as follows:—"*Beaumont* v. *Reeve*, 8 Q. B. 843, much relied upon in the court below, does not in our judgment affect the question. It is clear that past cohabitation and previous seduction are not good considerations for a parol promise; but they are not therefore illegal considerations. They are no considerations at all: and, inasmuch as a bond, or other instrument under seal, is good without any consideration, it by no means follows that a covenant to pay a sum of money, tainted with illegality, can be enforced merely because a bond for maintenance, founded upon past cohabitation or previous seduction, is good. If an agreement had been made to pay a sum of money in consideration of future cohabitation, and, after cohabitation, the money being unpaid, a bond had been given to secure that money,

Fisher v. *Bridges.*

Distinction between considerations void and illegal.

that would be the same case as this; and such a bond could not under such circumstances be enforced." See also *Ayerst* v. *Jenkins*, 16 Eq. 275, *per* Lord Selborne.

Contracts void for constructive illegality.

Fisher v. *Bridges* belongs to a class of cases, which it has been the tendency of some modern decisions to enlarge, of solemn contracts not in themselves transgressing any positive rule of law, yet held to be void by reason of some constructive illegality, or supposed tendency to contravene public policy. The expression, upon which the judgment of the Exch. Cham. turns, that the contract was void because it was "to pay a *sum of money tainted with illegality*," is surely vague in itself and dangerous as a precedent. What may have been the true construction of the plea in *Fisher* v. *Bridges*, is a matter of small importance; but it may be hoped that it is not too late, by the aid of the highest tribunal, to restore the rule of law laid down by the Q. B. In *Hilton* v. *Eckersley*, 6 E. & B. 47, 66, the doctrine was again avowed by high authority, that a contract might be void as contrary to public policy, although not violating any rule of law, and the existence of such a doctrine was lamented. The law upon this subject is, it must be confessed, in an unsatisfactory state, and there seems but too much ground to fear that unless checked by a firm determination to uphold men's acts, when not in violation of some known rule of law, and to treat decided cases having a contrary tendency as exceptional, it may degenerate into the mere private discretion of the majority of the court as to a subject of all others most open to difference of opinion, and most liable to be affected by changing circumstances. In *Re Mirams*, (1891), Q. B. 595, Cave, J., said: "Certain kinds of contracts have been held void at common law on the ground of public policy; a branch of the law, however, which should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy;" and this passage was cited with approval by Lord Bramwell in *Mogul Co.* v. *McGregor*, (1892) A. C. 25, 45. *Fisher* v. *Bridges* was acted on in *Geere* v. *Mare*, 2 H. & C. 339. In *A.-G.* v. *Hollingsworth*, 2 H. & N. 416; and *Flight* v. *Reed*, 1 H. & C. 703, the connexion of the instruments with the prior illegal transaction was held not to be such as to vitiate them; compare *Payne* v. *Brecon*, 3 H. & N. 572.

Contracts by corporations.

Reference may here be made to *Hawkes* v. *E. Counties R. Co.*, 5 H. L. C. 331, where the cases relating to what has

Ultra vires doctrine.

been called the *ultra vires* doctrine, respecting contracts made by corporations, were discussed and much qualified.

The defence resting on the *ultra vires* doctrine exists only when the corporation is prohibited by law from entering into the contract sued upon. "Corporations," said Parke, B., in an often-quoted passage, "which are creatures of law, are, when their seal is properly affixed, bound just as individuals are by their own contracts, and as much as all the members of a partnership would be by a contract in which all concurred." (See *per* Blackburn, J., *Riche* v. *Ashbury Co.*, L. R. 9 Ex. 264.) "But where a corporation is created by an act of parliament *for particular purposes*, with special powers, then indeed another question arises: their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appear by the express provisions of the statute creating the corporation, or by reasonable inference from its enactments, that the deed was *ultra vires* —that is, that the legislature meant that such a deed should not be made. The question," continued the learned judge, referring to the case before him, "appears to me to be simply this, whether it can reasonably be made out from the statute that this covenant is *ultra vires*, or, in other words, forbidden to be entered into by either the plaintiffs or the defendants;" *S. Yorkshire R. Co.* v. *G. N. R. Co.*, 9 Exch. 84. See *Norwich* v. *Norfolk R. Co.*, 4 E. & B. 413, 447, *per* Lord Campbell, and Erle, J.; *S. Wales R. Co.* v. *Redmond*, 10 C. B. N. S. 675; *Chambers* v. *Manchester R. Co.*, 5 B. & S. 588; *Re Cork R. Co.*, 4 Ch. 748; *A.-G.* v. *G. E. R. Co.*, 5 App. Cas. 473; *Wenlock* v. *River Dee Co.*, 10 Id. 354; *A.-G.* v. *Newcastle*, (1892) A. C. 568; *Mann* v. *Edinburgh Trams*, (1893) A. C. 69.

But though a prohibition is implied, or to speak more exactly, an incapacity to contract exists, where the contract appears to be necessarily unconnected with the purpose of the incorporation (*e.g.*, where a railway company, invested with only the usual statutory powers of such a company, attempts to carry on the business of coal merchants, *A.-G.* v. *G. N. R. Co.*, 1 Drew. & Sm. 154), yet whatever may fairly be regarded as incidental to or consequential on those things which the legislature has authorized ought not, unless expressly prohibited, to be held *ultra vires*; see *per* Lord Selborne, in *A.-G.* v. *G. E. R. Co.*, *supra*; *General Auction Co.* v. *Smith*, (1891) 3 Ch. 432.

Accordingly, in *Bateman* v. *Ashton-under-Lyne*, 3 H. & N.

323, a waterworks company was held liable (Bramwell, B., *diss.*) on their contract to pay for work which they required for the purpose of applying to parliament for extension of their powers, and the ground of this decision was that the company did not appear to be prohibited from making such a contract; see also *Payne* v. *Brecon*, 3 H. & N. 572. A power *bonâ fide* to compromise any dispute whatever appears to be incident to the legal existence of the *persona* of a body corporate or politic, or of associations which are quasi corporate; see *per* James, L.J., *Bath's Case*, 8 Ch. D. 334. Contracts by corporations. *Ultra vires* doctrine.

There is a class of cases relating to corporations established under acts of parliament, and more particularly to registered joint-stock companies, in which the contract sued upon was such as the corporation could lawfully make; but the question has been whether the fulfilment of some provision or regulation, prescribed by the statute or deed of settlement constituting the corporation, is a condition precedent to the validity of the contract. In *Frend* v. *Dennett*, 4 C. B. N. S. 576, a statutory requirement, by which local boards are empowered to contract so as to bind the rates, provided their contracts are under seal, was held to be a condition essential to the validity of their contracts. So in *Hunt* v. *Wimbledon L. B.*, 3 C. P. D. 208, 4 Id. 48, it was held that s. 174 of the Public Health Act, 1875, is imperative and not merely directory, and consequently that a claim by an architect for plans supplied by him upon a verbal order to a value above 50*l.* could not be supported. This decision was approved, and followed, in *Young* v. *Leamington*, 8 App. Cas. 517; see *Stevens* v. *Hounslow Burial B.*, 61 L. T. 839. In *Ernest* v. *Nicholls*, 6 H. L. C. 401, a deed which purported to be an assignment of its business by one joint-stock company to another, the latter covenanting to indemnify the former against its existing liabilities, was held to be invalid under 7 & 8 Vict. c. 110, s. 29, because one of the directors who executed it was interested in the contract; see *Re South Essex Gas Co.*, 1 Johns. 480; *D'Arcy* v. *Tamar R. Co.*, L. R. 2 Ex. 158. Where particular act a condition precedent to validity of contract.

The following cases, namely, *Prince of Wales Ass. Co.* v. *Harding*, E. B. & E. 183, where the deed of settlement required that the seal should not be affixed except by previous order of three directors, signed by them: *Agar* v. *Athenæum Ass. Soc.*, 3 C. B. N. S. 725, where the deed of settlement required a resolution at a general meeting of the company in order to authorise the directors to borrow money: Where party with whom corporation has contracted had no notice of provision.

Contracts by corporations. *Ultra vires* doctrine.

and *Nowell* v. *Worcester*, 9 Exch. 457, are decisions in which the violation of provisions not known to the parties contracting with the companies was held to afford no answer to actions against the companies on their contracts, although such violation might amount to breach of trust as between shareholders and directors of the companies. See also *Bill* v. *Darenth Vale R. Co.*, 1 H. & N. 305.

Where persons contracting taken to have notice of deeds and statutes of incorporation.

But persons dealing with incorporated companies are ordinarily bound to take notice of the terms both of the statutes constituting the companies and of their deeds of settlement; *Balfour* v. *Ernest*, 5 C. B. N. S. 601; *Re Athenæum Soc.*, 4 K. & J. 549; and the execution by directors on behalf of a company of an instrument which, upon the face of the deed of settlement, the directors *could not* have had authority to execute, does not bind the company; see *Re Era Ass. Soc.*, 2 J. & H. 400; *Re State Fire Ins. Co.*, 33 L. J. Ch. 123. "We may now take it for granted," said Jervis, C.J., in *Royal British Bank* v. *Turquand*, 6 E. & B. 237, "that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. *But they are not bound to do more.* The party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorising that which on the face of the document appeared to be legitimately done." See *Gloucester Bank* v. *Rudry Co.*, (1895) 1 Ch. 629. See also *per* Wood, V.-C., *Re Athenæum Soc.*, *supra*; *Prince of Wales Ass. Co.* v. *Harding*, *supra*; *Agar* v. *The Athenæum Ass. Soc.*, *supra*; *Phosphate Lime Co.* v. *Green*, L. R. 7 C. P. 43, where the shareholders were held to have ratified an act of the directors which was *ultra vires* of the directors; and also *Re Saxon Life Ass. Co.*, 32 L. J. Ch. 207. But the whole body of shareholders cannot ratify an act which is *ultra vires* of the company itself; *Riche* v. *Ashbury Co.*, *supra*; nor can a society be made indirectly liable upon a contract *ultra vires* on the ground that they have held out their secretary as having power to make it; *Chapleo* v. *Brunswick Building Soc.*, 6 Q. B. D. 696; but the directors may make themselves personally liable by so holding him out, Id.

Distinction between acts *ultra vires qua*

The distinction, in the case of companies registered under the Act of 1862, between contracts invalid because they are

outside the scope of the memorandum of association, and those invalid for non-fulfilment of some condition or formality required by the articles of association was clearly explained by Lord Cairns, in *Ashbury Co.* v. *Riche*, L. R. 7 H. L. 653, 668: "The memorandum . . is as it were the charter, and defines the limitation of the powers of a company to be established under the Act . . The articles of association play a part subsidiary to the memorandum of association. They accept the memorandum of association as the charter of incorporation of the company; and so accepting it, the articles proceed to define the duties, the rights and the powers of the governing body as between themselves and the company at large, and the mode and form in which the business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made. With regard, therefore, to the memorandum of association, if you find anything which goes beyond that memorandum, or is not warranted by it, the question will arise, whether that which is so done is *ultra vires*, not only of the directors of the company, but of the company itself. With regard to the articles of association, if you find anything which, still keeping within the memorandum of association, is a violation of the articles of association, or in excess of them, the question will arise whether that is anything more than an act *ultra vires* the directors, but *intra vires* the company." See *Ex p. British Nation Ass.*, 8 Ch. D. 679; *A.-G.* v. *G. E. R. Co.*, 5 App. Cas. 473.

the company and acts *ultra vires quo* the directors.

Distinction between memorandum and articles of association

A question sometimes arises, whether, when a statute points out a particular mode for the performance of some act therein commanded, its enactments shall be taken to be *imperative* or only *directory*; in the former of which cases alone an act done in a different mode from that pointed out by the statute would be void. In *Pearce* v. *Morrice*, 2 A. & E. 96, the following rule for distinguishing between imperative and merely directory enactments is given by Taunton, J.: "A clause is *directory*, where the provisions contain mere matter of direction, and no more; but not so, when they are followed by words of positive prohibition." See *R.* v. *Gravesend*, 3 B. & Ad. 240; *R.* v. *St. Gregory*, 2 A. & E. 106; *Brooks* v. *Cock*, 3 A. & E. 138; *Southampton Dock Co.* v. *Richards*, 1 M. & Gr. 448; *Thompson* v. *Harvey*, 4 H. & N. 254; *Wolverhampton Waterworks Co.* v. *Hawksford*, 7 C. B. N. S. 795, where an act was required to be

Statute whether imperative or directory.

done within a certain time; *Cole* v. *Green*, 6 M. & Gr. 872, where a particular mode of signature of a contract was directed.

Want of remedy for non-compliance, no argument against construing clause as directory.

"It is" (said Parke, B., in *Gwynne* v. *Burnell*, 2 B. N. C. 39) "by no means any impediment to construing a clause to be *directory*, that if it is so construed there is no remedy for noncompliance with the direction. Thus, the statutes which direct quarter sessions to be held at certain times in the year are construed to be directory, *R.* v. *Leicester JJ.*, 7 B. & C. 6, and sessions held at other times are not void; yet it would be difficult to say that there would be any remedy against the justices for appointing them on other than the times prescribed by the statute." See *Thames Haven Co.* v. *Rose*, 4 M. & Gr. 552.

Effect of statutory disability of one of two grantors of joint deed.

In *Gillow* v. *Lillie*, 1 B. N. C. 696, the question was discussed, whether a joint deed executed by two persons, one of whom laboured under statutory disability, would be void as against both, or only as against the one rendered incapable by statute; but the point was not decided, as the court held that, the deed being several as well as joint, the defendant's several liability was sufficient to maintain the action.

MERRYWEATHER *v.* NIXAN.

EASTER.—39 *GEO.* 3, *K. B.*

[REPORTED 8 T. R. 186 (16 R. R. 810).]

If A. recover in *tort* against two defendants, and levy the whole damages on one, that one cannot recover a moiety against the other for his contribution; *aliter*, in *assumpsit*.

ONE Starkey brought an action on the case against the present plaintiff and defendant for an injury done by them to his reversionary estate in a mill, in which was included a count in trover, for the machinery belonging to the mill; and, having recovered 840*l.*, he levied the whole on the present plaintiff, who thereupon brought this action against the defendant for a contribution of a moiety, as for so much paid to his use.

At the trial, before Mr. Baron Thomson, at the last York assizes, the plaintiff was nonsuited, the learned judge being of opinion that no contribution could by law be claimed as between joint wrong-doers; and, consequently, this action, upon an implied *assumpsit*, could not be maintained on the mere ground that the plaintiff had alone paid the money which had been recovered against him and the other defendant in that action.

Chambre now moved to set aside the nonsuit; contending, that as the former plaintiff had recovered against both these parties, both of them ought to contribute to pay the damages: but

Lord KENYON, C.J., said, there could be no doubt but that the nonsuit was proper: that he had never before heard of such an action having been brought where the former recovery was for a *tort*: that the distinction was clear between this case and that of a joint judgment against several defendants in an action of *assumpsit*: and that this decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right.

Rule refused.

The case of *Philips* v. *Biggs*, Hard. 164, was mentioned by *Law*, for the defendant, as the only case to be found in the books in which the point had been raised; but it did not appear what was ultimately done upon it.

THE principle established by *Merryweather* v. *Nixan*, viz., that one *tort-feasor* cannot recover contribution against another, is but one modification of that general rule laid down by Wilmot, C. J., in *Collins* v. *Blantern*, *ante*, p. 360, viz.: *Ex turpi causâ non oritur actio.* "Whoever," his lordship there laid down, "is a party to an unlawful contract, if he have once paid the money stipulated to be paid in pursuance thereof, shall not have the help of a court of justice to fetch it back again." This general statement, however, must be taken subject to the qualifications mentioned below.

Ex turpi causâ non oritur actio.

The statement of an account in which the money due by the terms of the illegal contract is allowed, seems for this purpose equivalent to payment of it. In *Owens* v. *Denton*, 5 Tyr. 359, the plaintiff sued for wages; it appeared that the defendant had sold malt to the plaintiff by the hobbett, contrary to statute, but that the price had been included in an account settled between them, in which the malt was set off against the wages; it was held that the defendant might rely upon this settlement as a payment of the wages. "The general proposition," said Lord Abinger, "may be admitted, that a seller cannot enforce a contract of this sort by action, or in support of a plea of set-off. But the question here is, whether a settlement of accounts, equivalent to a payment in cash, has not taken place between the parties."

Owens v. *Denton.*

Instances of rule that money paid on illegal contract cannot be recovered.

Examples of the rule, that money paid in pursuance of an illegal contract shall not be brought back again, are to be found in *M'Kinnell* v. *Robinson*, 3 M. & W. 434, where it was held that money lent for the express purpose of illegal gaming is not recoverable; in *Howson* v. *Hancock*, 8 T. R. 575, where it was held that money paid to the winner of an illegal wager with the loser's consent is not recoverable; and in *Browning* v. *Morris*, 2 Cowp. 790; *Andrée* v. *Fletcher*, 3 T. R. 266; *Vandyke* v. *Hewitt*, 1 East, 97; and *Howard* v. *Refuge Soc.*, 54 L. T. 644; which show, that, in case of

illegal insurance, the premium cannot be recovered back, notwithstanding that, the insurance being void, the underwriters could not have been compelled to pay the loss; though it is otherwise where the illegality has been occasioned by an accident of which the insured could not have been aware, such as the breaking out of hostilities between the country of the insured and this country, of which no news had arrived at the place where the insurance was effected; *Oom* v. *Bruce*, 12 East, 225; see *Hentig* v. *Staniforth*, 5 M. & S. 122. Premiums on illegal insurance.

It must be observed that the generality of this rule is subject to some qualifications, for though, generally speaking, money paid in pursuance of an illegal contract cannot be recovered, yet "where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one from their situation and condition being liable to be oppressed or imposed upon by the other; there the parties are not *in pari delicto*; and in furtherance of these statutes the person injured, after the transaction is finished and completed, may bring his action and defeat the contract;" *per* Lord Mansfield, *Browning* v. *Morris*, 2 Cowp. 790; *Jaques* v. *Golightly*, 2 W. Bl. 1073; *Jaques* v. *Withy*, 1 H. Bl. 75; *Smith* v. *Bromley*, 2 Doug. 695 n.; B. N. P. 133. Qualification of general rule, where oppression.

So also, if one person has paid money to another in pursuance of an illegal agreement, but under such circumstances that there has been *oppression*, though both parties are *in delicto*, yet they are not *in pari delicto*, and the person who has paid the money may recover it back in an action for money had and received. Thus, where a debtor has secretly paid a sum of money to one creditor to induce him to agree to a composition, the money so paid may be recovered back by the debtor; *Atkinson* v. *Denby*, 6 H. & N. 778, 7 Id. 934; *Smith* v. *Cuff*, 6 M. & S. 160; see *Smith* v. *Bromley*, *supra*, and *Kearley* v. *Thomson*, 24 Q. B. D. 742.

In a court of equity also a person can obtain relief if he has entered into an illegal contract and paid money or given securities under it, under pressure or undue influence. Thus if money or securities are given, under an agreement not to prosecute, under such circumstances that there has been *pressure or undue influence*, the transaction will be set aside and the money or securities ordered to be returned; *Osbaldiston* v. *Simpson*, 13 Sim. 513; *Williams* v. *Bayley*, Remedy in equity.

L. R. 1 H. L. 200; *Jones* v. *Merionethshire Soc.*, (1892) 1 Ch. 173; *McClatchie* v. *Haslam*, 63 L. T. 376.

Rights of trustee in bankruptcy.

Again, if a man has paid money under an illegal contract and becomes a bankrupt, his trustee in bankruptcy may recover back the money, if it was paid after the date to which the trustee's title relates back, though the bankrupt himself could not have recovered it; *Ex p. Wolverhampton Bank*, 14 Q. B. D. 32, distinguishing *Ex p. Caldecott*, 14 Ch. D. 150.

Money paid to stakeholder.

It must also be observed that money paid in pursuance of an illegal contract by one of the parties to it, if paid, not to the other party but to a stakeholder, may be recovered back from the stakeholder before it has reached the other party's hands; for to permit this is merely to allow a *locus pœnitentiæ*, and to prevent the illegal contract from being executed at all; see *Cotton* v. *Thurland*, 5 T. R. 405; *Smith* v. *Bickmore*, 4 Taunt. 474; *Hastelow* v. *Jackson*, 8 B. & C. 221; *Hodson* v. *Terrill*, 1 C. & M. 802; *Barclay* v. *Pearson*, (1893) 2 Ch. 154, 168. The last three cases show that the stakeholder remains liable, if he pay the money to the winner after notice from the loser not to do so. He is not liable, however, if he pays it with his assent, or without notice of his dissent; *Howson* v. *Hancock*, 8 T. R. 575; *Gatty* v. *Field*, 9 Q. B. 431, 440. The right to recover money deposited with a stakeholder is not taken away by the Gaming Act, 1892: *O'Sullivan* v. *Thomas*, (1895) 1 Q. B. 698: see notes to *Godsall* v. *Boldero*, *post*, vol. ii.

Money received by agent of winner

Further, if the money reach the hands of any person who can be considered to receive it as agent for the party entitled to it under the illegal contract, such agent cannot set up the illegality as an answer to his principal's claim; *Tenant* v. *Elliott*, 1 B. & P. 3; *Farmer* v. *Russell*, Id. 296; *Bousfield* v. *Wilson*, 16 M. & W. 185; see *Johnson* v. *Lansley*, 12 C. B. 468; *Beeston* v. *Beeston*, 1 Ex. D. 13; *Bridger* v. *Savage*, 15 Q. B. D. 363; unless "such receipt itself was illegal and part of an illegal transaction in which both the principal and agent were concerned;" *per* Crompton, J., *Nicholson* v. *Gooch*, 5 E. & B. 999, 1016, citing *M'Gregor* v. *Lowe*, Ry. & M. 571; see *Sykes* v. *Beadon*, 11 Ch. D. 170, 197.

Stakeholder not agent of winner.

A stakeholder, however, cannot be considered to receive the money as agent for the winner, in the case of an illegal wager or lottery; *Allport* v. *Nutt*, 1 C. B. 974; see *Thorpe* v. *Coleman*, Id. 990; for to treat him as such would in

fact be to enforce the illegal contract, part of which is that the stakeholder shall pay the money to the winner. But if the stakeholder pay the money to a third person for the use of the winner, such person receives it upon another and different contract which the winner can enforce against him without having recourse to the original illegal contract; and this seems to be the test of the plaintiff's right to recover: see *Simpson* v. *Bloss*, 7 Taunt. 246; *per* Lord Esher, *Herman* v. *Jeuchner*, 15 Q. B. D. 562.

Third party may be

This was the test acted on in *Fivaz* v. *Nicholls*, 2 C. B. 501; *Taylor* v. *Chester*, L. R. 4 Q. B. 309; *Begbie* v. *Phosphate Co.*, L. R. 10 Q. B. 491, 500, 1 Q. B. D. 679; *Kearley* v. *Thomson*, 24 Q. B. D. 742, and *Scott* v. *Brown*, (1893) 2 Q. B. 724; which show that if a plaintiff cannot maintain his cause of action without having recourse to, or relying on, the original illegal contract, then the courts will not assist him.

Test of plaintiff's right to recover.

In *Taylor* v. *Bowers*, 1 Q. B. D. 291, it was broadly laid down that "if money is paid or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back *before the illegal purpose is carried out*; but if he waits until the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action;" *per* Mellish, L.J.

Generally, where illegal purpose not carried out. *Taylor* v. *Bowers.*

In *Symes* v. *Hughes*, 9 Eq. 475, it had been held that the plaintiff who had conveyed his property upon trust for an illegal purpose, which had in no way been carried out, was entitled to have the property re-conveyed to him by the defendant who took as assignee from the original trustee; Lord Romilly saying: "where the purpose for which the assignment was given is not carried out, and nothing is done under it, the mere intention to effect an illegal object when the assignment was executed does not deprive the assignor of the right to recover his property from the assignee who has given no consideration for it;" and in *Taylor* v. *Bowers*, *supra*, the facts were very similar.

Property assigned for illegal purpose not carried out.

In *Herman* v. *Jeuchner*, 15 Q. B. D. 561, it was decided by the C. A. that money could not be recovered back, which had been deposited by the plaintiff with the defendant as security to induce him to become surety for the plaintiff's good behaviour for two years. The defendant had become surety, but the two years had not expired when the action was brought. Lord Esher observed: "I will not stop to

Herman v. *Jeuchner.*

say whether, in order to defeat the plaintiff in an action like this, the defendant must be able to prove that the illegal object is performed, or whether it is sufficient that the contract itself shall be tainted with illegality; for if the contract is illegal and has been performed, then the person vouching the illegality cannot recover. In this case the illegal purpose has been wholly performed, and therefore the plaintiff cannot recover." Baggallay, L.J., said: "I am hardly prepared to say that, in order to prevent a plaintiff from recovering who sues to recover back money deposited in furtherance of an illegal purpose, the illegal object itself must be fully carried out."

If illegal purpose *partially* performed, property cannot be recovered.

In *Kearley* v. *Thomson*, 24 Q. B. D. 742, it was held by the C. A. that where money is paid under an illegal contract which has been *partially* performed it cannot be recovered back. It was there explained that the observations of Lord Esher, in *Herman* v. *Jeuchner*, *supra*, did not mean that the illegal purpose must be *fully* carried out in order to prevent the money being recovered back. The judgment of the court was delivered by Fry, L.J., who expressed a doubt whether the principle, laid down in *Taylor* v. *Bowers*, was sound, saying: "It is remarkable that this proposition is, as I believe, to be found in no earlier case than *Taylor* v. *Bowers*, which occurred in 1867, and, notwithstanding the very high authority of the learned judge (Mellish, L.J.) who expressed the law in the terms which I have read, I cannot help saying for myself that I think the extent of the application of that principle, and even the principle itself, may at some time hereafter require consideration, if not in this court, yet in a higher tribunal; and I am glad to find that in expressing that view I have the entire concurrence of Lord Coleridge."

Doubt as to principle of *Taylor* v. *Bowers*.

Where money had been paid as the consideration for a wagering contract which was against public policy, and which had in no way been executed, the money was held to be recoverable, and it was said that there was a distinction in this respect between cases where there was moral turpitude and where there was not; *Tappenden* v. *Randall*, 2 B. & P. 467. See also *Re Great Berlin Steamboat Co.*, 26 Ch. D. 616, and *Howard* v. *Refuge Soc.*, 54 L. T. 644.

As to the recovery of money in cases of contracts void under the Gaming Acts, see the notes to *Godsall* v. *Boldero*, *post*, vol. ii.

There is this further distinction, if, indeed, it can be

properly so called. Where an illegal instrument has been concocted, even though it assume the shape of a deed, no person is estopped from disputing the right to sue upon it. Thus the covenantor or obligor in an illegal bond or covenant can plead the illegality in order to avoid the deed. But where the deed is one under which an estate has passed, and the party conveying is *particeps criminis*, privy to the illegal purpose, there it is said he cannot defend himself against an ejectment upon the ground of his own fraud in executing the conveyance. Therefore, where A. conveyed land to B., in order to give him a colourable qualification to kill game, and so defeat an information against him, it was held that A. had no defence in an ejectment for the land brought by B.; *Doe* v. *Roberts*, 2 B. & Ald. 367; see *Hawes* v. *Leader*, Cro. Jac. 270, Yelv. 196. But this does not always hold good as against persons claiming *through* the party who made the fraudulent conveyance, for they may be the very persons sought to be defrauded; therefore, where A. conveyed in order to evade the Mortmain Acts, his heir was allowed in ejectment to question the conveyance, for it operated to his disherison; *Doe* v. *Lloyd*, 5 B. N. C. 741.

No estoppel against disputing right to sue on illegal instrument.

Semble, secus where estate has passed and grantor is *particeps criminis*.

In *Webb* v. *Herne Bay Commissioners*, L. R. 5 Q. B. 642, it was held that a body corporate which had statutory power to issue negotiable securities, to secure loans, and had issued securities which purported on the face of them to have been issued pursuant to that power, were estopped from alleging against an innocent assignee for value that they had been issued under an illegal contract. See further as to such estoppel, the notes to *The Duchess of Kingston's Case*, *post*, vol. ii.; and as to the *ultra vires* doctrine in the case of corporations, see the notes to *Collins* v. *Blantern*, *ante*, p. 376 *et seq.*

Body corporate estopped from setting up illegality of debentures against innocent assignee.

The doctrine established in *Merryweather* v. *Nixan*, is drawn from the same source as that which prevents the recovery back of money paid in pursuance of an illegal contract. If contributions could be claimed by one tort-feasor from another, the community of wrong between the plaintiff and defendant would be the very foundation of the action; and it is as contrary to policy to allow a man to recover that which he has paid in consequence of his illegal *act*, as to allow him to recover that which he has paid in consequence of his illegal *contract*; and therefore, where a sheriff let the defendant go without taking a bail-bond, and was in

Analogy of doctrine of principal case to that which prevents recovery of money paid on illegal contract.

consequence obliged to pay the debt, he failed to recover the amount from the defendant; *Pitcher* v. *Bailey*, 8 East, 171; *Eyles* v. *Faikney*, Peake, 195 n.

Some qualifications which have been engrafted on the general rule laid down in *Merryweather* v. *Nixan* will be found collected in the notes to *Lampleigh* v. *Braithwaite*, *ante*, p. 154, where the right of a joint-contractor to contribution is also spoken of. It is important to observe that the rule applies only to cases where the person asking redress must be presumed to have known that he was doing an illegal act, and does not extend to cases where he was a tort-feasor by inference of law only, as, for instance, where one of several partners has been sued for negligent acts done, not by himself, but by a servant of the firm; see *Pearson* v. *Skelton*, 1 M. & W. 504; and *Adamson* v. *Jarvis*, 4 Bing. 66. "The general rule is that between wrong-doers there is neither indemnity nor contribution: the exception is where the act is not clearly illegal in itself;" *per* Lord Denman, *Betts* v. *Gibbins*, 2 A. & E. 57, 74.

Rule of principal case applies only where guilty knowledge presumed.

For an application of the general rule to cases where a vessel is damaged at sea in a collision caused by the joint negligence of two other vessels, see *The Avon*, (1891) P. 7; *The Englishman*, (1894) P. 239, (1895) P. 212.

In *Palmer* v. *Wick Co.*, (1894) A. C. 318, Lord Halsbury said that "the case of *Merryweather* v. *Nixan* has been so long and so universally acknowledged as part of the English law that . . . it would be now too late to question its applicability to all cases in England governed by the principle therein enunciated."

MITCHEL *v.* REYNOLDS.

HIL. 1711.—*B. R.*

[REPORTED 1 P. WILLIAMS, 181.]

A bond or promise to restrain oneself from trading in a particular place, if made upon a reasonable consideration, is good. *Secus*, if it be on no reasonable consideration, or to restrain a man from trading at all.

DEBT upon a bond (*a*). The defendant prayed *oyer* of the condition, which recited, that "whereas the defendant had assigned to the plaintiff a lease of a messuage and bakehouse in Liquorpond Street, in the parish of St. Andrew's, Holborn, for the term of five years: now if the defendant should not exercise the trade of a baker within that parish during the said term, or, in case he did, should within three days after proof thereof made, pay to the plaintiff the sum of 50*l.*, then the said obligation to be void." *Quibus lectis et auditis*, he pleaded, that he was a baker by trade, that he had served an apprenticeship to it, *ratione cujus* the said bond was void in law, *per quod* he did trade, *prout ei bene licuit.* Whereupon the plaintiff demurred in law.

And now, after this matter had been several times argued at the bar, PARKER, C.J., delivered the resolution of the court:—

The general question upon this record is, whether this bond, being made in restraint of trade, be good.

And we are all of opinion that, a special consideration being set forth in the condition, which shows it was *reasonable* for the parties to enter into it, the same is good; and that the true distinction of this case is, not between promises and bonds, but between contracts *with* and *without* consideration; and that wherever a sufficient consideration appears to make it a proper and a useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity (*b*), *viz.*, where the restraint is general, not to exercise a trade throughout the kingdom, and where it is limited

(*a*) 10 Mod. 27, 85, 130. Fort. 296. (*b*) See *post, in notis.*

to a particular place; for the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shown by-and-by.

The resolutions of the books upon these contracts seeming to disagree, I will endeavour to state the law upon this head, and to reconcile the jarring opinions; in order whereunto I shall proceed in the following method:

1st. Give a general view of the cases relating to the restraint of trade.

2ndly. Make some observations from them.

3rdly. Show the reasons of the differences which are to be found in these cases; and

4thly. Apply the whole to the case at bar.

As to the cases, they are either, first, of involuntary restraints against, or without, a man's own consent: or, secondly, of voluntary restraints by agreement of the parties.

Involuntary restraints may be reduced under these heads:—

1st. Grants or charters from the crown.

2ndly. Customs.

3rdly. By-laws.

Grants or charters from the crown may be,

1st. A new charter of incorporation to trade generally, exclusive of all others, and this is void; 8 Co. 121.

2ndly. A grant to particular persons for the sole exercise of any known trade: and this is void, because it is a monopoly, and against the policy of the common law, and contrary to *Magna Charta*; 11 Co. 84.

3rdly. A grant of the sole use of a new invented art, and this is good, being indulged for the encouragement of ingenuity; but this is tied up by the statute of (*c*) 21 Jac. 1, c. 3, s. 6, to the term of fourteen years; for after that time it is presumed to be a known trade, and to have spread itself among the people.

Restraints by custom are of three sorts:—

1st. Such as are for the benefit of some particular persons, who are alleged to use a trade for the advantage of a community, which are good; 8 Co. 125; Cro. Eliz. 803; 1 Leon. 142; Mich. 22 H. 6, 14; 2 Bulst. 195; 1 Roll. Abr. 561.

2ndly. For the benefit of a community of persons who are not

(*c*) See now the Consolidating and Amending Act, 46 & 47 Vict. c. 57.

alleged, but supposed, to use the trade, in order to exclude foreigners (*d*); Dyer, 279 b; W. Jones, 162; 8 Co. 121; 11 Co. 52; Carter, 68, 114; held good.

3rdly. A custom may be good to restrain a trade in a particular place, though none are either supposed or alleged to use it; as in the case of *Rippon*, Register 105, 106.

Restraints of trade by by-laws are these several ways:—

1st. To exclude foreigners; and this is good, if only to enforce a precedent custom by a penalty; Carter, 68, 114; 8 Co. 125 (*e*). But where there is no precedent custom, such by-law is void; 1 Roll. Abr. 364; Hob. 210; 1 Bulst. 11; 3 Keb. 808 (*f*). But the case in Keble is misreported; for there the defendants did not plead a custom to exclude foreigners, but only generally to make by-laws, which was the ground of the resolution in that case.

2ndly. All by-laws made to cramp trade in general are void; Moor. 576; 2 Inst. 47; 1 Bulst. 11.

3rdly. By-laws made to restrain trade, in order to the better government and regulation of it, are good, in some cases (*g*), *viz.*, if they are for the benefit of the place, or to avoid public inconveniences, nuisances, &c.; or for the advantage of the trade, and improvement of the commodity; Sid. 284; Raym. 288; 2 Keb. 27, 873; and 5 Co. 62 b; which last is upon the by-law for bringing all broad-cloth to Blackwell Hall, there to be viewed and marked, and to pay a penny *per* piece for marking: this was held a reasonable by-law; and indeed it seems to be only a fixing of the market; for one end of all markets is, that the commodity may be viewed; but then they must not make people pay unreasonably for the liberty of trading there.

In 2 Keb. 309, the case is upon a by-law for restraining silk-throwsters from using more than such a certain number of spindles, and there the by-law would have been good, if the reasons given for it had been true.

Voluntary restraints by agreement of the parties are either,

(*d*) Restraints of this kind, whether by custom or by law, were abolished in all boroughs by 5 & 6 W. 4, c. 76, s. 14. See now 45 & 46 Vict. c. 50, s. 247. These Acts do not affect London.

(*e*) *Woolley* v. *Idle*, 4 Burr. 1951.

(*f*) See *Harrison* v. *Godman*, 1 Burr. 12; *Hesketh* v. *Braddock*, 3 Burr. 1856.

(*g*) *Wannel* v. *Chamber of the City of London*, 1 Stra. 675; *R.* v. *Harrison*, 3 Burr. 1322; *Pierce* v. *Bartrum*, Cowp. 269.

1st. General, or

2ndly. Particular, as to places or persons.

General restraints are all void, whether by bond, covenant or promise, &c., with or without consideration, and whether it be of the party's own trade or not; Cro. Jac. 596; 2 Bulst. 136; Allen, 67.

Particular restraints are either, 1st, without consideration, all of which are void by what sort of contract soever created; 2 H. 5, 5; Moor. 115, 242; 2 Leon. 210; Cro. Eliz. 872; Noy, 98; Owen, 143; 2 Keb. 377; March, 191; Show. 2 (not well reported); 2 Saund. 156.

Or, 2ndly, particular restraints are with consideration.

Where a contract for restraint of trade appears to be made upon a good and adequate consideration, so as to make it a proper and useful contract, it is good; 2 Bulst. 136, *Rogers* v. *Parry*; though that case is wrongly reported, as appears by the roll which I have caused to be searched (it is B. R. Trin. 11 Jac. 1 Rot. 223), and the resolution of the judges was not grounded upon its being a particular restraint, but upon its being a particular restraint with a consideration, and the stress lies on the words, as the case is here, though, as they stand in the book, they do not seem material. Noy, 98; W. Jones, 13; Cro. Jac. 596: in that case (*h*), all the reasons are clearly stated, and, indeed, all the books, when carefully examined, seem to concur in the distinction of restraints general and restraints particular, and with or without consideration, which stands upon very good foundation: *Volenti non fit injuria*; a man may, upon a valuable consideration, by his own consent, and for his own profit, give over his trade, and part with it to another in a particular place.

Palm. 172, *Bragg* v. *Stanner*; the entering upon the trade, and not whether the right of action accrued by bond, promise or covenant, was the consideration in that case. *Vide* March's Rep. 77, but more particularly Allen's, 67, where there is a very remarkable case, which lays down this distinction, and puts it upon the consideration and reason of the thing.

Secondly, I come now to make some observations that may be useful in the understanding of these cases. And they are,

1st. That to obtain the sole exercise of any known trade

(*h*) *Broad* v. *Jollyfe*.

throughout *England*, is a complete monopoly, and against the policy of the law.

2ndly. That when restrained to particular places or persons, (if lawfully and fairly obtained,) the same is not a monopoly.

3rdly. That since these restraints may be by custom, and custom must have a good foundation, therefore the thing is not absolutely, and in itself, unlawful.

4thly. That it is lawful upon good consideration for a man to part with his trade.

5thly. That since actions upon the case are actions *injuriarum*, it has been always held that such actions will lie for a man's using a trade contrary to custom, or his own agreement; for there he uses it *injuriously*.

6thly. That where the law allows a restraint of trade, it is not unlawful to enforce it with a penalty.

7thly. That no man can contract not to use his trade at all.

8thly. That the particular restraint is not good without just reason and consideration.

Thirdly, I proposed to give the reasons of the differences which we find in the cases; and this I will do,

1st. With respect to involuntary restraints, and

2ndly. With regard to such restraints as are voluntary.

As to involuntary restraints, the first reason why such of these as are created by grants and charters from the crown and by-laws, generally are void, is drawn from the encouragement which the law gives to trade and honest industry, and that they are contrary to the liberty of the subject.

2ndly. Another reason is drawn from *Magna Charta*, which is infringed by these acts of power; that statute says, *nullus liber homo, &c., disseisetur de libero tenemento vel libertatibus, vel liberis consuetudinibus suis, &c.*, and these words have been always taken to extend to freedom of trade.

But none of the cases of customs, by-laws to enforce these customs, and patents for the sole use of a new invented art, are within any of these reasons; for here no man is abridged of his liberty, or disseised of his freehold; a custom is *lex loci*, and foreigners have no pretence of right in a particular society, exempt from the laws of that society; and as to new invented arts, nobody can be said to have a right to that which was not

in being before; and therefore it is but a reasonable reward to ingenuity and uncommon industry.

I shall show the reason of the differences in the cases of voluntary restraint.

1st. Negatively.

2ndly. Affirmatively.

I. *Negatively*; the true reason of the disallowance of these in any case, is never drawn from *Magna Charta*; for a man may, voluntarily, and by his own act, put himself out of the possession of his freehold; he may sell it, or give it away at his pleasure.

2ndly. Neither is it a reason against them that they are contrary to the liberty of the subject; for a man may, by his own consent, for a valuable consideration, part with his liberty: as in the case of a covenant not to erect a mill upon his own lands; W. Jones, 13; Mich. 4 Ed. 3, 57. And when any of these are at any time mentioned as reasons upon the head of voluntary restraints, they are to be taken only as general instances of the favour and indulgence of the law to trade and industry.

3rdly. It is not a reason against them, that they are against law, I mean in a proper sense, for in an improper sense they are.

All the instances of conditions against law in a proper sense, are reducible under one of these heads:

1st. Either to do something that is *malum in se*, or *malum prohibitum*; 1 Inst. 206.

2ndly. To omit the doing of something that is a duty; Palm. 172; Hob. 12; *Norton* v. *Sims*.

3rdly. To encourage such crimes and omissions; Fitzherb. tit. *Obligation*, 13; Bro. tit. *Obligation*, 34; Dyer, 118.

Such conditions as these, the law will always, and without any regard to circumstances, defeat, being concerned to remove all temptations and inducements to those crimes; and therefore, as in 1 Inst. 206, a feoffment shall be absolute for an unlawful condition, and a bond void. But from hence I would infer,

1st. That where there may be a way found out to perform the condition, without a breach of the law, it shall be good; Hob. 12; Cro. Car. 22; Perk. 228 (*i*).

(*i*) See *ante*, p. 371.

2ndly. That all things prohibited (*j*) by law may be restrained by condition; and therefore these particular restraints of trade, not being against law, in a proper sense, as being neither *mala in se*, nor *mala prohibita*, and the law allowing them in some instances, as in those of customs and *assumpsits*, they may be restrained by condition.

II. *Affirmatively*; the true reasons of the distinction upon which the judgments in these cases of voluntary restraints are founded are, 1st, the mischief which may arise from them, 1st, to the party, by the loss of his livelihood, and the subsistence of his family; 2ndly, to the public, by depriving it of a useful member.

Another reason is, the great abuses these voluntary restraints are liable to: as, for instance, from corporations who are perpetually labouring for exclusive advantages in trade, and to reduce it into as few hands as possible; as likewise from masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom when they come to set up for themselves.

3rdly. Because, in a great many instances, they can be of no use to the obligee; which holds, in all cases of general restraint throughout England; for what does it signify to a tradesman in London what another does at Newcastle? (*k*) and surely it would be unreasonable to fix a certain loss on one side, without any benefit to the other. The Roman law would not enforce such contracts by an action; see Puff. lib. 5, c. 2, sect. 3; 21 H. 7, 20.

4thly. The fourth reason is in favour of these contracts, and is, that there may happen instances wherein they may be useful and beneficial, as to prevent a town from being overstocked with any particular trade; or in case of an old man, who finding himself under such circumstances, either of body or mind, as that he is likely to be a loser by continuing his trade, in this case it will be better for him to part with it for a consideration, that by selling his custom he may procure to himself a livelihood, which he might probably have lost by trading longer.

5thly. The law is not so unreasonable as to set aside a man's own agreement for fear of an uncertain injury to him, and fix a certain damage upon another; as it must do, if contracts with

(*j*) Read "not prohibited." (*k*) See (1894) A.C. 547, 553.

a consideration were made void; *Barrow* v. *Wood*, March Rep. 77; Mich. 7 Ed. 3, 65; Allen 67; 8 Co. 121.

But here it may be made a question, that, suppose it does not appear whether or no the contract be made upon good consideration, or be merely injurious and oppressive, what shall be done in this case?

Resp. I do not see why that should not be shown by pleading; though certainly the law might be settled either way without prejudice; but as it now stands, the rule is, that wherever such contract *stat indifferenter*, and, for aught appears, may be either good or bad, the law presumes it *primâ facie* to be bad, and that for these reasons:

1st. In favour of trade and honest industry.

2ndly. For that there plainly appears a mischief, but the benefit (if any) can be only presumed; and in that case, the presumptive benefit shall be overborne by the apparent mischief.

3rdly. For that the mischief (as I have shown before) is not only private, but public.

4thly. There is a sort of presumption, that it is not of any benefit to the obligee himself, because, it being a general mischief to the public, everybody is affected thereby: for it is to be observed that, though it be not shown to be the party's trade or livelihood, or that he had no estate to subsist on, yet all the books condemn those bonds, on that reason, *viz.*, as taking away the obligor's livelihood, which proves that the law presumes it; and this presumption answers all the difficulties that are to be found in the books.

As, 1st, That all contracts, where there is a bare restraint of trade and no more, must be void; but this, taking place only where the consideration is not shown, can be no reason why, in cases where the special matter appears, so as to make it a reasonable and useful contract, it should not be good; for there the presumption is excluded, and therefore the courts of justice will enforce these latter contracts, but not the former.

2ndly. It answers the objection, that a bond does not want a consideration, but is a perfect contract without it; for the law allows no action on a *nudum pactum*, but every contract must have a consideration, either expressed, as in *assumpsits*, or implied, as in *bonds* and *covenants*; but these latter, though they

are perfect as to the form, yet may be void as to the matter; as in a covenant to stand seised, which is void without a consideration, though it be a complete and perfect deed.

3rdly. It shows why a contract not to trade in any part of England, though with consideration, is void; for there is something more than a presumption against it, because it can never be useful to any man to restrain another from trading in all places, though it may be to restrain him from trading in some, unless he intends a monopoly, which is a crime.

4thly. This shows why promises in restraint of trade have been held good; for in those contracts it is always necessary to show the consideration, so that the presumption of injury could not take place, but it must be governed by the special matter shown. And it also accounts not only for all the resolutions, but even all the expressions that are used in our books in these cases; it at least excuses the vehemence of Judge Hull in 2 H. 5, fol. quinto; (*l*) for suppose (as that case seems to be) a poor weaver, having just met with a great loss, should, in a fit of passion and concern, be exclaiming against his trade, and declare that he would not follow it any more, &c., at which instant, some designing fellow should work him up to such a pitch, as, for a trifling matter, to give a bond not to work at it again, and afterwards, when the necessities of his family and the cries of his children send him to the loom, should take advantage of the forfeiture, and put the bond in suit; I must own, I think this such a piece of villany, as is hard to find a name for; and therefore cannot but approve of the indignation that judge expressed, though not his manner of expressing it. Surely it is not fitting that such unreasonable mischievous contracts should be countenanced, much less executed by a Court of Justice.

As to the general indefinite distinction made between bonds and promises in this case, it is in plain words this, that the agreement itself is good, but when it is reduced into the form of a bond, it immediately becomes void; but for what reason, see 3 Lev. 241. Now, a bond may be considered two ways, either as a security, or as a compensation; and,

1st. Why should it be void as a security? Can a man be bound too fast from doing an injury? which I have proved the using of a trade contrary to custom or promise, to be.

(*l*) See *post*, p. 402.

2ndly. Why should it be void as a compensation? Is there any reason why parties of full age, and capable of contracting, may not settle the *quantum* of damages for such an injury? Bract., lib. 3, c. 2, s. 4.

It would be very strange, that the law of England, that (*m*) delights so much in certainty, should make a contract void when reduced to certainty, which was good when loose and uncertain: the cases in *March's Rep.* 77, 101, and also *Show.* 2, are but indifferently reported, and not warranted by the authorities they build upon.

1st *Objection.* In a bond the whole penalty is to be recovered, but in *assumpsit* only the damages.

Resp. This objection holds equally against all bonds whatsoever.

2nd *Objection.* Another objection was, that this is like the case of an infant, who may make a promise but not a bond, or that of a sheriff who cannot take a bond for fees.

Resp. The case of an infant stands on another reason, *viz.*, a general disability to make a deed, but here both parties are capable; neither is it the nature of the bond, but merely the incapacity of the infant, which makes a bond by him void, since there a surety would be liable; but it is otherwise here.

Also the case of a sheriff is very different; for at common law he could take nothing for doing his duty, but the statute has given him certain fees; but he can neither take more, nor a chance for more, than that allows him.

3rd *Object.* It was further objected, that a promise is good, and a bond void, because the former leaves the matter more at large to be tried by a jury; but what is there to be tried by a jury in this case?

Resp. 1st. It is to be tried whether upon consideration of the circumstances the contract be good or not? and that is matter of law, not fit for a jury to determine.

2ndly. It is to ascertain the damages. But *cui bono* (say they) should that be done? Is it for the benefit of the obligor?

Resp. Certainly it may be necessary on that account, for these reasons:—

1st. A bond is a more favourable contract for him than a

(*m*) *Grantham* v. *Gordon*, 1 P. Williams, 614.

promise; for the penalty is a re-purchase of his trade ascertained beforehand (*n*), and on payment thereof he shall have it again; he may rather choose to be bound not to do it under a penalty, than not to do it at all.

2ndly. However it be, it is his own act.

3rdly. He can suffer only by his knavery, and surely courts of justice are not concerned lest a man should pay too dear for being a knave.

4thly. Restraints by custom may (as I have proved) be enforced with penalties which are imposed without the party's consent; nay, by the injured party without the concurrence of the other; and if so, then *a fortiori* he may bind himself by a penalty.

Object. It may perhaps be objected, that a false recital of a consideration in the condition may subject a man to an inconvenience, which the law so much labours to prevent.

Resp. But this is no more to be presumed than false testimony, and in such a case I should think the defendant might aver against it; for though the rule be, that a man is estopped from averring against anything in his own deed, yet that is, supposing it to be his deed; for where it is void, it is otherwise, as in the case of an usurious contract (*o*).

The application of this to the case at bar is very plain. Here the particular circumstances and consideration are set forth, upon which the court is to judge, whether it be a reasonable and useful contract.

The plaintiff took a baker's house, and the question is whether he or the defendant shall have the trade of this neighbourhood? The concern of the public is equal on both sides.

What makes this the more reasonable is, that the restraint is exactly proportioned to the consideration, *viz.*, the term of five years.

To conclude. In all restraints of trade, where nothing more appears, the law presumes them bad; but, if the circumstances are set forth, that presumption is excluded, and the court is to judge of those circumstances, and determine accordingly: and if

(*n*) In equity, however, if it appears that it was intended that the act should not be done at all, a party cannot acquire the right to do the act by paying the penalty, and an injunction will be granted to restrain him from doing it; *Fox* v. *Scard*, 33 Beav. 327; *Howard* v. *Woodward*, 34 L. J. Ch. 47; *Nat. Provincial Bank* v. *Marshall*, 40 Ch. D. 112; *Hanbury* v. *Cundy*, 58 L. T. 155.

(*o*) *Accord. Collins* v. *Blantern*, *ante*, p. 355.

upon them it appears to be a just and honest contract, it ought to be maintained.

For these reasons we are of opinion, that the plaintiff ought to have judgment.

All restraints of trade *primâ facie* bad.

"The general rule is, that all restraints of trade, which the law so much favours, if nothing more appear, are bad. This is the rule which is laid down in the famous case of *Mitchel* v. *Reynolds*, which is well reported in 1 P. Wms. 181, in which Lord Macclesfield took such great pains, and in which all the cases and arguments in relation to this matter are thoroughly weighed and considered: but to this general rule there are some exceptions; as, first, if the restraint be only particular in respect to the time or place, and there be a good consideration given to the party restrained. A contract or agreement upon such consideration, so restraining a particular person, may be good and valid in law, notwithstanding the general rule, and this was the very case of *Mitchel* v. *Reynolds*;" *per* Willes, C.J., *Gunmakers' Co.* v. *Fell*, Willes, 388. The same principles were recognised in *Gale* v. *Reed*, 8 East, 83, and in a variety of cases, both previous and subsequent, particularly in *Chesman* v. *Nainby*, 2 Str. 739, 1 Bro. P. C. 234, which received the successive decisions of the K. B., C. P., and H. L. The reader will find all the earlier authorities collected in *Young* v. *Timmins*, 1 Tyr. 226, where the rule to be collected from them was thus stated by Vaughan, B.: "Any agreement by bond or otherwise in *general restraint* of trade, is illegal and void. But such a security given to effect a *partial restraint* of trade may be good or bad, according as the consideration is adequate or inadequate."

Exception if restraint be partial and upon good consideration.

Rule of old cases that partial restraint valid if consideration adequate.

Conditions of validity.

In order, therefore, that a contract in restraint of trade may be valid, it seems to have been considered that the restraint must be partial as to space; it must be upon a consideration not merely colourable; and it must be *reasonable*.

1. Old rule that restraint must be partial in space,

The rule seems formerly to have been that the restraint must be partial as to space. It was decided so early as the reign of Henry V. that a contract imposing a general restraint on trade was void. Indeed, Hull, J., flew into a passion at the very sight of a bond imposing such a con-

dition, and exclaimed, with more fervour than decency: "A ma intent vous purres aver demurre sur luy que l'obligation est voide co que le condition est encounter common ley, *et per Dieu, si le plaintiff fuit icy, il irra al prison tanque il ust fait fine au Roy*;" 2 Hen. V., fo. 5, pl. 26. "The law," said Best, C.J., in *Homer* v. *Ashford*, 3 Bing. 328, "will not permit any one to restrain a person from doing what his own interest and the public welfare require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital in any useful undertaking *in the kingdom*, would be void. But it may often happen that individual interest and general convenience render engagements not to carry on trade, or to act in a profession, in a particular place, proper."

and that restraint "in the kingdom" void.

Such partial restraints were upheld in *Chesman* v. *Nainby*, *supra*; in *Clerk* v. *Comer*, Cas. temp. Hardw. 53, where a bond was conditioned not to carry on trade within the city of Westminster, or the bills of mortality; in *Davis* v. *Mason*, 5 T. R. 118'; and in *Bunn* v. *Guy*, 4 East, 190, where an attorney bound himself not to practise within London, and 150 miles from thence; see the remarks on this case in *Bozon* v. *Farlow*, Meriv. 472. In *Leighton* v. *Wales*, 3 M. & W. 545, the restraint was against running any coach on a particular road. In *Proctor* v. *Sargent*, 2 M. & Gr. 31, it was against carrying on the business of cowkeeper, milkman, or milkseller, within five miles of Northampton Square; see *Benwell* v. *Inns*, 24 Beav. 307. In *Rannie* v. *Irvine*, 7 M. & Gr. 969, it was against soliciting the custom of, or knowingly supplying bread or flour to, any of the customers then dealing at a baker's shop, the lease and goodwill of which were sold; and in *Mumford* v. *Gething*, 7 C. B. N. S. 305, the restraint was upon a commercial traveller, and against his ever travelling for any other firm than the plaintiffs' within the district within which they employed him.

Instances of partial restraints upheld;

In *Ward* v. *Byrne*, 5 M. & W. 548, a bond conditioned not to follow or be employed in the business of a coal merchant for nine months was held void. So in *Hinde* v. *Gray*, 1 M. & Gr. 195, was a covenant not to carry on the business of a brewer, or merchant, or agent for the sale of ale, in S. or elsewhere, or in any other manner soever be concerned in that business during ten years; but perhaps that might now be considered a valid covenant so far as it related to S., though void as to the rest; see *post*, p. 413.

and general restraints held void.

In some cases, however, this rule was not followed.

In some cases this rule not followed.

Thus, in *Whittaker* v. *Howe*, 3 Beav. 383, the agreement was by a solicitor not to practise in Great Britain for twenty years without the consent of the persons to whom he had sold his business; and Lord Langdale, "having regard to the nature of the profession, and to the limitation of time," upheld the contract. In *Leather Cloth Co.* v. *Lorsont*, 9 Eq. 345, James, V.-C., enforced a restriction extending throughout Europe, saying, "I do not read the cases as laying down that unrebuttable presumption which was insisted upon with so much power. All the cases, when they come to be examined, seem to establish this principle, that all restraints upon trade are bad as being in violation of public policy, unless they are natural and not unreasonable for the protection of the parties." And in *Rousillon* v. *Rousillon*, 14 Ch. D. 351, an agreement not to carry on business as a champagne merchant was enforced by Fry, J.

Now not necessary that restriction be partial as to space.

The whole question whether there ever was a rule that the restraint *must* be partial was elaborately considered in *Nordenfelt* v. *Maxim-Nordenfelt Co.*, (1893) 1 Ch. 630, (1894) A. C. 535, where Lord Herschell, and Bowen, L.J. (in the C. A.), expressed a clear opinion that such a rule had existed; while Lord Macnaghten was equally clear that it had not. The decision in this case, however, makes it clear that, having regard to the changed conditions of commerce and of the means of communication, that rule is no longer applicable, and the question is, in *every* case, whether the restraint is reasonable or not.

Distance, how measured.

Where the restraint is partial as to space, and the agreement is silent as to the mode of ascertaining the distance, the measurement should be in a straight line from point to point. "I should have thought," said Parke, J., in *Leigh* v. *Hind*, 9 B. & C. 774, "that the proper mode of admeasuring the distance would be to take a straight line from house to house, in common parlance, as the crow flies." This view was acted upon in *Duignan* v. *Walker*, 1 Johns. 446; and finally adopted by the Exch. Cham. in *Mouflet* v. *Cole*, L. R. 8 Ex. 32, where the authorities on the question were reviewed, and it was laid down that the distance should be measured on the map. In *Atkyns* v. *Kinnier*, 4 Exch. 776, the deed expressly prescribed how the measurement should be made, namely, by "measuring by the usual streets or ways of approach."

2. *Adequacy* of considera-

Upon the second point, namely, *the consideration*, some confusion, rather verbal than substantial, at one time crep

into the judgments. Thus in *Young* v. *Timmins*, 1 Tyr. 226, where I. bound himself to work exclusively for certain persons for his and their lives, and they did not undertake to find him full employ, but on the contrary, reserved to themselves liberty to employ others, the contract was held to be void for want of *adequacy* of *consideration*, though it contained a proviso under which I. was allowed to take and execute the orders of persons residing in London or within six miles thereof. "If I could find," said Bayley, B., "any obligation on the defendants to find the bankrupt a supply of work sufficient to keep him and his workmen in an adequate and regular course of employ, that might be a good consideration for the restraint he thus imposes on himself. But if no such thing exists, but, on the contrary, I find it possible that no employ might, for a considerable time, be given to him, then there is no adequate consideration." "The restraint on one side meant to be enforced," said Lord Ellenborough, in *Gale* v. *Reed*, 8 East, 86, "should in reason be co-extensive only with the benefits meant to be enjoyed on the other."

tion—old rule.

In *Hitchcock* v. *Coker*, 6 A. & E. 439, however, Tindal, C.J., in delivering the judgment of the Exch. Cham. said: "If by 'adequacy of consideration' it is intended only that there must be a good and valuable consideration, such consideration as is essential to support any contract not under seal, we concur in that opinion . . . But if by 'adequacy of consideration' more is intended, and that the court must weigh whether the consideration is equal in value to that which the party gives up or loses by the restraint under which he has placed himself, we feel ourselves bound to differ from that doctrine. . . . It is enough, as it appears to us, that there actually is *a* consideration for the bargain and that such consideration is a legal consideration and of some value." That case perhaps turned less on *adequacy* than *reasonableness*. In the course of the argument, Alderson, B., observed, that "if the consideration were so small as to be colourable, the agreement would be bad." In *Archer* v. *Marsh*, 6 A. & E. 966, the Q. B. pronounced *Hitchcock* v. *Coker* to have decided that the parties must act on their own view as to the adequacy of the compensation; and in *Leighton* v. *Wales*, 3 M. & W. 545, 551, Parke, B., said: "It is clear, since *Hitchcock* v. *Coker*, that the court cannot inquire into the extent or adequacy of the consideration."

Hitchcock v. *Coker*.

Adequacy of consideration cannot now be inquired into.

Pilkington v. *Scott.*

The same doctrine was emphatically repeated in *Pilkington* v. *Scott*, 15 M. & W. 657, where the contract was not under seal, and the law may now be considered settled, as there stated by Alderson, B.: "If it be an unreasonable restraint of trade, it is void altogether; but if not, it is lawful; the only question being whether there is a consideration to support it, and the adequacy of the consideration the court will not inquire into, but will leave the parties to make the bargain for themselves. Before the case of *Hitchcock* v. *Coker*, a notion prevailed that the consideration must be adequate to the restraint; that was in truth the law making the bargain, instead of leaving the parties to make it, and seeing only that it is a reasonable and proper bargain." See also *Gravely* v. *Barnard*, 18 Eq. 518.

How consistent with rule that there must be some consideration even in such deeds.

If there be objected to this view an inconsistency with the decisions (*Hutton* v. *Parker*, 7 Dowl. 739) that to create a valid restraint of trade some consideration is necessary, even in the case of a contract under seal (which in general wants no consideration), the answer is easy; it is this, that consideration is here required for a different reason from that whereon the ordinary law of contracts without consideration rests, the reason being that it would be *unreasonable* for a man to enter into such a stipulation without some consideration, though it must be left to his sense of his own interest to determine what should be the amount or nature of that consideration. And this appears to have been the view taken by Parke, B., in *Wallis* v. *Day*, 2 M. & W. 277, and by the Court of Exch. in *Mallan* v. *May*, 11 Id. 665, where Parke, B., in delivering the judgment, recognised the proposition of Tindal, C.J., in *Horner* v. *Graves*, 7 Bing. 744, that "contracts in restraint of trade are in themselves, if nothing shows them to be *reasonable*, bad in the eye of the law:" and proceeded to add, that "therefore if there be simply a stipulation, though in an instrument under seal, that a trade or profession shall not be carried on in a particular place, without any recital in the deed, and without any averments showing circumstances which rendered such a contract *reasonable*, the instrument is void." And it seems not improbable, now that the doctrine of *adequacy of consideration* is overturned by *Hitchcock* v. *Coker*, and *Archer* v. *Marsh*, that several of the contracts, which formerly would have been open to the objection of inadequacy of consideration, may be held upon the same grounds obnoxious to that of *unreasonableness*:

Because contract otherwise *unreasonable*;

and all such contracts are *primâ facie* void if not shown to be reasonable.

for instance, the contract in *Young* v. *Timmins* might possibly be held an *unreasonable* one, and the decision sustained on that ground. In the case of a contract under seal, if the above observations be correct, it may be thought to follow that any consideration on which a man might reasonably act, though not sufficient to sustain a promise not under seal, ought to be held to satisfy the rule acted on in *Hutton* v. *Parker*, provided always that the deed be not open to any of the other objections mentioned in the note. But the decisions, it must be admitted, do not expressly warrant that conclusion, and it is so hard to conceive of a *reasonable* contract of this nature without some consideration, that the precise question seems unlikely to arise.

Quære, what consideration necessary to support such contracts under seal.

In *Sainter* v. *Ferguson*, 7 C. B. 716, the engagement by the plaintiff, a surgeon at M., of the defendant as his assistant, though the term and conditions of the engagement were not shown, was held to be a sufficient consideration for a promise by the defendant not at any time to practise at M. or within seven miles of it; so also in *Davis* v. *Mason*, 5 T. R. 118; *Mumford* v. *Gething*, 7 C. B. N. S. 305; and *Gravely* v. *Barnard*, 18 Eq. 518.

3. Though restraint partial and on consideration, agreement must also be *reasonable*.

It is not sufficient that the restraint should be founded upon consideration. The agreement must be *reasonable*. "We do not see," said Tindal, C.J., in *Horner* v. *Graves*, 7 Bing. 735, 743, "how a better test can be applied to the question, whether reasonable or not, than by considering *whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public*. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either; it can only be oppressive, and, if oppressive, it is in the eye of the law unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy. . . . No certain precise boundary can be laid down, within which the restraint would be reasonable, and beyond which excessive. In *Davis* v. *Mason*, 5 T. R. 118, where a surgeon had restrained himself not to practise within ten miles of the plaintiff's residence, the restraint was held reasonable; and in one of the cases (*Bunn* v. *Guy*, 4 East, 190), 150 miles was considered as not an unreasonable distance, where an attorney had bought the business of another who had retired from his profession. But it is obvious that the business of an attorney requires a

Test of reasonableness, *per* Tindal, C.J.

limit of a much larger range, as so much may be carried on by correspondence or by agents. And unless the case were such that the restraint was plainly and obviously unnecessary, the court would not feel itself justified in interfering. It is to be remembered, however, that contracts in restraint of trade are, if nothing more appears to show them reasonable, bad in the eye of the law." The above test of reasonableness was adopted in the H. L. in *Nordenfelt* v. *Maxim-Nordenfelt Co.*, (1894) A. C. 535.

Mallan v. *May.*

In *Mallan* v. *May*, 11 M. & W. 653, 13 Id. 511; *Green* v. *Price*, Id. 695; *Price* v. *Green*, 16 Id. 346, and *Mumford* v. *Gething*, 7 C. B. N. S. 305, but more especially in the highly instructive judgment of the Court of Exch. in *Mallan* v. *May*, the doctrine of the principal case was much discussed and fully confirmed. In *Mallan* v. *May* the agreement was one by which the defendant was to become assistant to the plaintiffs in their business of dentist for four years; the plaintiffs were to instruct him in the business; and the defendant covenanted not to carry on the same business, after the expiration of the term, in London or in any of the places in England or Scotland where the plaintiffs, or the defendant on their account, might have been practising before its expiration. Parke, B., in delivering the judgment of the court, pointed out that contracts for the partial restraint of trade are in fact, in many cases, beneficial to the public; and he instanced the case of a tradesman selling his shop with a contract not to carry on the trade in the same place, which is in effect the sale of a goodwill, "and offers an encouragement to trade by allowing a party to dispose of all the fruits of his industry," and also that of a manufacturer or professional man taking an assistant into his service with a stipulation that he shall not carry on the same business within certain limits. "In such a case," said his lordship, "the public derives an advantage in the unrestrained choice which such a stipulation gives to the employer of able assistants, and the security it affords that the master will not withhold from the servant instructions on the secrets of his trade and the communication of his own skill and experience from the fear of his afterwards having a rival in the same business." And the covenant was, in that case, adjudged to be *divisible*, and to be not an unreasonable restriction so far as it related to not practising in London, though it was stated on the record that London had more than a million of inhabitants;

Restraints beneficial to public,

by allowing party to dispose of all the fruits of his industry.

and the court doubted the propriety of taking the comparative populousness of particular districts, the number of men of the same profession, the habits of the people in the neighbourhood, or other like matter of a fluctuating and uncertain character into consideration, and expressed an opinion, "that it would be better to lay down such a limit as under any circumstances would be sufficient protection to the interest of the contracting party, and if the limit stipulated for did not exceed that, to pronounce the contract to be valid." On the other hand, the rest of the covenant, relating to not practising in any of the places in England or Scotland where the plaintiffs or the defendant on their account might have been practising before the expiration of the service, was held unreasonable and void, as going beyond what the protection of the plaintiff's interests could reasonably require, and putting into their hands the power of preventing the defendant from practising anywhere.

Mumford v. Gething.

The above passage from Baron Parke's judgment in *Mallan* v. *May*, was cited by Erle, C.J., in *Mumford* v. *Gething*, 7 C. B. N. S. 305, who there said, "I think that contracts in partial restraint of trade are beneficial to the public, as well as to the immediate parties; for if the law discouraged such agreements as these, employers would be extremely scrupulous as to engaging servants in a *confidential* capacity; seeing that they would incur the risk of their taking advantage of the knowledge they acquired of their customers and their mode of conducting business, and then transferring their services to a rival trader. It appears to me highly important that persons like this defendant" (a commercial traveller) "should be able to enter into contracts of this sort, which afford some security to their employers that the knowledge acquired in their service will not be used to their prejudice."

Covenant valid if not plainly beyond what the interest of covenantee requires.

In *Tallis* v. *Tallis*, 1 E. & B. 391, the rule was acted upon, that such a covenant is valid, unless it *plainly appears that a restriction is imposed by it beyond what the interest of the plaintiff requires*; and a covenant restraining a partner in the publishing trade from carrying on the business of soliciting purchasers for works, of which the copyright had expired, published in parts (known as the canvassing trade), within 150 miles of the General Post Office, was upheld; and a plea, stating various reasons of expediency against the validity of the covenant under the peculiar circumstances

of the case, was held bad, as *not shewing plainly* that the plaintiff's interest did not require the defendant's exclusion, or that the public interest would be sacrificed if the defendant's publications were excluded. See *Avery* v. *Langford*, 1 Kay, 663.

Leather Cloth Co. v. *Lorsont*, *per* James, V.-C.

In the *Leather Cloth Co.* v. *Lorsont*, 9 Eq. 345, James, V.-C., thus stated the law: "All the cases when they come to be examined seem to establish this principle, that all restraints upon trade are bad, as being in violation of public policy, unless they are natural and *not unreasonable for the protection of the parties* in dealing legally with some subject-matter of contract. The principle is this: Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the state of his labour, skill, or talent, by any contract that he enters into. On the other hand, public policy requires that when a man has by skill, or by any other means, obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market, and in order to enable him to sell it advantageously in the market it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy that enables him to do that does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation, *however restrictive* it is, provided that restriction in the judgment of the court is not unreasonable, having regard to the subject-matter of the contract." In that case, on the sale to the plaintiff's company of certain patent rights and processes of manufacture introduced into this country from America, the vendors agreed neither directly nor indirectly to carry on, nor to the best of their power to allow to be carried on by others, *in any part of Europe*, any company or manufactory, having for its object the manufacture or sale of productions then manufactured in the defendant's business; and it was held that this restriction was not greater, having regard to the subject-matter of the contract, than was necessary for the protection of the purchasers.

Reasonableness depends upon subject-matter of contract.

Nordenfelt v. *Maxim-Nordenfelt Co.*

This question was fully considered in the H. L. in *Nordenfelt* v. *Maxim-Nordenfelt Co.*, (1894) A. C. 535, where it was laid down that, whether the covenant be general or particular, the question of its validity is to be determined by the consideration *whether it exceeds what is necessary for the protection of the covenantee*. In that case a patentee

Question is whether restraint exceeds what is

and manufacturer of guns and ammunition for war purposes covenanted with a company to which his patents and business had been transferred, that he would not for twenty-five years engage, except on the company's behalf, in the business of a manufacturer of guns and ammunition, and it was held that, having regard to the nature of the business and the limited number of customers, the covenant was valid; see *Badische Fabrik* v. *Schott*, (1892) 3 Ch. 447. necessary fo covenantee's protection.

In *Horner* v. *Graves*, 7 Bing. 735, an agreement that a surgeon-dentist would abstain from practising within 100 miles of York, was held void on the ground that the distance rendered it unreasonable. In the case of a horse-hair manufacturer, 200 miles was considered not to be too great a distance; *Harms* v. *Parsons*, 32 Beav. 328; in the case of a solicitor, a covenant with no limit as to space was held reasonable; *Whittaker* v. *Howe*, 3 Beav. 383; and so also in the case of a sale of certain patent rights and processes of manufacture; *Leather Cloth Co.* v. *Lorsont*, 9 Eq. 345, and in the case of a wine merchant; *Rousillon* v. *Rousillon*, 14 Ch. D. 351. In *Allsopp* v. *Wheatcroft*, 15 Eq. 59, a covenant by a brewer's traveller not to be in any way whatever concerned in the sale of Burton ale other than the plaintiff's, for two years after the expiration of his service, was held to be unreasonably extensive. Instances. Limits of space.

In some cases the restraint was held to be reasonable, because it was partial as to the mode of exercising the trade or business, though unlimited in regard to space; *Gale* v. *Reed*, 8 East, 80; *Jones* v. *Lees*, 1 H. & N. 189; *Vernon* v. *Hallam*, 34 Ch. D. 748, where a covenant not to trade under a particular name was held to be reasonable. Limits as to mode of exercise of trade

In *Hitchcock* v. *Coker*, 6 A. & E. 439, where A., in consideration of B. employing him as his assistant at a salary in the business of a chemist, agreed not to carry on business within three miles of T., it was urged that this was unreasonable because not limited to B.'s life or continuance in trade. The covenant was held good, Tindal, C.J., saying, "It does not appear to us unreasonable that the restriction should go so far as to secure to the master the enjoyment of the price or value for which the trade would sell, or secure the enjoyment of the same trade to his purchaser or legatee or executor. And the only effectual mode of doing so appeared to be by making the restriction of the servant's setting up the trade within the given limit co-extensive with the servant's life." In *Hastings* v. *Whitley*, Reasonable though not limited to l of contracte

2 Exch. 611, a bond conditioned for payment if the obligor should practise at S. "without the consent in writing of the obligee," was held not to be limited to the lifetime of the obligee.

Where the condition of a bond given by an agent to his employers was that he would faithfully serve them, and not do business in their trade within ten miles of T. for himself or any other person or firm, the restraint was held to be only "*durante servitio*;" *King* v. *Hansell*, 5 H. & N. 106; see *Carnes* v. *Nisbett*, 31 L. J. Ex. 273.

Limit of time not essential.

A limit of time is not essential, but, in considering the reasonableness of a restraint, the time for which it is to be imposed may be a material element to consider; *Badische Fabrik* v. *Schott*, (1892) 3 Ch. 447; *Nordenfelt* v. *Maxim-Nordenfelt Co.*, (1893) 1 Ch. 630, 663, *per* Bowen, L.J.

Regard must be had to conditions of commerce and business.

In considering whether a restriction is greater than is necessary for the protection of the covenantee, regard must always be had to the conditions of commerce and business, and of the means of communication, existing at the time when the restrictive agreement is made. "There is no doubt that, with regard to some professions and commercial occupations, it is as true to-day as it was formerly, that it is hardly conceivable that it should be necessary, in order to secure reasonable protection to a covenantee, that the covenantor should preclude himself from carrying on such profession or occupation anywhere in England. But it cannot be doubted that in other cases the altered circumstances have rendered it essential, if the requisite protection is to be obtained, that the same territorial limitations should not be insisted upon, which would in former days have been only reasonable;" *Nordenfelt* v. *Maxim-Nordenfelt Co.*, (1894) A. C. 535, 547, *per* Lord Herschell.

Construction of agreements.

All these agreements in restraint of trade are to be construed in the same way as other contracts, and, when the proper construction has been ascertained, the court is to see whether the agreement is reasonable; *Mills* v. *Dunham*, (1891) 1 Ch. 576; *Perls* v. *Saalfield*, (1892) 2 Ch. 149; *Mocnich* v. *Fenestre*, 61 L. J. Ch. 737. If the agreement is vague and indefinite, the court will not enforce it at all; *Davies* v. *Davies*, 36 Ch. D. 359.

Meaning of London.

It may be worth noticing that in *Mallan* v. *May*, 13 M. & W. 511, the word "London" in the contract was considered to mean only the City of London, that being its strict and proper meaning, and there being nothing in the

contract to prevent its being so construed. But it seems open to explanation in each case, in what sense the word is used; see *Beckford* v. *Crutwell*, 1 M. & Rob. 187; *Smyth* v. *Smyth*, 10 Bing. 406; *Wallace* v. *A.-G.*, 33 L. J. Ch. 314.

Divisibility of covenants.

Mallan v. *May*.

In *Mallan* v. *May*, 11 M. & W. 653, the defendant agreed to assist the plaintiffs in their business of dentist for four years, and covenanted not to carry on after the end of that term the like business in London *or* in any of the places in England or Scotland where the plaintiffs or the defendant on their account might have been previously practising. This covenant was held to be divisible, and therefore so much of it as prohibited practising in London was upheld as reasonable, although the rest of it was held void, because it exceeded what the protection of the plaintiffs' interests could reasonably require. Similarly in *Green* v. *Price*, 13 M. & W. 695, 16 Id. 346, where a perfumer, on the sale of his share in the business, covenanted not to carry on the like business in the cities of London and Westminster *or* within 600 miles therefrom, the covenant was held valid as to not practising in London and Westminster, and merely void as to the residue; and the defendant having been shown to have practised in London, judgment was given for the plaintiff. See also *Nicholls* v. *Stretton*, 10 Q. B. 346, and *Baines* v. *Geary*, 35 Ch. D. 154, cases where a servant's covenant not to deal, after the end of his service, with his master's then existing *or* future customers, was held to be divisible, and enforceable as to persons who were customers during the employment; see also *Rogers* v. *Maddocks*, (1892) 3 Ch. 346; *Nordenfelt* v. *Maxim-Nordenfelt Co.*, *supra*; *Baker* v. *Hedgecock*, 39 Ch. D. 520, where the covenant was held not to be divisible; *Davies* v. *Lowen*, 64 L. T. 655, where the contract was held to be divisible.

Green v. *Price*.

Covenant, if reasonable when made, is not affected by subsequent circumstances.

If the covenant is reasonable when made, subsequent circumstances, such as the fact of the covenantee ceasing business, so as no longer to need the protection, do not affect its operation; *Elves* v. *Crofts*, 10 C. B. 241. "If the contract is a reasonable one at the time when it is entered into, we are not bound to look out for improbable and extravagant contingencies in order to make it void;" *per* Tindal, C.J., *Rannie* v. *Irvine*, 7 M. & Gr. 976; see (1894) A. C. 574, *per* Lord Macnaghten.

Who may enforce the restraint.

Restrictive covenants which have been obtained for the protection of a business or trade may be enforced by the

personal representatives of the covenantee; *Archer* v. *Marsh*, 6 A. & E. 966; *Hastings* v. *Whitley*, 2 Exch. 611; *Green* v. *Price*, 13 M. & W. 695, 16 Id. 346; or by the assignees of the business; *Benwell* v. *Inns*, 24 Beav. 307; *Baines* v. *Geary*, 35 Ch. D. 154; *Davies* v. *Davies*, 36 Id. 359; unless "the contract in its nature, on its true construction, is a personal one;" *Davies* v. *Davies*, *supra*, *per* Cotton, L.J.

Contracts of service for life or fixed period valid.

Under the same head as contracts in restraint of trade, may be classed those by which the services of individuals are secured for a specified time, or for life, to a particular master. There seems to be no objection to such contracts, even when they extend over the whole period of the life of the servant, though in some countries a restraint so extensive has been considered inconsistent with individual liberty, and accordingly forbidden. The question appears to have been long since settled in our law, without regard to considerations which seem to embrace a shadow; see *Wallis* v. *Day*, 2 M. & W. 273. In *Pilkington* v. *Scott*, 15 Id. 657, and *Hartley* v. *Cummings*, 5 C. B. 247, agreements whereby, in substance, workmen engaged to serve certain persons and no others, at a certain scale of wages, for a term of years, subject to determination in the event of sickness or incapacity of the men, or cessation of business by the employers, and with power to the employers to dismiss the men in certain events, or on certain notice, were considered open neither to the objection of want of mutuality, nor to that of interference with public policy.

Quære, must contract for life be by deed.

Here may be noticed a *dictum* in *Wallis* v. *Day*, 2 M. & W. 281, that according to 15 Viner, 323, *Master and Servant*, (N.) 5, "in order to maintain an action against a person who contracts to serve for life, the contract must be by deed." However, all that was necessary in *Wallis* v. *Day* was to show that such a contract was not illegal, and not that it must be under seal; and on reference to the authority mentioned in the passage from Viner, *viz.*, H. 2 H. 4, fol. 14, pl. 12, the point there really decided will be found to be, that an action of *debt* on simple contract was not then, (as it is now, by 3 & 4 W. 4, c. 42, s. 14, see *Barry* v. *Robinson*, 1 B. & P. N. R. 293), maintainable against *executors*, and the passage in Viner itself does not relate to the subject of master and servant generally, but to the construction of the statute of labourers; so that the *dictum* in *Wallis* v. *Day* can hardly be considered, what it seemingly

was not intended to be, an authority for the proposition that a contract to serve for life must be under seal.

Trades unions.

Agreements between masters not to give employment, or between workmen not to take it, except upon fixed terms, being restraints upon trade, are as a general rule not enforceable; for "*primâ facie*, it is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of carrying on his trade, according to his own discretion and choice," and "no power short of the general law ought to restrain his free discretion;" *Hilton* v. *Eckersley*, 6 E. & B. 47, 66, 75; see also *Mogul Co.* v. *McGregor*, (1892) A. C. 25.

Rules of trade combinations and societies.

With regard to trade societies and combinations, whether of traders or of workmen, the general rule is that rules which are *bonâ fide* intended for the protection of the legitimate interests of the members, and which go no further than are reasonably necessary for that purpose, are not illegal and may be enforced, though to some extent in restraint of trade; *Collins* v. *Locke*, 4 App. Cas. 674; *Mineral Water Soc.* v. *Booth*, 36 Ch. D. 465; *Strick* v. *Swansea Tinplate Co.*, Id. 558; *Swaine* v. *Wilson*, 24 Q. B. D. 252; *Urmston* v. *Whitelegg*, 55 J. P. 453.

In *Jones* v. *North*, 19 Eq. 426, an agreement among four quarry owners was upheld, that one of them should not tender for a certain contract, and that two others should tender at a price higher than the fourth, with a view to secure the contract to him, with a stipulation that he should buy stone from each of them at a fixed price.

A bye-law restraining Sunday traffic on a canal held void.

In *Calder Navigation Co.* v. *Pulling*, 14 M. & W. 76, a bye-law of a canal company directed against Sunday trading and travelling was held void upon the construction of the local Act, which, though very general in its terms, was considered not to give the company any power to restrain the traffic on the canal, for the purpose of enforcing the proper observance of religious duties. As to bye-laws regulating the places in a market in which particular trades may be carried on, see *Strike* v. *Collins*, 55 L. T. 182; *Wortley* v. *Nottingham L. B.*, 21 L. T. 582; and *ante*, p. 393.

Perpetuities rest on same ground as restraints of trade.

On the same reason with bonds and contracts in restraint of trade, stand *perpetuities*; attempts to create which are never permitted by the law to succeed, on account of the tendency of such limitations to paralyse trade, by shackling property, and preventing its free circulation for the purposes of commerce; for *trade* consists in the free application of

Perpetuities.

labour to the free circulation of property, and any restraint laid upon the one would be as injurious to its interests as if imposed upon the other.

Origin of rule.

This doctrine of *perpetuities*, as it is called, is of comparatively modern introduction. Its objects were, indeed, at a very ancient period of English law, in some degree accomplished by a maxim which is recognised by our earliest writers, *viz.*, that *property has certain inseparable incidents, among which is the right of aliening it by the assurances appropriated by the law to that purpose, of which incidents it cannot be deprived by any private disposition.* One of the earliest cases in which this doctrine was maintained is reported by Littleton, sect. 720, who tells us that "a certain Justice of the Common Pleas dwelling in Kent, called Richel, had issue divers sons, and his intent was that his eldest son should have certain lands and tenements to him and the heirs of his body begotten, and, for default of issue, the remainder to the second son, &c., and so to the third son, &c.; and because he would that none of his sons should alien or make warrantie to bar or hurt the others that should be in the remainder, &c., he causeth an indenture to be made to this effect, *viz.*, that the lands and tenements were given to his eldest son, upon such condition, that if the eldest son alien in fee, or in fee tail, &c., or if any of the sons alien, &c., that then their estate should cease, and be void, and that then the same lands and tenements immediately should remain to the second son, and the heirs of his body begotten, *et sic ultra*, the remainder to his other sons; and livery of seisin was made accordingly." This device, however, was held void; and Mr. Butler remarks, in a learned note to Co. Litt. 379 b, the perusal of which is strongly recommended to readers desirous of pursuing this subject, that "this was one of the many attempts which have been made to restrain that right of alienation which is inseparable from the estate of a tenant in tail. The chief of them are stated in a very pointed manner by Mr. Knowler, 1 Burr. 84."

Upon the same principle, *viz.*, that property cannot by any private disposition be robbed of its incidents, of which the power of alienation is one, proceeds the case put by Littleton, s. 360, *viz.*: "Also if a feoffment be made on this condition, *that the feoffee shall not alien the land to any*, this condition is void, because when a man is enfeoffed of lands or tenements, he hath power to alien them to any

Condition that feoffee shall not alien void.

person, by the law. For, if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason; and therefore such a condition is void." On which Lord Coke observes that "the like law is of a devise in fee on condition that the devisee shall not alien; the condition is void; and so it is of a grant, release, confirmation, or any other conveyance, whereby a fee simple doth pass; for it is absurd and repugnant to reason that he that hath no possibility to have the land revert to him should restrain his feoffee in fee simple of all his power to alien; and so it is if a man be possessed of a lease for years, or of a horse, or of any other chattel, real or personal, and give or sell his whole interest and property therein, upon condition that the donee or vendee shall not alien the same, the same is void; because his whole interest and property is out of him, so as he hath no possibility of a reverter, *and it is against trade and traffic, and bargaining and contracting between man and man*;" Co. Litt. 223 a; see Shep. Touch. 131; *Rosher* v. *Rosher*, 26 Ch. D. 801; *Corbett* v. *Corbett*, 13 P. D. 136, 14 Id. 7.

Devise in fee.

On this doctrine, *viz.*, that property cannot be deprived of the power of alienation legally incident to it, by any private disposition, equity has engrafted one exception, by allowing married women to be restrained from aliening, by way of anticipation, property limited to their sole and separate use during the coverture. This equitable doctrine is fully considered in the notes to *Hulme* v. *Tenant*, in White & Tudor's L. C. in Equity, vol. i.

Exception to general rule. Restraint of anticipation upon married women with separate estate.

To return to the head of *perpetuities*. It was in time found that the interests of commerce were by no means sufficiently guarded by the assertion of the maxim, that property could not be robbed of the quality of transferability; for it would have been easy to limit particular estates in such a manner as to postpone the actual enjoyment of the fee so long as to create what would have been virtually, though not nominally, a strict entail; had not the courts, proceeding on the maxim of law, *quodcunque prohibetur fieri ex directo prohibetur et per obliquum*, established, as an inflexible rule, "that though an estate may be rendered inalienable during the existence of a life, or of any number of lives, in being, and twenty-one years after; *Cadell* v. *Palmer*, 10 Bing. 140; or possibly even for nine months beyond the twenty-one years, in case the person ultimately

Perpetuities: rule that restraint must not extend beyond a life or lives in being and 21 years after.

Perpetuities.

entitled to the estate should be an infant *in ventre sa mère* at the time of its accruing to him; yet, that all attempts to postpone the enjoyment of the fee for a longer period are void;" and, further, that an estate cannot be limited to any unborn person for life followed by an estate to any child of such unborn person; see *Whitby* v. *Mitchell*, 42 Ch. D. 494. Therefore, in *Spencer* v. *Marlborough*, 3 Bro. P. C. 232, where John Duke of Marlborough devised to trustees and their heirs, to the use of his daughter for life, remainder to Lord Ryalton for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of Lord Ryalton in tail male, remainder to Lord Robert Spencer for life, remainder to trustees to preserve contingent remainders, &c., remainder to Charles Spencer in the same manner, and inserted a clause empowering his trustees, on the birth of each son of Lord Ryalton, Lord Robert, and Charles Spencer, to revoke and make void the respective uses limited to their respective sons in tail male, and in lieu thereof to limit the premises to the use of such sons for their lives with immediate remainder to the respective sons of such sons severally and respectively in tail male, Lord Northington declared the clause void, as tending to a perpetuity; and, on appeal to the Lords, the judges were unanimously of the same opinion. See Cruise's Digest, title 32, c. 23; *Beard* v. *Westcott*, 5 B. & Ad. 801; *Cadell* v. *Palmer*, *supra*; and Mr. Butler's note, Co. Litt. 379 b. See also *Harding* v. *Nott*, 7 E. & B. 650; Lewis, on *The Law of Perpetuity*; 1 Jarman on *Wills*, 5th ed., 213; and *Keppell* v. *Bailey*, 2 M. & K. 517. In *Gilbertson* v. *Richards*, 4 H. & N. 277, 5 Id. 453, where in a mortgage in fee, with a power of sale on default, and covenants for quiet enjoyment until default, a proviso that on entry for default the land should be charged with a rent-charge payable to the mortgagor and his assigns was held to be valid, the Exch. Cham. doubted whether the rule as to perpetuities applied where the party who is, or whose heirs are, to take, and who can dispose of, release, or alienate the estate, is ascertained, but did not decide the case upon this point. In accordance with this expression of opinion, and with the decision of the Court of Exch. in the same case, Fry, J., upheld a covenant to give an unlimited right of pre-emption of land, on the ground that the covenantor and covenantee together could at any time alienate the land absolutely; *Birmingham Co.* v. *Cartwright*, 11 Ch. D. 421. This decision was over-

Where person to take is ascertained.

Perpetuities.

ruled, however, in *L. & S. W. R. Co.* v. *Gomm*, 20 Id. 562.

Bond by feoffee not to alien, good, according to Coke.

Lord Coke laid it down, 1 Inst. 206, that "if a feoffee be bound in a bond that the feoffee and his heirs shall not alien, this is good, for he may notwithstanding alien, if he will forfeit his bond that he himself hath made." And in *Freeman* v. *Freeman*, 2 Vern. 233, a father settled lands on his son in tail, taking a bond from him that he would not dock the entail. On a bill to be relieved against this bond, the court held it good, because, if the son had not agreed to give his bond, the father might have made him only tenant for life.

Sed quære.

It seems, however, that the above opinion of Lord Coke cannot be supported; for, if a general restraint on alienation be, as it unquestionably is, contrary to public policy, there is no more reason for supporting a bond made to enforce it, than for supporting a bond in general restraint of trade. And in a case where A., having limited lands to B. in tail, took a bond from him not to commit waste, it was decreed to be delivered up to be cancelled, the court saying that it was an idle bond; *Jervis* v. *Bruton*, 2 Vern. 251. So, where an elder brother enfeoffed his second brother in tail, remainder to a younger brother in the like manner, and made each of them enter into a statute with the other that he would not alien; because these statutes were in substance to make a perpetuity, they were ordered to be cancelled by the Court of Chancery, with the advice of Lord Coke himself; *Poole's Case*, Moore, 810.

Accumulations of income, at common law.

It only remains to remark that trusts for accumulation, being thought to partake of the objectionable nature of perpetuities, are bounded at common law by the same limits; see *Thellusson* v. *Woodford*, 4 Ves. 227; *Williams* v. *Lewis*, 6 H. L. C. 1013; *Rendlesham* v. *Robarts*, 23 Beav. 321; wherefore trusts to accumulate income for a longer period than a life in being and 21 years were, and still are, wholly void; *Southampton* v. *Hertford*, 2 V. & B. 54; *Marshall* v. *Holloway*, 2 Swanst. 423. Additional limits, however, have been placed upon such trusts by Thellusson's Act, and by the Accumulations Act, 1892.

Under 39 & 40 G. 3, c. 98.

Thellusson's Act enacts that no settlement or disposition shall be made by deed, will, or otherwise, of any realty or personalty in such manner that its profits or produce shall be wholly or partially accumulated for any longer term than one only (see *Wilson* v. *Wilson*, 1 Sim. N. S. 288) of the

following periods; viz., (1), the settlor's life; see *Rosslyn's Trust*, 16 Sim. 391; *Jagger* v. *Jagger*, 25 Ch. D. 729; (2), 21 years from the settlor's death; see *Gorst* v. *Lowndes*, 11 Sim. 434; *A.-G.* v. *Poulden*, 3 Hare, 555; (3), the minority of any person living, or *in ventre sa mère*, at the time of the settlor's death; (4), the minority only of any person who, under the settlement, would for the time being, if of full age, be entitled to the profits or produce directed to be accumulated. And it enacts that every direction to accumulate for a longer term shall be null and void, and that the profits and produce shall, so long as they shall be directed to be accumulated contrary to the above provisions, go to such person or persons as would have been entitled thereto, if such excessive accumulation had not been directed.

S. 2

But the Act does not extend to any provisions for payment of debts; *or* for raising portions for children (see *Walker* v. *Walker*, 54 L. T. 792); *or* touching the produce of timber or wood upon lands.

55 & 56 Vict. c. 58.

Accumulations for the purchase of lands.

The Accumulations Act, 1892, prohibits the settlement or disposition of property in such a manner that its profits or income shall be "wholly or partially accumulated for the purchase of land only, for any longer period than during the minority or respective minorities of any person or persons who, under the uses or trusts" of the settlement, "would for the time being, if of full age, be entitled to receive" the profits or income directed to be accumulated.

Upon this subject, see Lewin on Trusts, 9th ed., pp. 90 *et seq*; and Marsden on Perpetuities, pp. 314 *et seq*.

SIMPSON *v.* HARTOPP.

MICH. 18 *GEO.* 2.—*C. B.*

[REPORTED WILLES, 512.]

Implements of trade are privileged from distress for rent, if they be in actual use at the time, or if there be any other sufficient distress on the premises.

But if they be not in actual use, and if there be no other sufficient distress on the premises, then they may be distrained for rent.

THE opinion of the court was delivered, as follows, by WILLES, L. C. J.:—

Trover. This comes before the court on a special verdict found at the Leicester assizes, held at Leicester, on the 3rd of August, 1743.

The plaintiff declared against the defendant, for that on the 20th October, 1741, he was possessed of one frame for the knitting, weaving, and making of stockings, value 20*l.*, as of his own proper goods, and being so possessed, he lost the same, and that afterward, *to wit*, on the 18th August, 1742, it came to the hands of the defendant, who, knowing the same to be the goods of the plaintiff, afterwards, *to wit*, on the 19th day of the same month of August, converted the same to his own use; damage 30*l.*

The defendant pleads *not guilty*; and the jury find that the plaintiff, on the 27th March, 1741, was possessed of one frame for knitting, weaving, and making stockings, value 8*l.*, as his own proper goods. That upon that day he let the said frame to John Armstrong, at the weekly rent of 9*d.*, and so from week to week, as long as they, the said Nathaniel Simpson, the plaintiff, and John Armstrong, should please: by virtue of which letting, the said John Armstrong was possessed of the said frame, at the said rent, until the time after-mentioned, when the same was seized as a distress for rent by the defendant. That the said John Armstrong is by trade a stocking-weaver, and used the said stocking-frame as *an instrument of his trade*, and continued the

use thereof, and his apprentice was using the said stocking-frame at the time thereinafter mentioned, when the same was seized by the defendant as a distress for rent. That the said John Armstrong held of the defendant a certain messuage and tenement in the parish of Woodhouse and county of Leicester, by virtue of a lease to him, the said John Armstrong, thereof granted by the defendant under the yearly rent of 35*l.* for a term of years not yet expired, and was in the actual possession of the same when the said stocking-frame was distrained for rent by the defendant. That on the 19th December, 1741, John Armstrong was indebted to the defendant in 53*l.* for arrears of rent of the said messuage and tenement; and that the said stocking-frame was then upon the said messuage in the possession of the said John Armstrong, and that there were not goods or chattels by law distrainable for rent in the said messuage, without the said stocking-frame, sufficient to satisfy the said rent, so in arrear, at the time when the said stocking-frame was seized as a distress for the said rent. That on the said 19th December the defendant entered in the same messuage and tenement, and then and there seized the said stocking-frame on the said premises as a distress for the said rent so in arrear, as the said John Armstrong's apprentice was then weaving a stocking on the said frame. And that the defendant (though often requested) hath refused to deliver the said stocking-frame to the said plaintiff, and continues to detain the same. The special verdict concludes, as usual, by submitting the matter to the opinion of the court whether the said stocking-frame was by law distrainable for the said arrears of rent or not; and if the court should be of opinion that it was not, they assess the damages of the plaintiff at 8*l.*, &c.

Upon this special verdict three questions arise:—

First, Whether a stocking-frame has any privilege at all as being an instrument of trade, or whether it be generally distrainable for rent as other goods are, even though there was sufficient distress besides.

Secondly, Though it may be so far privileged as not to be distrainable if there be other goods sufficient, yet whether or not it may be distrained if there be not sufficient distress besides.

Thirdly, Though it be distrainable either in the one case or

the other when it is not in actual use, yet whether or no it has not a particular privilege by being *actually in use* at the time of the distress, as the present case is.

I shall but touch upon the two first questions, because they are not the present case; but yet it may be proper to consider them a little, to introduce the third, which is the very case now in question.

There are five sorts of things which at common law were not distrainable:

1st. Things annexed to the freehold.

2nd. Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ.

3rd. Cocks or sheaves of corn.

4th. Beasts of the plough and instruments of husbandry.

5th. The instruments of a man's trade or profession.

The first three sorts were absolutely free from distress, and could not be distrained, even though there were no other goods besides.

The two last are only exempt *sub modo*, that is, upon a supposition that there is sufficient distress besides.

Things annexed to the freehold, as furnaces, mill-stones, chimney-pieces, and the like, cannot be distrained, *because they cannot be taken away without doing damage to the freehold*, which the law will not allow.

Things sent or delivered to a person exercising a trade, to be carried, wrought, or manufactured in the way of his trade, as a horse in a smith's shop, materials sent to a weaver, or cloth to a tailor to be made up, are privileged *for the sake of trade and commerce*, which could not be carried on if such things under these circumstances could be distrained for rent due from the person in whose custody they are.

Cocks and sheaves of corn were not distrainable before the statute 2 W. & M. c. 5 (which was made in favour of landlords), because they *could not be restored again in the same plight and condition* that they were before, upon a replevin, but must necessarily be damaged by being removed.

Beasts of the plough, &c., were not distrainable *in favour of husbandry* (which is of so great advantage to the nation), and

likewise *because a man should not be left quite destitute of getting a living for himself and his family.* And the same reasons hold in the case of the instruments of a man's trade or profession.

But these two last are privileged in case there is distress enough besides; otherwise they may be distrained.

These rules are laid down and fully explained in Co. Lit. 47 a, b, and many other books which are there cited; and there are many subsequent cases in which the same doctrine is established, and which I do not mention because I do not know any one case to the contrary.

From what I have said on this head, the second question is likewise answered; for as the stocking-frame in the present case could only be privileged as it was an instrument of trade, we think that it might have been distrained if it had not been actually in use, it being found that there was not sufficient distress besides. These are the words in Carth. 358, in the case of *Vinkinstone* v. *Ebden*, "the very implements of trade may be distrained if no other distress can be taken."

But whether or no this stocking-frame's being actually in use at the time of the distress gives any further privilege, is the third and principal question in the present case. And we are all of opinion that upon this account it could not be distrained for rent, for these two plain reasons:

1st. *Because it could not be restored again upon a replevin in the same plight and condition as it was*, but must be damnified in removing, for the weaving of the stocking would at least be stopped, if not quite spoiled, which is the very reason of the case of corn in cocks, &c.

2ndly. Whilst it is in the custody of any person, and used by him, it is a breach of the peace to take it. And these are two such plain and strong reasons, that even if it were quite a new case, I should venture to determine it without any authority at all; but I think that there are several cases and authorities which confirm this opinion.

It is expressly said in Co. Lit. 47 a, that a horse whilst a man is riding upon him, or an axe in a man's hand cutting wood, and the like, cannot be distrained for rent. In Bracton, and several other old books, there is a distinction made between *catalla otiosa* and things which are in use. It was held in P. 14 H. 8, pl. 6,

that if a man has two millstones, and only one is in use, and the other lies by not used, it may be distrained for rent. In *Read's Case*, Cro. Eliz. 594, it was holden that yarn carrying on a man's shoulders to be weighed could not be distrained any more than a net in a man's hand, or a horse on which a man is riding. So in Moor. 214, *The Viscountess of Bindon's Case*, it is said that if a man be riding on a horse, the horse cannot be distrained, but if he hath another horse, on which he rides sometimes, his spare horse may be distrained.

I could cite many other cases to the same purpose, but I think that these are sufficient to support a point which has so strong a foundation in reason, especially since there is but one case which seems to look the contrary way, which is *Webb* v. *Bell*, 1 Sid. 440, where it was holden that two horses and the harness fastened to a cart loaden with corn might be distrained for rent. But in the first place, I am not clear that this case is law; and besides, it is expressly said in that case that a horse upon which a man was riding cannot be distrained for rent; and therefore a *quære* is made whether if a man had been on the cart the whole had not been privileged, which is sufficient for the present purpose, it being found that the stocking-frame was to be in the actual use of a man at the time when it was distrained.

For these reasons, and upon the strength of these authorities, we are all of opinion that this stocking-frame, the apprentice being actually weaving a stocking upon it at the time when it was distrained, was not distrainable for rent, even though there were no other distress on the premises, and therefore judgment must be for the plaintiff.

This is usually cited as a leading case, whenever a question arises respecting the exemption of property from distress; and deservedly so, for it would be difficult to find a clearer summary of the authorities, as they existed at the time when it was decided, than is contained in the judgment of Willes, C.J.

At common law six sorts of property privileged from distress.

There are, according to his lordship, five sorts of property privileged from distress for rent by the common law, and to these the judgment in the principal case authorises us to add a sixth.

Things absolutely privileged at common law.

Four absolutely.

1. Things annexed to the freehold.

2. Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ.

3. Things which cannot be restored in the same plight.

4. Things in actual use.

1. Fixtures.

With respect to the first class, *viz.*, *fixtures*, it was always held for clear law, that they were not distrainable, for the reason stated by the Chief Justice; see 4 T. R. 567; *Darby* v. *Harris*, 1 Q. B. 895; Gilb. *Dist.* 34, 48; *Hellawell* v. *Eastwood*, 6 Exch. 311; and there is a distinction in this respect between a distress and an execution; for, under the latter, fixtures, which would be removable by the judgment debtor, as between him and his lessor, may be seized; *Poole's Case*, 1 Salk. 368; see 3 Atk. 13; 3 B. & C. 368; *Place* v. *Fagg*, 4 M. & Ry. 277; and so may *growing corn*, Id.; though neither the tenant's fixtures, nor the growing corn, would at common law have been distrainable; *Darby* v. *Harris*, *supra*; *Dalton* v. *Whitten*, 3 Q. B. 961. However, as respects growing corn, the law was altered by 11 G. 2, c. 19, s. 8, which enables landlords to distrain corn, grass, hops, roots, fruits, pulse, or other product growing on any part of the land demised. The words *other product* apply only to other products of a nature similar to the things specified, *i.e.*, product to which the process of ripening, and of being cut, gathered, made, and laid up when ripe, is incidental. Therefore, trees or shrubs growing in a nursery ground are not distrainable under this statute; *Clark* v. *Gaskarth*, 8 Taunt. 431. A deed giving power to distrain for arrears of an annuity charged on land, and "to detain, manage, sell, and dispose of the distresses in the same manner, in all respects, as distresses for rents reserved upon leases for years, and as if the annuity was a rent reserved upon a lease for years," has been held not to empower the grantee to distrain *growing crops*, but only to confer the powers given to landlords by 2 W. & M. c. 5; *Miller* v. *Green*, 2 Tyr. 1; *Johnson* v. *Faulkner*, 2 Q. B. 923. As appraisement is expressly required by 11 G. 2, c. 19, s. 8, growing corn, &c., must still be appraised in all cases, in spite of the partial repeal of 2 W. & M. c. 5, by 51 & 52 Vict. c. 21.

They may be taken in *execution*.

So may growing crops.

Crops distrainable by statute.

"Other product," what.

Machinery, when distrainable.

Machinery fixed to the freehold, not for the improvement or profitable use of the land, but only for the purpose of being more conveniently used as machinery, *e.g.*, a mule

used for spinning cotton, attached to a floor, but "capable of removal without the least injury to the fabric of the building or itself," retains its chattel character, and may be distrained for rent; *Hellawell* v. *Eastwood*, 6 Exch. 295, where the law laid down is correct, even if misapplied to the facts; see *Holland* v. *Hodgson*, L. R. 7 C. P. 328; *Waterfall* v. *Penistone*, 6 E. & B. 876; V.-C. Wood's doubt in *Mather* v. *Fraser*, 2 K. & J., being due to his erroneous assumption that fixtures can be distrained for rent. In *Turner* v. *Cameron*, L. R. 5 Q. B. 306, railway rails and sleepers, which could not be removed without disturbing the surface of the soil, were held not distrainable; see *Ward* v. *Dudley*, 57 L. T. 20.

Effect of including fixtures in notice of distress.

A landlord who includes fixtures in his notice of distress, and expresses an intention to sell them, is not liable as for an unlawful distress if the fixtures are not actually seized or severed; *Beck* v. *Denbigh*, 29 L. J. C. P. 273; see also *post*, p. 497. There is a distinction, in questions of fixtures, between cases of landlord and tenant and cases of mortgagor and mortgagee; and between the right to distrain and the right to remove; see notes to *Elwes* v. *Maws*, *post*, vol. ii.

2. Things delivered to a person in the way of his trade.

2. *Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ.* That this class of property is exempt from distress has never been questioned; see *Gisbourn* v. *Hurst*, Salk. 249; 1 Inst. 47 a; and *Gibson* v. *Ireson*, 3 Q. B. 39, where the phrase "public trade" was discussed.

Meaning of public trade.

But the dispute has always been in ascertaining whether the goods in each particular case were so circumstanced as to fall within the rule. The examples commonly cited as being clearly within it, are those of cloth bailed to a tailor to make a garment, or a horse standing in a smith's shop to be shod. So, too, goods of the principal in the factor's hands cannot be distrained by the factor's landlord; *Gilman* v. *Elton*, 3 B. & B. 75; for the advancement of trade as much requires that goods should be placed in a factor's hands for sale, as in a carrier's for carriage; and, on the same principle, goods deposited for safe custody in a warehouse or a wharf are not distrainable for rent due in respect thereof; *Thompson* v. *Mashiter*, 1 Bing. 283; *Matthias* v. *Mesnard*, 2 C. & P. 353. It has also been decided that goods deposited on the premises of an auctioneer for the purposes of sale are privileged from a distress for rent due in respect of those premises; *Adams* v. *Grane*, 3 Tyr. 326;

Instances of privilege.

for, to use the words of Bayley, B., "*Interest reipublicæ* to bring buyers and sellers together at fixed places, where goods may be brought for the purposes of sale and exchange. This privilege is, therefore, of great importance to the owners of goods, who should not be exposed to the risk of losing them from the default of the parties on whose premises they may be deposited for that purpose." This is so, though the place is only temporarily used for the purpose of an auction, and the auctioneer is wrongfully there; *Brown* v. *Arundell*, 10 C. B. 54; and though it is only a yard attached to the premises; *Williams* v. *Holmes*, 8 Exch. 861; but the privilege is confined to goods on the auctioneer's premises, and does not extend to goods in his custody, but on the owner's premises; *Lyons* v. *Elliott*, 1 Q. B. D. 210. Similarly, goods pledged with a pawnbroker cannot be taken as a distress; *Swire* v. *Leach*, 18 C. B. N. S. 479; nor can furniture placed in a depository; *Miles* v. *Furber*, L. R. 8 Q. B. 77; nor carriages on premises of a commission agent for their sale; *Findon* v. *M'Laren*, 6 Q. B. 891.

In *Brown* v. *Shevill*, 2 A. & E. 138, a beast was sent to a butcher's premises to be slaughtered, and, after it had been slaughtered, the carcass was seized for rent due from the butcher; it was held not distrainable. This species of privilege, as was remarked by Bayley, B., in *Adams* v. *Grane*, 3 Tyr. 326, "has been from time to time increased in extent, according to the new modes of dealing established between parties by the change of times and circumstances, one of which modern modes of dealing is the case of a factor." His lordship, in the same case, approved an observation in Blackstone's Commentaries, that "the exemption from liability to distress, in a case of this sort, occasions no hardship, because the privilege is generally applicable to goods which no man could possibly suppose to be the property of the individual from whom the rent is due."

Instances not within privilege.

In *Muspratt* v. *Gregory*, 1 M. & W. 633, 3 Id. 678, it was held that a barge, which a person, meaning to purchase salt, sent to saltworks to carry it home, was not privileged from distress for arrears of a rent-charge; see, however, as to the case of a carriage actually containing privileged goods, *Read* v. *Burley*, Cro. Eliz. 596; *Gisbourn* v. *Hurst*, Salk. 243. In *Joule* v. *Jackson*, 7 M. & W. 450, it was held that brewers' casks, left according to the usage of trade on a publican's premises with beer, are not privileged. Things to come within the exception must be *sent or delivered* to a person in

Things must be sent or delivered.

the way of his trade. Where, therefore, a ship in course of construction, and in respect of which all instalments of purchase-money then due had been paid, was distrained upon by the builder's landlord, it was held that, even assuming that the property in so much of the ship as had been built had passed to the buyer, the ship did not come within the exception, and the distress was valid; *Clarke* v. *Millwall Docks*, 17 Q. B. D. 494.

In *Francis* v. *Wyatt*, 1 W. Bl. 483, the court seemed strongly inclined to think that a carriage standing in the yard of a livery-stable was distrainable for rent due from the keeper of the livery-stable; an opinion acted upon in *Parsons* v. *Gingell*, 4 C. B. 545; but see *Miles* v. *Furber*, L. R. 8 Q. B. 77, where the correctness of the latter decision was doubted. In *Wood* v. *Clarke*, 1 Tyr. 314, it was held that, though materials delivered by a manufacturer to a weaver, to be manufactured by him at his own home, were privileged from distress for rent due to the weaver's landlord (see *Gibson* v. *Ireson*, 3 Q. B. 39), yet that a frame or other machinery delivered by the manufacturer to the weaver along with the materials, for the purpose of being used in the weaver's house in manufacturing such materials, was not privileged, unless there were other goods sufficient to satisfy the rent; for the privilege applies only to the materials and not to the machinery by which they are to be worked up. The principle laid down in this case (approved in *Fenton* v. *Logan*, 9 Bing. 676) still holds good; but by the 6 & 7 Vict. c. 40, s. 18, absolute immunity from distress for rent now attaches to frames, looms, machinery, materials, tools, and apparatus, intrusted (whether for hire or no) for the purpose of being used or worked up in any woollen, linen, cotton, flax, mohair or silk manufacture, unless the rent be due from the owner or part-owner.

Machinery delivered to workmen for purpose of working up material.

Cattle put to graze or rest on land while on their way to market are privileged; *Nugent* v. *Kirwan*, 1 Jebb. & S. 97.

3. *Things which cannot be restored in the same plight*; see *Wilson* v. *Ducket*, 2 Mod. 61. The reason for this exemption is, that, the distress being at common law merely a pledge, things are not distrainable which cannot be restored in the same plight as they were in at the time of seizure. Hence butcher's meat cannot be distrained; *Morley* v. *Pincombe*, 2 Exch. 101. Cocks and sheaves of corn were within this exemption; but by 2 W. & M. c. 5, sheaves or cocks of corn, or loose corn and hay lying upon any part

3. Things that cannot be restored in same plight.

Sheaves of corn distrainable by statute.

of the land charged with the rent, may be seized, secured, and locked up in the place where found, in the nature of a distress, until replevied; but the same must not be removed, to the damage of the owner, from such place; and the landlord has, it would seem, no option, but *must* sell at the expiration of five days; *per* Parke, B., 1 M. & W. 448. The benefit of this statute, since 4 Geo. 2, c. 28, s. 5, extends to the grantee of a rent-charge; *Johnson* v. *Faulkner*, 2 Q. B. 925; but the benefit of 11 G. 2, c. 19, s. 8, does not;

Money. *Miller* v. *Green*, 2 Tyr. 1. Loose money, apparently, comes within the exemption, because it cannot be identified; but not money in a sealed bag; see Bac. Abr., *Distress*, B.; 1 Roll. Abr. 667. *Quære*, as to selling the latter.

4. Things in actual use. 4. *Things in actual use.* These, as the text informs us, are privileged in order to prevent the breach of the peace which might be occasioned by an attempt to distrain them; see *Field* v. *Adames*, 12 A. & E. 652, where a replication that the things were in actual use was held good; and *Bunch* v. *Kennington*, 1 Q. B. 679, where it was bad for want of sufficient *averments*.

Two more cases of absolute privilege. The above four sorts of property are the only sorts where absolute freedom from distress could be deduced from *Simpson* v. *Hartopp*. It is, however, proper to observe, that there are two other descriptions of goods absolutely privileged from distress at common law.

5. Animals *feræ naturæ*. 5. *Animals feræ naturæ*, and other things, wherein no valuable property is in any person; Finch, 176; Bro. Abr., *Property*, pl. 20; Com. Dig., *Distress*, C.; Keilway, 30 b;

Deer in park. Co. Lit. 47 a; 1 Rolle's Abr. 666. But *deer* in an inclosed ground not being a park are not within this exception; *Davies* v. *Powell*, Willes, 47; nor deer in a park, unless they are wild, according to *Morgan* v. *Abergavenny*, 8 C. B. 768; from which latter case, if it be law, it seems to follow that if tenant for life of a park feed deer so as to diminish their wildness, he is in peril of an action for waste, *quære*; see *Ford* v. *Tynte*, 31 L. J. Ch. 177, where *Morgan* v. *Abergavenny* was acted upon.

Dogs *Dogs* have been said to be protected from distress on the ground that they are animals *feræ naturæ*; but it is clear that this cannot be now said of them, 2 Bl. Comm. 391; and that there may now be a valuable property in them; see *per* Willes, C.J., in *Davies* v. *Powell*, Willes, 46. Indeed, even in Lord Coke's time, trespass or trover would lie for a dog (*Filow's Case*, 12 Hen. 8, 3, pl. 3), without

averring it to be tame; see *Ireland* v. *Higgins*, Cro. Eliz. 125; Com. Dig., *Action on the Case upon Trover*, C; *Binstead* v. *Buck*, 2 W. Bl. 1117; *Sandys* v. *Hodgson*, 10 A. & E. 472; and 1 Wms. Saund. 84. Yet Lord Coke (Co. Lit. 472) includes dogs, and upon his authority Rolle (Abr. *Dist.* H.), Comyns (Dig. *Dist.* C.), Viner (Abr. *Dist.* H.), Bacon (N. Abr. *Dist.* B.), Blackstone (3 Comm. 8), Stephen (Comm. 8th ed. vol. iii. 249), and Burton (Comp. 1014), all include dogs in the class of things not distrainable, because not the subject of valuable property, being animals *feræ naturæ*. It is, however, to be observed that Lord Coke himself classes dogs, more correctly it would seem, among creatures *domitæ naturæ*, in which men may have a property, 4 Inst. 109; although that property appears to be in some sense of a base kind; see the *Case of Swans*, 7 Rep. 18 a, 1 Hawk. P. C. 314 and 511, where the reason why dogs were not at common law the subject of larceny is stated to be that, although a property may exist in them, yet, "in respect of the baseness of their nature, they shall never be so highly regarded at law that for their sakes a man shall die;" and *Filow's Case*, *supra*, where Eliot, J., went so far in his depreciation of these animals as to lay down that dogs are vermin, and for that reason the Church would not debase herself by taking tithes of them, though in Rastal, Ent. 611 b, pl. 10, 1, (see 1 Wms. Saund. 84) it appears that you may justify a battery in defence of your dog. According to criminal law, dogs, though the theft of them is punishable under 8 Vict. c. 47, s. 2, are not to be considered goods or chattels; *R.* v. *Robinson*, 28 L. J. M. C. 58; *Cox* v. *Burbidge*, 13 C. B. N. S. 430; but they are goods within 2 & 3 Vict. c. 71, s. 40; *R.* v. *Slade*, 21 Q. B. D. 433.

According to Coke, not distrainable.

Sed quære.

In *Davies* v. *Powell*, *supra*, Willes, C.J., took exception to Lord Coke's rule regarding animals not distrainable, as being "plainly too general, for it is extended to dogs, yet it is clear now that a man may have a valuable property in a dog." Several text-writers have, in reliance upon this opinion, distinctly asserted that dogs are distrainable; see, for instance, Burn's Justice, *Distress*, 2. It may be admitted that, if by the common law the remedy by distress did not apply to dogs specifically, no alteration in their qualities, or in the law relating to other remedies respecting them, could render them distrainable: for the maxim "*cessante ratione cessat et ipsa lex*" does not show that a liability of this

description will *arise* whenever the reason for an exemption from it has ceased; yet it is not improbable that Lord Coke, in the passage referred to above, was only stating the general common law rule with reference to things of no value, and giving what, in his opinion, were instances of the application of that rule. With regard to other animals, rooks in a rookery are not the subject of property; *Hannam* v. *Mockett*, 2 B. & C. 934; but young partridges under a hen are; *R.* v. *Shickle*, 1 C. C. R. 158; linnets trained as decoy birds are "domestic" animals; *Colam* v. *Pagett*, 12 Q. B. D. 66; not so rabbits lately caught for coursing; *Aplin* v. *Pornitt* (1893), 2 Q. B. 57; nor caged lions; *Harper* v. *Marcks* (1894), 2 Q. B. 319.

3. Things in custody of the law.

6. *Things in the custody of the law*, such as property already taken damage feasant or in execution; 1 Inst. 47 a; Gilb. *Dist.*, ed. 1757, p. 44; *Eaton* v. *Southby*, Willes, 131; *Peacock* v. *Purvis*, 2 B. & B. 362; *Wright* v. *Dewes*, 1 A. & E. 641; whether in the hands of the sheriff or of his vendee; *Wharton* v. *Naylor*, 12 Q. B. 673; but the vendee must remove them within a reasonable time; *Re Davis*, 54 L. T. 304.

56 G. 3, c. 50.

By 56 G. 3, c. 50, the purchaser from a sheriff of corn, hay, straw, or other produce, if severed, or of turnips, whether drawn or growing, which he has agreed to consume on the premises, is protected from a distress by the landlord upon such produce; and animals, carts, and implements of the purchaser, which are upon the premises for the purpose of carrying out the agreement, are similarly protected. Growing crops sold by the sheriff were protected from distress until a reasonable time for their removal had elapsed; *Peacock* v. *Purvis*, 2 B. & B. 362; *Wright* v. *Dewes*, 1 A. & E. 641; but by 14 & 15 Vict. c. 25, s. 2, such growing crops are liable to distress, for rent accruing due after the seizure and sale, in default of sufficient distress of the tenant's goods.

14 & 15 Vict. c. 25.

8 Anne, c. 14.

By 8 Anne, c. 14 (c. 18, Rev. Stat.) the landlord is entitled to be paid the rent due at the time of the sheriff's seizure, not exceeding one year's rent; and by the County Courts Act, 1888, s. 160, the bailiff who has seized must distrain for certain arrears of rent, on receiving written notice from the landlord. Under the latter Act the bailiff can distrain only upon the goods of the execution debtor; *Beard* v. *Knight*, 8 E. & B. 865; *Foulger* v. *Taylor*, 5 H. & N. 202; *Hughes* v. *Smallwood*, 25 Q. B. D. 306.

51 & 52 Vict. c. 43.

Goods in

Goods in the possession of a High Court receiver can be

distrained upon. But before actual distress, leave of the court should be obtained; *Sutton* v. *Rees*, 32 L. J. Ch. 437 but see *Walsh* v. *Walsh*, 1 Ir. Eq. 209. possession of receiver.

The Companies Act, 1862, s. 163, makes void any distress enforced against a company's goods after the commencement of its winding up by, or subject to the supervision of, the court; but this section applies only where the company is tenant to the landlord who distrains; *Re Lundy Granite Co.*, 6 Ch. 462; *Re Regent U. S. Stores*, 8 Ch. D. 616; *and* where the goods distrained are goods of the company; *Re New City Constitutional Club Co.*, 34 Ch. D. 646, in which *Ex p. Clemence*, 23 Ch. D. 154, is questioned. The section applies whether the rent accrued due before or after the winding-up. Where the section applies, leave can, nevertheless, be obtained from the court to distrain. Such leave will be granted, if it be shown that it is inequitable to insist on the section, or if the rent ought to be paid as one of the expenses of winding-up: *e.g.*, where possession has been retained for the company's benefit; *Re Lancashire Cotton Spinning Co.*, 35 Ch. D. 656; *Shackell* v. *Chorlton*, (1895) 1 Ch. 378; *Re Oak Pitts Co.*, 21 Ch. D. 322; see *Re House and Land Trust*, 42 W. R. 572, where leave was refused; but, generally, it will not be granted in respect of rent accrued due before the winding-up; Id. Goods of insolvent companies.

In the case of his tenant's bankruptcy a landlord's right to distrain upon his tenant's goods is limited by the Bankruptcy Act, 1883, s. 42, and the Bankruptcy Act, 1890, s. 28. These sections allow the landlord to distrain both before and after the commencement of the bankruptcy; but provide that if the distress be levied after its commencement it shall be "available only for six months' rent accrued due prior to the date of the order of adjudication." When the rent is payable quarterly, and the tenant is adjudged bankrupt during a quarter, an apportioned part of the rent for that part of the quarter which has elapsed prior to the order of adjudication is "rent accrued due" within the meaning of the sections; *Re Howell*, (1895) 1 Q. B. 844. The sections do not apply to a distress for rent accruing due after the order of adjudication; *Ex p. Hale*, 1 Ch. D. 285; nor to any distress upon goods which are not the bankrupt's; *Brocklehurst* v. *Law*, 26 L. J. Q. B. 107; nor, apparently, to any distress by a superior landlord, or to any distress upon a bankrupt's goods where they are upon the premises of a third person and are distrained upon for Goods of bankrupts.

rent due in respect of such premises. Except so far as the sections apply, bankruptcy is no bar to a landlord's rights of distress; *Briggs* v. *Sowry*, 8 M. & W. 729; *Re Collins*, 21 L. R. Ir. 508; *Ex p. Hale*, *supra*; see also *Re Birmingham Gas Co.*, 11 Eq. 615; *Ex p. Till*, 16 Eq. 97; *Ex p. Harrison*, 13 Q. B. D. 750.

Things conditionally privileged.

Next with respect to *property conditionally privileged* at common law. Of this the Chief Justice enumerates two classes:

Beasts of the plough, implements of husbandry, and beasts which improve the land.

1. Beasts of the plough and instruments of husbandry; *Davies* v. *Aston*, 1 C. B. 746; to which should be added beasts which improve the land, as sheep, whether the tenant's or not; *Keen* v. *Priest*, 4 H. & N. 236; Com. Dig., *Distress*, C.; and 51 H. 3, st. 3, declaratory of the law, but now repealed. Colts, steers, and heifers do not fall within this class; *Keen* v. *Priest*, *supra*.

Instruments of trade.

2. The instruments of a man's trade or profession. These species of property are privileged, provided that there be other sufficient distress upon the premises; see Co. Lit. 47 a, b; *Fenton* v. *Logan*, 9 Bing. 676; *Gorton* v. *Falkner*, 4 T. R. 565; and if there be, trespass will lie for taking them; *Nargett* v. *Nias*, 1 E. & E. 439. It is, however, settled that beasts of the plough may be distrained for poor-rates, though there are other distrainable goods on the premises, more than sufficient to answer the value of the demand; *Hutchins* v. *Chambers*, 1 Burr. 579. This decision proceeded on the analogy between such a distress and an execution; see *Stevens* v. *Evans*, 1 W. Bl. 283, which shows that strangers' goods cannot be seized for rates. It must further be observed, with respect to things privileged *sub modo*, that, even though there be a sufficient distress besides, yet if that distress consists of growing crops, distrainable only by statute, and not immediately productive, the landlord need not avail himself of it, but may distrain the things privileged *sub modo*; *Piggott* v. *Birtles*, 1 M. & W. 441. And possibly the principle of this decision may hereafter be thought to extend to every case of a distress given by statute but not liable to precisely the same rules of treatment as a distress at common law.

Beasts of the plough distrainable for poor-rates.

Reason.

Things conditionally privileged distrainable before growing crops.

Where landlord has consented that strangers' goods shall be exempt.

To the above exceptions it may be well to add, that a landlord cannot distrain upon strangers' goods, brought on to the premises under his express or implied promise that they shall be exempt from distress; *Horsford* v. *Webster*, 5 Tyr. 409; *Giles* v. *Spencer*, 3 C. B. N. S. 253; but see *Welsh* v. *Rose*, 6 Bing. 638.

It is said that strangers' cattle, which have strayed on to the premises without their owners' default or knowledge, and by reason of defective fences where the landlord or his tenant ought to repair them, are not distrainable until they have been on the premises for a night and a day and actual notice has been given to the owner, and he has neglected to take them away; Bullen, *Dist.* 103; *Kemp* v. *Crews*, Raym. 168. Straying cattle.

Besides the privileges already referred to, there remain various statutory privileges still to be noticed. Statutory privileges.

1. By the Law of Distress Amendment Act, 1888, s. 4, goods and chattels protected by the County Court Act from seizure in execution are exempt from distress, unless the tenancy has expired and possession has been demanded and the distress is made not earlier than seven days after such demand. By the County Court Act, 1888, s. 147, these goods and chattels now are "the wearing apparel and bedding of the debtor or his family, and the tools and implements of his trade to the value of 5*l.*" In *Churchward* v. *Johnson*, 54 J. P. 326, a sewing machine, hired by a tenant for the use of his wife, who applied what she earned through using it in maintaining the household, was held an implement of *his* trade. Neces-saries.

2. By the Agricultural Holdings Act, 1883, s. 45, in case of holdings to which that Act applies (s. 54): 46 & 47 Vict. c. 61. Agricultural holdings.

(1) Agricultural or other *machinery*, which is the *bonâ fide* property of a person other than the tenant, and is on the premises under an agreement with the tenant for its hire or use in the conduct of his business, is exempt from distress.

(2) *Live stock* of all kinds which is the *bonâ fide* property of a person other than the tenant, and is on the premises *solely for breeding purposes*, is also exempt. By s. 61, live stock includes any animal capable of being distrained.

(3) *Live stock* belonging to another person which the tenant has "taken in" for *agistment* "at a fair price" is exempt from distress, if there is other sufficient distress. In default of other sufficient distress, the amount recoverable by distress of such stock is not to exceed the amount of such "fair price" remaining unpaid; but such stock may be so distrained as long as it remains on the premises. The "fair price" need not be payable in money. Any "fair equivalent" will suffice; *London & Yorkshire Bank* v. *Belton*, 15 Q. B. D. 457; but the price must be payable for

the agistment only, and not as rent for use and occupation; *Masters* v. *Green*, 20 Q. B. D. 807.

34 & 35 Vict. c. 79. Lodgers.

3. By the Lodger's Goods Protection Act, 1871, the goods of lodgers are protected, under certain conditions, from distress by a superior landlord.

If the superior landlord levies or authorises a distress, for rent due from his immediate tenant, upon a lodger's goods, the lodger may serve the landlord or his bailiff with a declaration, stating, (1) that the immediate tenant has no property or beneficial interest in the goods; (2) that they are the property or in the lawful possession of the lodger; (3) what rent, if any, is due, and for what period, from the lodger to his immediate landlord. An inventory of the goods, subscribed by the lodger, must be annexed to the declaration. Upon the service of this declaration, and upon payment by the lodger to the superior landlord or his bailiff of the rent so due, or of so much of it as suffices to discharge his claim, the lodger's goods become protected from the distress.

The declaration must be made after the distress has been made or authorised. It is therefore inoperative against a subsequent distress neither made nor authorised at the time of the declaration; *Thwaites* v. *Wilding*, 12 Q. B. D. 4. It need not state that the declarant is a lodger. If no rent is due from the lodger, it need not say so expressly. If it does not say whether any rent is due, it must be read as stating that none is due; *Ex p. Harris*, 16 Q. B. D. 130.

Whether a person is or is not a lodger is a question of fact; *Ness* v. *Stephenson*, 9 Q. B. D. 245; depending on the circumstances of the case; *Bradley* v. *Baylis*, 8 Q. B. D. p. 219, *per* Jessel, M.R. He may be a lodger though he has the right to occupy a very considerable part of a house; *Phillips* v. *Henson*, 3 C. P. D. 26; or though his landlord does not, either by himself or his agent, sleep or reside in it; *Morton* v. *Palmer*, 51 L. J. Q. B. 7; or though he has a separate and uncontrolled power of ingress or egress; *Toms* v. *Luckett*, 5 C. B. 23, *per* Maule, J; *Ness* v. *Stephenson*, *supra*; but to be a lodger he must live and sleep on the premises, occupation merely for business purposes being insufficient; *Heawood* v. *Bone*, 13 Q. B. D. 179.

Ambassadors

4. The goods of Foreign Ambassadors or Ministers and their servants are protected by 7 Anne, c. 12, s. 3. The following cases show what persons are entitled to this privilege; *Triquet* v. *Bath*, 3 Burr. 1478; *Lockwood* v.

Coysgarne, Id. 1676; *Hopkins* v. *De Robeck*, 3 T. R. 79; *Novello* v. *Toogood*, 1 B. & C. 554; *Macartney* v. *Garbutt*, 24 Q. B. D. 368; *Re Cloete*, 65 L. T. 102. See also the notes to *Mostyn* v. *Fabrigas*, *post*, p. 630.

Railway rolling stock, &c.

5. Railway rolling stock, not being the tenant's, is protected, if properly marked, by 35 & 36 Vict. c. 50. The Gasworks Clauses Acts, 1847, s. 14, and 1871, s. 18, and the Waterworks Clauses Acts, 1847, s. 44, and 1863, s. 14, respectively provide for the protection of gas and water meters, fittings, etc. A gas stove let by a gas company for hire is a "gas fitting;" *Gaslight & Coke Co.* v. *Hardy*, 17 Q. B. D. 619. Electric lines, meters, etc., are protected by the Electric Lighting Act, 1882, s. 25.

Tenants in common under separate demises.

According to *Ex p. Parke*, 18 Eq. 381, where land is held by tenants in common under separate demises, a distress for the rent due from any one tenant can be made only upon his separate goods; and, hence, where such tenants are partners, and each of them owes rent, their partnership property cannot be seized, though their landlord be one and the same person.

SCOTT *v.* SHEPHERD.

EASTER—13 *GEO.* 3. *C. P.*

[REPORTED 2 W. BLACKSTONE, 892.]

Trespass and assault will lie for originally throwing a squib which, after having been thrown about in self-defence by other persons, at last put out the plaintiff's eye.

TRESPASS and assault (*a*) for throwing, casting and tossing a lighted squib at and against the plaintiff, and striking him therewith on the face, and so burning one of his eyes, that he lost the sight of it, whereby, &c. On not guilty pleaded, the cause came on to be tried before Nares, J., last summer assizes at Bridgwater, when the jury found a verdict for the plaintiff with 100*l.* damages, subject to the opinion of the court on this case:—On the evening of the fair-day at Milborne Port, 28th Oct., 1770, the defendant threw a *lighted squib*, made of gunpowder, &c., from the street into the market-house, which is a covered building supported by arches, and enclosed at one end, but open at the other and both the sides, where a large concourse of people were assembled; which lighted squib, so thrown by the defendant, fell upon the standing of one Yates, who sold gingerbread, &c. One Willis instantly, and to prevent injury to himself and the said wares of the said Yates, took up the said lighted squib from off the said standing, and then threw it *across* the said market-house when it fell upon another standing there of one Ryal, who sold the same sort of wares, who instantly, and to save his own goods from being injured, took up the said lighted squib from off the said standing, and then threw it to another part of the said market-house, and, in so throwing it, struck the plaintiff, then in the said market-house, in the face therewith, and, the combustible matter then bursting, put out one of the plaintiff's eyes. *Qu.* If this action be maintainable?

This case was argued last term by *Glyn*, for the plaintiff, and *Burland*, for the defendant: and this Term, the Court, being

(*a*) S. C. 3 Wils. 403.

divided in their judgment, delivered their opinions *seriatim*.

NARES, J., was of opinion that trespass would lie well in the present case. That the natural and probable consequence of the act done by the defendant was injury to somebody, and therefore the act was illegal at common law. And the throwing of squibs has, by statute W. 3 (*b*), been since made a nuisance. Being therefore unlawful, the defendant was liable to answer for the consequences, be the injury mediate or immediate. 21 Hen. 7, 28, is express that *malus animus* is not necessary to constitute a trespass. So, too, 1 Stra. 596; Hob. 134; T. Jones, 205; 6 Edw. 4, 7, 8; Fitzh. *Trespass*, 110. The principle I go upon is what is laid down in *Reynolds* v. *Clarke*, 1 Stra. 634, that, if the act in the first instance be unlawful, trespass will lie. Wherever, therefore, an act is unlawful at first, trespass will lie for the consequences of it. So, in 12 Hen. 4, trespass lay for stopping a sewer with earth, so as to overflow the plaintiff's land. In 26 Hen. 8, 8, for going upon the plaintiff's land to take the boughs off which had fallen thereon in lopping. See also Hardr. 60; Reg. 108, 95; 6 Ed. 4, 7, 8; 1 Ld. Raym. 272; Hob. 180; Cro. Jac. 122, 43; F. N. B. 202, 91, G. I do not think it necessary, to maintain trespass, that the defendant should personally touch the plaintiff; if he does it by a mean it is sufficient. *Qui facit per aliud facit per se*. He is the person who, in the present case, gave the mischievous faculty to the squib. That mischievous faculty remained in it till the explosion. No new power of doing mischief was communicated to it by Willis or Ryal. It is like the case of a mad ox turned loose in a crowd. The person who turns him loose is answerable in trespass for whatever mischief he may do. The intermediate acts of Willis and Ryal will not purge the original tort in the defendant. But he who does the first wrong is answerable for all the consequential damages. So held in the *King* v. *Huggins*, 2 Ld. Raym. 1574; *Parkhurst* v. *Foster*, 1 Ld. Raym. 480; *Rosewell* v. *Prior*, 12 Mod. 639. And it was declared by this court, in *Slater* v. *Baker*, M. 8 Geo. 3, 2 Wils. 359, that they would not look with eagle's eyes to see whether the evidence applies exactly or not to the case: but if the plaintiff has

(*b*) 9 & 10 W. 3, c. 7; repealed, 23 & 24 Vict. c. 139; see, now, 38 & 39 Vict. c. 17, s. 80.

(Nares, J.)

obtained a verdict for such damages as he deserves, they will establish it if possible.

Blackstone, J., was of opinion that an action of *trespass* did not lie for *Scott* against *Shepherd*, upon this case. He took the settled distinction to be, that where the injury is *immediate*, an action of *trespass* will lie; where it is only *consequential*, it must be an action on the *case*; *Reynolds* v. *Clarke*, Ld. Raym. 1401, Stra. 634; *Haward* v. *Bankes*, Burr. 1114; *Harker* v. *Birkbeck*, Burr. 1559. The *lawfulness* or *unlawfulness* of the original act is not the criterion; though something of that sort is put into Lord Raymond's mouth in 1 Stra. 635, where it can only mean, that, if the act then in question, of erecting a spout, has been in itself unlawful, trespass might have lain; but as it was a lawful act (upon the defendant's own ground), and the injury to the plaintiff only consequential, it must be an action on the case. But this cannot be the general rule; for it is held by the court in the same case, that, if I throw a log of timber into the highway (which is an unlawful act), and another man tumbles over, and is hurt, an action on the case only lies, it being a *consequential* damage; but, if in throwing it I hit another man, he may bring trespass, because it is an *immediate* wrong. Trespass may sometimes lie for the consequences of a lawful act. If in lopping my own trees a bough accidentally falls on my neighbour's ground, and I go thereon to fetch it, trespass lies. This is the case cited from 6 Edw. 4, 7. But then the entry is of itself an immediate wrong. And case will sometimes lie for the consequence of an unlawful act. If by false imprisonment I have a special damage, as if I forfeit my recognizance thereby, I shall have an action on the case; *per* Powel, J., 11 Mod. 180. Yet here the original act was unlawful, and in the nature of trespass. So that *lawful* or *unlawful* is quite out of the case; the solid distinction is between *direct* or *immediate* injuries on the one hand, and *mediate* or *consequential* on the other. And trespass never lay for the latter. If this be so, the only question will be whether the injury which the plaintiff suffered was *immediate* or *consequential* only; and I hold it to be the latter. The original act was, as against Yates, a trespass; not as against Ryal or Scott. The tortious act was complete

when the squib lay at rest upon Yates's stall. He, or any bystander, had, I allow, a right to protect themselves by removing the squib, but should have taken care to do it in such a manner as not to endamage others. But Shepherd, I think, is not answerable in an action of trespass and assault for the mischief done by the squib in the new motion impressed upon it, and the new direction given it, by either Willis or Ryal; who both were free agents, and acted upon their own judgment. This differs from the cases put of turning loose a wild beast or a madman. They are only instruments in the hand of the first agent. Nor is it like diverting the course of an enraged ox, or of a stone thrown, or an arrow glancing against a tree; because there the original motion, the *vis impressa*, is continued, though diverted. Here the instrument of mischief was at rest, till a new *impetus* and a new direction are given it, not once only, but by two successive rational agents. But it is said that the act is not complete, nor the squib at rest, till after it is spent or exploded. It certainly has a power of doing fresh mischief, and so has a stone that has been thrown against my windows, and now lies still. Yet, if any person gives that stone a new motion, and does farther mischief with it, trespass will not lie for that against the original thrower. No doubt but Yates may maintain trespass against Shepherd. And, according to the doctrine contended for, so may Ryal and Scott. Three actions for one single act; nay, it may be extended *in infinitum*. If a man tosses a football into the street, and, after being kicked about by one hundred people, it at last breaks a tradesman's window, shall we have *trespass* against the man who first produced it? Surely only against the man who gave it that mischievous direction. But it is said, if Scott has no action against Shepherd, against whom must he seek his remedy? I give no opinion whether *case* would lie against Shepherd for the *consequential* damage; though, as at present advised, I think, upon the circumstances, it would. But I think, in strictness of law, trespass would lie against Ryal, the immediate actor in this unhappy business. Both he and Willis have exceeded the bounds of self-defence, and not used sufficient circumspection in removing the danger from themselves. The throwing it across the market-house, instead of brushing it down, or throwing it out of the open sides

(BLACKSTONE, J.)

into the street, (if it was not meant to continue the sport, as it is called), was at least an unnecessary and incautious act. Not even menaces from others are sufficient to justify a trespass against a third person; much less a fear of danger to either his goods or his person; nothing but inevitable necessity (*c*); *Weaver* v. *Ward*, Hob. 134; *Dickenson* v. *Watson*, T. Jones, 205; *Gilbert* v. *Stone*, Al. 35, Styl. 72. So in the case put by Bryan, J., and assented to by Littleton and Cheke, C.J., and relied on in Raym. 467: "If a man assaults me, so that I cannot avoid him, and I lift up my staff to defend myself, and, in lifting it up, undesignedly hit another who is behind me, an action lies by that person against me; and yet I did a lawful act in endeavouring to defend myself." But none of these great lawyers ever thought that trespass would lie, by the person struck, against him who first assaulted the striker. The cases cited from the Register and Hardres are all of immediate acts, or the direct and inevitable effects of the defendant's immediate act. And I admit the defendant is answerable in trespass for all the direct and inevitable effects caused by his own immediate act. But what is his own immediate act? The throwing the squib to Yates's stall. Had Yates's goods been burnt, or his person injured, Shepherd must have been responsible in trespass. But he is not responsible for acts of other men. The subsequent throwing across the market-house by Willis is neither the act of Shepherd, nor the inevitable effect of it; much less the subsequent throwing by Ryal. *Slater* v. *Baker* (*d*) was, 1st, a motion for a new trial *after verdict*. In our case the verdict is suspended till the determination of the court. And although *after verdict* the court will not look with eagle's eyes to spy out a variance, yet when a question is put by the jury upon such a variance, and it is made the very point of the cause, the court will not wink against the light, and say that evidence, which at most is only applicable to an action on the case, will maintain an action of trespass. 2. It was an action on the case that was brought, and the court held the special case laid to be fully proved. So that the present question could not arise upon that action. 3. The same evidence that will maintain *trespass* may also frequently maintain *case*,

(*c*) See *Holmes* v. *Mather*, L. R. 10 Ex. 261. (*d*) 2 Wils. 359.

but not *e converso*. Every action of trespass with a "*per quod*" includes an action on the case. I may bring trespass for the immediate injury, and subjoin a "*per quod*" for the consequential damages;—or may bring case for the consequential damages, and pass over the immediate injury, as in the case from 11 Mod. 180, before cited. But if I bring trespass for an immediate injury, and prove at most only a consequential damage, judgment must be for the defendant; *Gates* v. *Bayley*, Tr. 6 Geo. 3, 2 Wils. 313. It is said by Lord Raymond, and very justly, in *Reynolds* v. *Clarke*, "we must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion." As I therefore think no immediate injury passed from the defendant to the plaintiff, (and without such immediate injury no action of trespass can be maintained), I am of opinion that in this action judgment ought to be for the defendant.

Gould, J., was of the same opinion with Nares, J., that this action was well maintainable. The whole difficulty lies in the form of the action, and not in the substance of the remedy. The line is very nice between *case* and *trespass* upon these occasions: I am persuaded there are many instances wherein both or either will lie. I agree with Brother Nares, that wherever a man does an unlawful act, he is answerable for all the consequences; and trespass will lie against him, if the consequences be in nature of trespass. But exclusive of this, I think the defendant may be considered in the same view as if he himself had personally thrown the squib in the plaintiff's face. The terror impressed upon Willis and Ryal excited self-defence, and deprived them of the power of recollection. What they did was therefore the inevitable consequence of the defendant s unlawful act. Had the squib been thrown into a coach full of company, the person throwing it out again would not have been answerable for the consequence (*c*). What Willis and Ryal did was by necessity, and the defendant imposed the necessity upon them. As to the case of the football, I think that if all the people assembled act in concert, they are all trespassers: 1, from the general mischievous intent; 2, from the obvious and natural consequences of such an act; which reasoning will equally apply to the case before us. And that actions of trespass will lie for

(*c*) See *Whalley* v. *L. & Y. R. Co.*, 13 Q. B. D. 131, 141.

(Gould, J.)
the mischievous consequen es of another's act, whether lawful or unlawful, appears from their being maintained for acts done in the plaintiff's own land; Hardr. 60; *Courtney* v. *Collett*, 1 Ld. Raym. 272. I shall not go over again the ground which Brother Nares has relied on and explained, but concur in his opinion, that this action is supported by the evidence.

De Grey, C.J.: This case is one of those wherein the line drawn by the law between actions on the case and actions of trespass is very nice and delicate. Trespass is an injury accompanied with force, for which an action of trespass *vi et armis* lies against the person from whom it is received. The question here is, whether the injury received by the plaintiff arises from the force of the original act of the defendant, or from a new force by a third person. I agree with my brother Blackstone as to the principles he has laid down, but not in his application of those principles to the present case. The real question certainly does not turn upon the lawfulness or unlawfulness of the original act; for actions of trespass will lie for legal acts when they become trespasses by accident; as in the cases cited of cutting thorns, lopping of a tree, shooting at a mark, defending oneself by a stick which strikes another behind, &c. They may also not lie for the consequences of illegal acts, as that o casting a log on the highway, &c. But the true question is, whether the injury is the direct and immediate act of the defendant, and I am of opinion that in this case it is. The throwing the squib was an act unlawful, and tending to affright the bystander. So far mischief was originally intended; not any particular mischief, but mischief indiscriminate and wanton. Whatever mischief therefore follows, he is the author of it: *Egreditur personam*, as the phrase is in criminal cases. And though criminal cases are no rule for civil ones, yet in trespass I think there is an analogy. Every one who does an unlawful act is considered as the doer of all that follows: if done with a deliberate intent the consequences may amount to murder; if incautiously, to manslaughter; Fost. 261. So, too, in 1 Ventr. 295, a person breaking a horse in Lincoln's Inn Fields hurt a man; held, that trespass lay: and, 2 Lev. 172, that it need not be laid *scienter*. I look upon all that was done subsequently to the

original throwing as a continuation of the first force and first act, which will continue till the squib was spent by bursting. And I think that any innocent person removing the danger from himself to another is justifiable; the blame lights upon the first thrower. The new direction and new force flow out of the first force, and are not a new trespass. The writ in the Register, 95 a, for trespass in maliciously cutting down a head of water, which thereupon flowed down to and overwhelmed another's pond, shows that the immediate act need not be instantaneous, but that a chain of effects connected together will be sufficient. It has been urged that the intervention of a free agent will make a difference: but I do not consider Willis and Ryal as free agents in the present case, but acting under a compulsory necessity for their own safety and self-preservation. On these reasons I concur with Brothers Gould and Nares that the present action is maintainable.

Postea for the plaintiff.

Grounds for omitting the note to *Scott* v. *Shepherd*.

The note to *Scott* v. *Shepherd*, which was almost wholly devoted to an examination of the distinction between the action of trespass and the action on the case, has been omitted since the 6th edition. The provisions of the C. L. P. Act, 1852, with its ample powers of Amendment, deprived the distinction itself of practical importance except as a test of liability in particular cases, and the changes in the system of pleading introduced by the Judicature Act, 1873, entirely destroyed whatever significance still attached to the different forms of action. The case itself, however, has been retained, as it contains in a short compass not only much that is of interest to those who study the gradual development of the law, but also much that is of practical value upon the question of direct and consequential damage.

Rail. Co. not liable in *Trespass* for injury to cattle straying on railway.

No doubt, as was pointed out in the note, the distinction above referred to was sometimes a test of substantial liability, as for example in *Sharrod* v. *L. & S. W. R. Co.*, 4 Exch. 580, which, for want of being properly understood, has met with some animadversion. There the company was sued in an action of trespass for an injury by a train to cattle which had strayed upon the railway, and was held

not to be liable in that form of action. A moment's reflection will suggest that, if the company could be so sued, all questions of duty to fence, careful driving, &c., upon which the liability of the company ought to depend, would be excluded by the nature of the inquiry called for by the plaintiff; and the case involves the substantive decision that a railway company is not liable for injury to cattle straying upon the line, unless it is alleged and proved that such injury was occasioned by its own or its servants' wrongful or negligent act.

Another instance in which the matters considered in the principal case may still be of practical importance is to be found in that class of cases where it becomes necessary to determine whether a cause of action, the damage resulting from which is not apparent at the time, be barred by the Statute of Limitations. See *Backhouse* v. *Bonomi*, 9 H. L. C. 509, overruling some important *dicta* in *Nicklin* v. *Williams*, 10 Exch. 259; and *Whitehouse* v. *Fellowes*, 10 C. B. N. S. 765; *Mitchell* v. *Darley Main Co.*, 14 Q. B. D. 125, 11 App. Cas. 127.

Statute of Limitations.

For a modern case in which the law as to defending one's own property against a common enemy to the damage of one's neighbour was considered, see *Whalley* v. *L. and Y. R. Co.*, 13 Q. B. D. 131.

In *Clark* v. *Chambers*, 3 Q. B. D. 327, the defendant unlawfully placed a dangerous obstruction on the carriageway of a road, which a third person removed on to the foot-path at the side of the road. The plaintiff, who was lawfully using the foot-path at night, was injured by the obstruction without any negligence on his part. The court held that the case came within the principle of *Scott* v. *Shepherd*, and that the defendant was liable.

MILLER *v.* RACE.

HILARY.—31 *GEO.* 3.

[REPORTED 1 BURR., 452.]

Property in a bank-note passes like that in cash, by delivery; and a party taking it *bonâ fide*, and for value, is entitled to retain it as against a former owner from whom it has been stolen.

It was an action of trover against the defendant, upon a bank-note, for the payment of 21*l.* 10*s.* to one William Finney, or bearer, on demand. The cause came on to be tried before Lord Mansfield, at the sittings in Trinity Term last at Guildhall, London: and upon the trial it appeared that William Finney, being possessed of this bank-note on the 11th Dec., 1756, sent it by the general post, under cover, directed to one Bernard Odenharty, at Chipping Norton, in Oxfordshire; that on the same night the mail was robbed, and the bank-note in question (amongst other notes) taken and carried away by the robber; that this bank-note, on the 12th Dec., came into the hands and possession of the plaintiff, for a full and valuable consideration, and in the usual course and way of his business, and without any notice or knowledge of the bank-note being taken out of the mail.

It was admitted and agreed that, in the common and known course of trade, bank-notes are paid by and received of the holder and possessor of them, as cash; and that, in the usual way of negotiating bank-notes, they pass from one person to another as cash, by delivery only, and without any further inquiry or evidence of title than what arises from the possession. It appeared that Mr. Finney, having notice of this robbery, on the 13th Dec., applied to the Bank of England "to stop the payment of this note;" which was ordered accordingly, upon Mr. Finney's entering into proper security "to indemnify the bank." Some little time after this the plaintiff applied to the

bank for the payment of this note; and, for that purpose, delivered the note to the defendant, who is a clerk in the bank; but the defendant refused either to pay the note or to re-deliver it to the plaintiff. Upon which this action was brought against the defendant.

The jury found a verdict for the plaintiff, and the sum of 21*l.* 10*s.* damages; subject, nevertheless, to the opinion of this court upon this question—"Whether, under the circumstances of this case, the plaintiff had a sufficient property in the bank-note to entitle him to recover in the present action."

Mr. *Williams* was beginning on behalf of the plaintiff. But Lord Mansfield said that, as the objection came from the side of the defendant, it was rather more proper for the defendant's counsel to state and urge their objection.

Sir *Richard Lloyd* for the defendant. The present action is brought, not for the money due upon the note, but for the note itself, the paper, the evidence of the debt. So that the right to the money is not the present question: the note is only an evidence of the money's being due to him as bearer. The note must either come to the plaintiff by assignment, or must be considered as if the bank gave a fresh, separate, and distinct note to each bearer. Now, the plaintiff can have no right by the assignment of a robber. And the bank cannot be considered as giving a new note to each bearer; though each bearer may be considered as having obtained from the bank a new promise. I do not say whether the bank can or cannot stop payment: that is another question. But the note is only an instrument of recovery. Now, this note, or the goods (as I may call it), was the property of Mr. Finney, who paid in the money: he is the real owner. It is like a medal which might entitle a man to payment of money, or to any other advantage. And it is by Finney's authority and request that Mr. Race detained it. It may be objected, that this note is to be considered as cash "in the usual course of trade." But the course of trade is not at all affected by the present question, about the right to the note. A different species of action must be brought for the note from what must be brought against the bank for the money. And this man has elected to bring trover for the note itself, as owner of the note; and not to bring his action against the bank for the

money. In which action of trover property cannot be proved in the plaintiff, for a special proprietor can have no right against the true owner.

The cases that may affect the present are 1 Salk. 126, M. 10 W. 3, *Anonymous*, *coram* Holt, C.J., at *nisi prius* at Guildhall. There Lord Holt held that the righ owner of a bank-bill, who lost it, might have trover against a stranger who found it; but not against the person to whom the finder transferred it for a valuable consideration, "by reason of the course of trade, which creates a property in the assignee or bearer." 1 Ld. Raym., 738, S.C., in which case the note was paid away in the course of trade: but this remains in the man's hands, and is not come into the course of trade. H. 12 W. 3, B. R., 1 Salk. 283, 284, *Ford* v. *Hopkins*, *per* Holt, C.J., at *nisi prius* at Guildhall: "If bank-notes, exchequer-notes, or million-lottery tickets, or the like, are stolen or lost, the owner has such an interest or property in them as to bring an action, into whatsoever hands they are come. Money or cash is not to be distinguished: but these notes or bills are distinguishable, and cannot be reckoned as cash; and they have distinct marks and numbers on them." Therefore the true owner may seize these notes wherever he finds them, if not passed away in the course of trade. 1 Strange, 505, H. 8 G. 1, in Middlesex, *coram* Pratt, C.J., *Armory* v. *Delamirie*: (*a*) a chimney-sweeper's boy found a jewel; it was ruled that the finder "has such a property as will enable him to keep it against all but the rightful owner; and, consequently, may maintain trover."

This note is just like any other piece of property, until passed away in the course of trade. And here the defendant acted as agent to the true owner.

Mr. *Williams*, *contra*, for the plaintiff. The holder of this bank-note, upon a valuable consideration, has a right to it, even against the true owner.

1st. The circulation of these notes vests a property in the holder who comes to the possession of it upon a valuable consideration. 2ndly. This is of vast consequence to trade and commerce: and they would be greatly incommoded if it were otherwise. 3rdly. This falls within the reason of a sale in

(*a*) See this case set forth at large, *ante*, p. 343.

(Argument for plaintiff.)

market-overt; and ought to be determined upon the same principle.

First—He put several cases where the usage, course, and convenience of trade made the law, and sometimes even against an act of parliament; 3 Keb. 444, *Stanley* v. *Ayles*, *per* Hale, C.J., at Guildhall; 2 Strange, 1000, *Lumley* v. *Palmer*, where a parol acceptance of a bill of exchange was holden sufficient against the acceptor (*b*); 1 Salk. 23.

Secondly—This paper credit has been always, and with great reason, favoured and encouraged; 2 Strange, 946, *Jenys* v. *Fawler*. The usage of these notes is, "that they pass by delivery only; and are considered as current cash; and the possession always carries with it the property." 1 Salk. 126, pl. 5, is in point. A particular mischief is rather to be permitted than a general inconvenience incurred. And Mr. Finney, who was robbed of this note, was guilty of some laches in not preventing it. Upon Sir Richard Lloyd's argument, a holder of a note might suffer the loss of it for want of title against a true owner, even if there was a chasm in the transfers of it through one only out of five hundred hands.

Thirdly—This is to be considered upon the same foot as a sale in market-overt. 2 Inst. 713: "A sale in market-overt binds those that had a right." But it is objected by Sir Richard, "that there is a substantial difference between a right to the note, and a right to the money." But I say the right to the money will attract to it a right to the paper. Our right is not by assignment, but by law, by the usage and custom of trade. I do not contend that the robber, or even the finder of a note, has a right to the note; but, after circulation, the holder upon a valuable consideration has a right. We have a property in this note; and have recovered the value against the withholder of it. It is not material what action we could have brought against the bank.

Then he answered Sir Richard Lloyd's cases; and agreed that the true owner might pursue his property, where it came into the hands of another without a valuable consideration or not in

(*b*) See now the Bills of Exchange Act, 1882, s. 17, subs. 2, by which a parol acceptance of a bill of exchange is rendered insufficient.

the course of trade: which is all that Lord Holt said in 1 Salk. 284. As to 1 Strange, 505, he agreed that the finder has the property against all but the rightful owner: not against him.

Sir *Richard Lloyd*, in reply. I agree that the holder of the note has a special property; but it does not follow that he can maintain trover for it against the true owner. This is not only without, but against, the consent of the owner. Supposing this note to be a sort of mercantile cash; yet it has an ear-mark, by which it may be distinguished; therefore trover will lie for it. And so is the case of *Ford* v. *Hopkins*. And you may recover a thing stolen from a merchant, as well as a thing stolen from another man. And this note is a mere piece of paper; it may be as well stopped as any other sort of mercantile cash (as, for instance, a policy which has been stolen). And this has not been passed away in trade; but remains in the hands of the true owner. And therefore it does not signify in what manner they are passed away, when they are passed away; for this was not passed away. Here, the true owner, or his servant (which is the same thing), detains it. And surely robbery does not divest the property. This is not like goods sold in market-overt: nor does it pass in the way of a market-overt: nor is it within the reason of a market-overt. Suppose it was a watch stolen: the owner may seize it, though he finds it in a market-overt, before it is sold there. But there is no market-overt for bank-notes. I deny the holder's (merely as holder) having a right to the note, against the true owner: and I deny that the possession gives a right to the note.

Upon this argument on Friday last, Lord Mansfield then said, that Sir Richard Lloyd had argued it so ingeniously, that (though he had no doubt about the matter) it might be proper to look into the cases he had cited, in order to give a proper answer to them: and therefore the court deferred giving their opinion to this day. But at the same time, Lord Mansfield said, he would not wish to have it understood in the City that the court had any doubt about the point.

Lord Mansfield now delivered the resolution of the court.

After stating the case at large, he declared that at the trial he had no sort of doubt but that this action was well brought, and would lie against the defendant in the present case, upon the

(Judgment.)

general course of business, and from the consequences to trade and commerce: which would be much incommoded by a contrary determination.

It has been very ingeniously argued by Sir Richard Lloyd, for the defendant. But the whole fallacy of the argument turns upon comparing bank-notes to what they do not resemble, and what they ought not to be compared to, *viz.*, to goods, or to securities, or documents for debts. Now, they are not goods, nor securities, nor documents for debts, nor are so esteemed: but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money, to all intents and purposes. They are as much money as guineas themselves are, or any other current coin, that is used in common payments, as money or cash. They pass by a will, which bequeaths all the testator's money or cash; and are never considered as securities for money, but as money itself. Upon Lord Ailesbury's will (*c*), 900*l.* in bank-notes was considered as cash. On payment of them, whenever a receipt is required, the receipts are always given as for money, not as for securities or notes. So, on bankruptcies, they cannot be followed as identical and distinguishable from money: but are always considered as money or cash.

'Tis pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench; and mistake their meaning. It has been quaintly said, "that the reason why money cannot be followed is, because it has no ear-mark;" but this is not true. *The true reason is, upon account of the currency of it: it cannot be recovered after it has passed in currency* (*d*). So, in case of money stolen, the true owner cannot recover it, after it has been paid away fairly and honestly upon a valuable and *bonâ fide* consideration: but before money has passed in currency, *an action may be brought for the money itself.* There was a case in 1 G. 1, at the sittings, *Thomas* v. *Whip*, before Lord Macclesfield; which was an action upon *assumpsit*, by an administrator against the defendant, for money had and received

(*c*) *Popham* v. *Bathurst*, in Chancery, 5 Nov. 1718, Amb. 68.

(*d*) See *Taylor* v. *Plumer*, 3 M. & S. 562, 571; *Foster* v. *Green*, 7 H. & N. 881; *Re Hallett's Estate*, 13 Ch. D. 696, *per* Jessel, M.R.; see also *post*, p. 468.

to his use. The defendant was nurse to the intestate during his sickness; and being alone, conveyed away the money. And Lord Macclesfield held that the action lay. Now, this must be esteemed a finding at least. Apply this to a case of a bank-note. An action may lie against the finder, it is true; (and it is not at all denied); but not after it has been paid away in currency. And this point has been determined even in the infancy of bank-notes; for 1 Salk. 126, M. 10 W. 3, at *nisi prius*, is in point. And Lord Holt there says, that it is "by reason of the course of trade; which creates a property in the assignee or bearer." (And "the bearer" is a more proper expression than "assignee.")

Here an innkeeper took it, *bonâ fide*, in his business, from a person who made the appearance of a gentleman. Here is no pretence or suspicion of collusion with the robber: for this matter was strictly inquired and examined into at the trial; and is so stated in the case, "that he took it for a full and valuable consideration, in the usual course of business." Indeed, if there had been any collusion, or any circumstances of unfair dealing, the case had been much otherwise. If it had been a note for 1,000*l.* it might have been suspicious: but this was a small note for 21*l.* 10*s.* only: and money given in exchange for it.

Another case cited was a loose note in 1 Ld. Raym. 738, ruled by Lord Holt at Guildhall, in 1698; which proves nothing for the defendant's side of the question: but it is exactly agreeable to what is laid down by Lord Holt in the case I have just mentioned. The action did not lie against the assignee of the bank-bill; because he had it for valuable consideration. In that case he had it from the person who found it; but the action did not lie against him, because he took it in the course of currency: and therefore it could not be followed into his hands. It never shall be followed into the hands of a person who *bonâ fide* took it in the course of currency, and in the way of his business.

The case of *Ford* v. *Hopkins* was also cited: which was in Hil. 12 W. 3, *coram* Holt, C.J., at *nisi prius*, at Guildhall; and was an action of trover for million-lottery tickets. But this must be a very incorrect report of that case: it is impossible that it can be a true representation of what Lord Holt said. It represents him as speaking of bank-notes, exchequer-notes, and million-lottery tickets, as like to each other. Now, no two things

(Judgment.)

can be more unlike to each other than a lottery-ticket and a bank-note. Lottery-tickets are identical and specific: specific actions lie for them. They may prove extremely unequal in value: one may be a prize; another a blank. Land is not more specific than lottery-tickets are. It is there said, "that the delivery of the plaintiff's tickets to the defendant, as that case was, was no change of property." And most clearly it was no change of the property: so far the case is right. But it is here urged as a proof "that the true owner may follow a stolen bank-note into whose hands soever it shall come." Now, the whole of that case turns upon the throwing in bank-notes, as being like to lottery-tickets. But Lord Holt could never say, "that an action would lie against the person who, for a valuable consideration, had received a bank-note which had been stolen or lost, and *bonâ fide* paid to him;" even though the action was brought by the true owner; because he had determined otherwise but two years before; and because bank-notes are not like lottery-tickets, but money. The person who took down this case certainly misunderstood Lord Holt, or mistook his reasons. For this reasoning would prove (if it was true, as the reporter represents it), that if a man paid to a goldsmith 500*l.* in bank-notes, the goldsmith could never pay them away.

A bank-note is constantly and universally, both at home and abroad, treated as money, as cash; and paid and received as cash; and it is necessary, for the purposes of commerce, that their currency should be established and secured. There was a case in the Court of Chancery, (*c*) on some of Mr. Child's notes, payable to the person to whom they were given, or bearer. The notes had been lost or destroyed many years. Mr. Child was ready to pay them to the widow and administratrix of the person to whom they were made payable, upon her giving bond, with two responsible sureties (as is the custom in such cases), to indemnify him against the bearer, if the notes should ever be demanded. The administratrix brought a bill, which was dismissed, because she either could not, or would not, give the security required. No dispute ought to be made with the bearer

(*c*) *Walmsley* v. *Child*, 11 Dec., 1749 c. 125, s. 87; 45 & 46 Vict. c. 61, s. 70. 1 Ves. Sen. 341. See 17 & 18 Vict.

of a cash note; in regard to commerce, and for the sake of the credit of these notes; though it may be both reasonable and customary to stay the payment, till inquiry can be made whether the bearer of the note came by it fairly or not.

Lord MANSFIELD declared that the court were all of the same opinion for the plaintiff; and that Mr. Justice Wilmot concurred.

Rule—that the *postea* be delivered to the plaintiff.

General rule as to title to chattels personal.

THE general rule of the law of England is, that no man can acquire a title to a chattel personal from any one who has himself no title to it, except only by sale in market-overt; *Peer* v. *Humphrey*, 2 A. & E. 495; see Sale of Goods Act, 1893, ss. 21, 22.

Exception in case of negotiable instruments.

The case of *Miller* v. *Race*, however, established an exception in the case of negotiable instruments, the property in which will pass, like that in coin, along with the possession, when they have been put into that state in which, according to the usage and custom of trade, they are transferred from one man to another by delivery. This was again determined in *Grant* v. *Vaughan*, 3 Burr. 1516, in the case of a draft by a merchant on his banker; and in *Gorgier* v. *Mieville*, 3 B. & C. 45, in the case of a bond, by which the King of Prussia declared himself and his successors bound *to every person who should for the time being be the holder of the bond*, as it was proved that "bonds of this description were sold in the market, and passed from hand to hand daily, like exchequer bills, at a variable price."

Bills of lading.
Dock warrants.
Promissory notes.
Exchequer bills.
Iron scrip notes.
Iron warrants.
Post-office orders.

In *A.-G.* v. *Bouwens*, 4 M. & W. 171, the forms of several foreign securities accustomably transferable like cash in this country will be found. See, as to bills of lading, *Lickbarrow* v. *Mason*, *post*, p. 674; as to dock warrants, *Zwinger* v. *Samuda*, 7 Taunt. 265, *Lucas* v. *Dorrein*, Id. 278, *Johnson* v. *Crédit Lyonnais*, 3 C. P. D. 32; as to a promissory note with coupons, *Maclae* v. *Sutherland*, 3 E. & B. 1; as to exchequer bills, *Brandao* v. *Barnett*, 1 M. & Gr. 909, 6 Id. 630, 12 Cl. & F. 787; as to iron scrip notes, *Dixon* v. *Borill*, 3 Macq. 1; as to iron warrants, *Merchant Bank* v. *Phœnix Co.*, 5 Ch. D. 205 (*post*, p. 542); as to post-office orders, *Fine Art Soc.* v. *Union Bank*, 17 Q. B. D. 705.

A negotiable instrument being clearly transferable by any

What are negotiable instruments.

person holding it, so as by delivery thereof to give a good title "to any person honestly acquiring it," (*per* Abbott, C.J., 3 B. & C. 47), the next question is, what instruments may with propriety be termed negotiable. And to this it may be answered, that, whenever an instrument is such that the *legal* right to the property secured thereby passes from one man to another by the delivery thereof, it is, properly speaking, a negotiable instrument, and the title to it will vest in any person taking it *bonâ fide*, and for value, whatever may be the defects in the title of the person transferring it to him. An instrument is called negotiable when the *legal* right to the property secured by it passes by its delivery, because, although an instrument may be saleable in the market, and treated in many respects like cash, yet, if by a transfer of it nothing pass but a right to sue on it in the name of the transferor or original party to it, such an instrument is not properly speaking negotiable.

India bonds.

Thus in *Glynn* v. *Baker*, 13 East, 509, India bonds were held not to be negotiable instruments (there being then no act equivalent to 51 G. 3, c. 64, s. 4, which afterwards made them negotiable). In that case the defendant lodged his India bonds with a banker, who improperly sold them, and on his demand delivered to him bonds of the plaintiff to the same amount, and payable to the same obligee; the defendant, not knowing that these bonds were not his own, sold them, and received the proceeds; it was held that the plaintiff might recover the amount from him in an action for money had and received; see *Williamson* v. *Thompson*, 16 Ves. 443. In *Gorgier* v. *Mieville*, 3 B. & C. 45, this case was cited as an authority against the negotiability of the King of Prussia's bond; but Abbott, C.J., held that the case was distinguishable from *Glynn* v. *Baker*, saying: "There it did not appear that India bonds were negotiable, and *no other person could have sued on them but the obligee*. Here, on the contrary, the bond is *payable to the bearer*, and it was proved at the trial that bonds of this description were negotiated like exchequer bills."

King of Prussia's bond.

Rule by which negotiability determined.

It may therefore be laid down as a safe rule that, where an instrument is by the custom of trade transferable in this country, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, there it is entitled to the name of a *negotiable instrument*, and the property in it passes to a *bonâ fide* transferee for value, though the transfer may not have taken place in market-

overt. But that if either of the above requisites be wanting, *i.e.*, if it be either not accustomably transferable, or, though it be accustomably transferable, yet, if its nature be such as to render it incapable of being put in suit by the party holding it *pro tempore*, it is not a *negotiable instrument*, nor (apart from the question of estoppel) will delivery of it pass the property of it to a vendee, however *bonâ fide*, if the transferor himself have not a good title to it, and the transfer be made out of *market-overt*. This rule was cited with approval in *Crouch* v. *Crédit Foncier*, L. R. 8 Q. B. 374, 384; see also *Goodwin* v. *Robarts*, 1 App. Cas. 476.

Bills and notes negotiable.

To illustrate these propositions, bills and notes payable to bearer, or payable to order and indorsed in blank, are beyond all doubt *negotiable instruments* in the full sense of those words; *Solomons* v. *Bank of England*, 13 East, 135; *Grant* v. *Vaughan*, 3 Burr. 1416; *Collins* v. *Martin*, 3 B. & P. 649; *Peacock* v. *Rhodes*, 2 Dougl. 636; *Wookey* v. *Pole*, 4 B. & Ald. 1; *Theidemann* v. *Goldschmidt*, 1 De G. F. & J. 4; for they are both accustomably transferable like cash, and are also capable of being sued on by the holder *pro tempore*. But if such a bill be specially indorsed, its negotiability, in the full sense of the word, is at an end, for it becomes thereby incapable of being sued upon by any one except the special indorsee, until indorsed away by him; *Sigourney* v. *Lloyd*, 8 B. & C. 622, 5 Bing. 525; *Archer* v. *Bank of England*, 2 Dougl. 639; *Treuttel* v. *Barandon*, 8 Taunt. 100. The Bills of Exchange Act, 1882, s. 31 (4), does not make a note, payable to order, transferred without indorsement, a negotiable instrument; *Good* v. *Walker*, 61 L. J. Q. B. 736.

Effect of special indorsement.

Restrictive indorsement.

The last cited cases deal with what are called restrictive indorsements, and the Bills of Exchange Act, 1882, provides that "an indorsement is restrictive which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof" (s. 35).

Crossed cheques.

The custom of "crossing" cheques for the purpose of making them payable only through a banker, was recognised in the Bills of Exchange Act, 1882 (ss. 76—82), which repealed the previous acts upon the subject. Before these acts it was held that a cheque was negotiable though "crossed," so that a *bonâ fide* holder for value, though not a banker, could make a good title to a crossed cheque; *Bellamy* v. *Marjoribanks*, 7 Exch. 389; *Carlon* v. *Ireland*,

5 E. & B. 765. The 19 & 20 Vict. c. 25, and 21 & 22 Vict. c. 79, did not alter the law on this point; *Smith* v. *Union Bank*, 1 Q. B. D. 31; see also *Matthiessen* v. *London and County Bank*, 5 C. P. D. 7, decided upon 39 & 40 Vict. c. 81; nor, it seems, does the Act of 1882; see *National Bank* v. *Silke*, (1891) 1 Q. B. 435. The Bills of Exchange Act, 1882, s. 8, provides that a bill is not negotiable which "contains words prohibiting transfer or indicating an intention that it should not be transferable." In *National Bank* v. *Silke*, *supra*, Lindley, L.J., doubted whether s. 8 applies to cheques at all; and Lindley and Fry, L.JJ., both thought that a bill payable to order or bearer cannot be made not negotiable; and it was held that, at any rate, to make it so, the words prohibiting transfer must be clear and unambiguous; see *Meyer* v. *Decroix*, (1891) A. C. 520, a case of a bill of exchange. By s. 81, a person who takes a cheque which is "crossed" and bears the words "not negotiable," does not get, and cannot give, a better title than the person from whom he took it had; see *National Bank* v. *Silke*, *supra*.

Words prohibiting transfer.

"Not negotiable."

Statutory protection to bankers in respect of cheques.

16 & 17 Vict. c. 59, s. 19.

For the protection of bankers a special negotiability, so to speak, has been given by statute to cheques when dealt with by them. By 16 & 17 Vict. c. 59, s. 19, a banker is authorised to pay a draft or order drawn upon him payable to order on demand which purports to be indorsed by the payee, and need not prove that that or any subsequent indorsement was made by or with the authority of the payee named by the drawer or by any indorser. This section protects only the banker; *Ogden* v. *Benas*, L. R. 9 C. P. 513; *Halifax Union* v. *Wheelwright*, L. R. 10 Ex. 191; and, though still unrepealed, is reproduced by the Bills of Exchange Act, 1882, s. 60. By s. 82 of the latter Act, a banker, who "in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself," does not incur any liability to the true owner of the cheque "by reason only of having received such payment," if the customer has no title or a defective title to the cheque; see *Matthiessen* v. *London and County Bank*, 5 C. P. D. 7, decided on the earlier Act, 39 & 40 Vict. c. 81; and *Bissell* v. *Fox*, 51 L. T. 663, 53 Id. 193; *Kleinwort* v. *Comptoir National*, (1894) 2 Q. B. 157; *Mathews* v. *Williams*, 63 L. J. Q. B. 494.

45 & 46 Vict. c. 61, ss. 60, 82.

Usage cannot make it that

In *Glynn* v. *Baker*, 13 East, 509, the court appears to have thought that, even had the jury expressly found the

India bond to be negotiable, and to pass accustomably by delivery, it would not have been so in contemplation of law. "If it be meant," said Lord Ellenborough, "to liken this to the case of bankers' notes, in *Miller* v. *Race*, as having acquired in fact a negotiable quality, and being received as cash, or to ordnance debentures, notes, bills, and other securities of the same description, which are circulated daily in the money market, the fact of such negotiability should be stated. But supposing it were so stated, how could a right of action be made to pass on these securities by such a practice to the holder of them, where by law no such right passes? There must always be that impediment existing to the legal negotiability of such instruments which distinguishes them from bills of exchange, and securities of that nature, in which the *legal* interest passes, under the law merchant, by indorsement and delivery to another." It is submitted, therefore, that if the right of suing on an instrument should not appear *upon the face of it* to be extended beyond one particular individual, no *usage of trade*, however extensive, would be allowed by the courts (at least in the case of an English instrument) to confer upon it the character and incidents of negotiability.

ments, on face of which the right to sue is limited, negotiable.

This appears to have been accepted as a correct statement of the law in *Partridge* v. *Bank of England*, 9 Q. B. 396, 425. The question there was whether a dividend warrant which merely directed payment to a particular individual was capable of being a negotiable instrument. The plaintiff proved "an usage of bankers and merchants used for sixty years, according to which such warrants passed by delivery without indorsement, and the *bonâ fide* holder was entitled to receive the amount from the bank," and that such warrants were "taken as cash and passed from hand to hand as freely as bank notes;" but the Exch. Cham., treating this as "rather a practice of trade than a custom properly so called," held that "such a practice cannot alter the law, by which such an instrument does not confer any right of action on an assignee." In *London & County Bank* v. *London & River Plate Bank*, 20 Q. B. D. 232, Manisty, J., held that share certificates of a foreign railway company, which were "on the face of them intended only to pass by transfer and not by delivery," were not negotiable instruments, although here "both on the Stock Exchange and by bankers they were treated as negotiable instruments." In the C. A., 21 Q. B. D.

535, where this judgment was affirmed, this point was not disputed. It was assumed to be correct in *Colonial Bank* v. *Cady*, 15 App. Cas. 267. A bill, cheque, or note, however, is negotiable, although made payable to a particular person, unless it contains words prohibiting transfer; Bills of Exchange Act, 1882, s. 8.

Apparent exception in *Renteria* v. *Ruding*, explained.

It is right to mention that *Renteria* v. *Ruding*, 1 M. & M. 511, seems at first sight to militate against the above doctrine. There the plaintiff signed a bill of lading for goods shipped from Spain, to be delivered in London, to O'Brien, on being paid freight. There was no mention of assigns in the bill of lading. The defendants, having received the goods, and being sued for freight, contended that, the bill not being assignable by indorsement, they were not liable. It was then proved that bills of lading from Spain were frequently in the same form, and were nevertheless treated as assignable by indorsement. Lord Tenterden cited from his Treatise on Shipping (5th ed., p. 286), "If a person accept anything which he knows to be subject to a duty or charge, it is natural to conclude he means to take the duty or charge on himself, and the law may very well imply a promise to perform what he so takes upon himself," and said, "This seems to me to be the correct principle, and the omission of the words *or their assigns* makes no difference."

Now, if *Renteria* v. *Ruding* be taken to prove that a bill of lading omitting the words *assigns* is nevertheless assignable, so as to pass the legal right in the goods to the indorsee, it certainly militates against the above doctrine, and seems also contrary to the opinion of Ashurst, J., in *Lickbarrow* v. *Mason*, 2 T. R. 71, who there said: "The assignee of a bill of lading trusts to the indorsement; the instrument is in its nature transferable in this respect; therefore, it is similar to the case of a bill of exchange. If the consignor had intended to restrain the negotiability of it, he should have confined the delivery of the goods to the vendee only, but he has made it an indorsable instrument." See also *Henderson* v. *Comptoir d'Escompte*, L. R. 5 P. C. 253, 260.

But if *Renteria* v. *Ruding* be taken only to show that the delivery of the goods to the defendants was a sufficient consideration to support a promise by them to pay the freight, and that such a promise might be implied from their knowledge that the goods were subject to that charge, the case is distinguishable, and is similar to that of *Williams* v. *Leper*,

3 Burr. 1886, where a broker being about to sell the goods of A. for the benefit of his creditors, A.'s landlord came to distrain them; upon which the broker promised to pay the rent, if the landlord would permit him to retain and sell the goods; and the consideration was held sufficient, and the promise binding. In *Williams* v. *Leper*, therefore, the landlord's relinquishment of his lien on the goods for rent was sufficient consideration to support a promise by a party not the owner of the goods, who obtained possession of them by the landlord's relinquishment of his lien, to pay the charge upon them for rent: and *pari ratione*, in *Renteria* v. *Ruding*, the master's relinquishment of his lien on the goods for freight was sufficient consideration to support a promise by the defendants, who obtained possession of the goods by the master's relinquishment of his lien, to pay the charge upon them for freight; and the passage of his book cited by Lord Tenterden shows that such a promise may be implied; and though *Scaife* v. *Tobin*, 3 B. & Ad. 523 (which, however, is subsequent to *Renteria* v. *Ruding*), decides that a person who is not the owner of goods does not by the mere receipt of them, with the knowledge that they are subject to a charge, bind himself to pay it; yet, it is there laid down by Lord Tenterden, that if such a person receive the goods in pursuance of a bill of lading making the payment of such charge a condition precedent to the delivery of the goods, or if he have notice from the master that if he take the goods he must take them subject to the charge, he will be liable.

Effect of receipt of goods in pursuance of a bill of lading.

Now, in *Renteria* v. *Ruding*, the defendants claimed to receive the goods by virtue of the bill of lading, which made payment of freight a condition precedent to the delivery; and though they might not be, properly speaking, indorsees of the bill, still as they exhibited it, and claimed to receive the goods in pursuance of it, they might fairly be taken to have assented to its terms, so that a promise to pay the charge therein imposed might be implied; see the note to *Lickbarrow* v. *Mason*, *post*.

Instrument must be accustomably transferable in this country like cash.

Although an instrument may contain nothing on the face of it inconsistent with the character of negotiability, still, if it be not accustomably transferable in this country in the same manner as cash, it will not be looked upon as a *negotiable instrument*. Thus in *Lang* v. *Smyth*, 7 Bing. 284, a question arose whether instruments called *bordereaux* and *coupons*, which purported to entitle the bearer to portions of

the public debt of the kingdom of Naples, were negotiable instruments; and the jury having found that they did not usually pass in England from hand to hand like money, that finding was held conclusive to show that they were not negotiable instruments.

Whether it is so transferable a question for the jury.

Whether an instrument which has never been solemnly recognised by the law as negotiable be accustomably transferable by delivery, or not, is a question which must in each case be left to the determination of a jury. It was submitted to the jury in *Lang* v. *Smyth, supra,* and held to have been rightly submitted.

Foreign bonds and scrip.

Bonds of foreign governments, or companies, or scrip promising to give bonds upon payment of all instalments, which are by the custom of bankers, money-dealers, and stockbrokers, transferable in this country as negotiable instruments by delivery, are negotiable instruments in this country to which a *bonâ fide* holder for value obtains a good title independent of the title of the person from whom he took; *Gorgier* v. *Mieville,* 3 B. & C. 45; *Symons* v. *Mulkern,* 30 W. R. 875; *A.-G.* v. *Bouwens,* 4 M. & W. 171; *Crouch* v. *Crédit Foncier,* L. R. 8 Q. B. 374; *Goodwin* v. *Robarts,* 1 App. Cas. 476; *Rumball* v. *Metropolitan Bank,* 2 Q. B. D. 194; *London J. S. Bank* v. *Simmons,* (1892) A. C. 201; *London J. S. Bank* v. *Bentinck,* (1893) 2 Ch. 120. It is immaterial that they are secured by a mortgage of property to trustees; *Venables* v. *Barings,* (1892) 3 Ch. 527.

It must be shown that such instruments are negotiable in this country, and it is not sufficient to show that by the law or custom of the foreign country they are negotiable; *Picker* v. *London & County Bank,* 18 Q. B. D. 515; "otherwise, if it were proved that cowries are part of the currency of Africa, they must be treated as money in this country, though there were no custom here to treat them as money;" Id., *per* Fry, L.J.

Semble, that a foreign instrument is not negotiable here unless negotiable where made.

It seems to have been thought in *Lang* v. *Smyth, supra,* that if a question were to arise respecting the negotiability of a foreign instrument, and it were shown not to be negotiable in the country where it was made, the fact of its accustomably passing like cash in this country would not make it negotiable. "These," said Tindal, C.J., "are ⌜not English instruments, recognised by the law of England, but Neapolitan securities brought to the notice of the court for the first time, and as judges we are not allowed to form an opinion on them unless supplied with evidence as to the law

of the country whence they come. Judges have only taken upon themselves to decide the nature of instruments recognised by the law of this country, as bills of exchange, which pass current by the law merchant, dividend warrants, or exchequer bills, the transfer of which is founded on statutes, which a judge in an English court is bound to know. It has been urged that in *Gorgier* v. *Mieville*, the case of the Prussian bonds, no evidence was given of the foreign law. But evidence was given, that, by the usage of merchants in this country, those bonds passed from hand to hand, which usage could have scarcely existed unless they were negotiable in Prussia, so that evidence as to the law of Prussia was rendered unnecessary. And the question is not so much what is the usage in the country whence the instrument comes, as in the country where it has passed."

The rule to be collected from this seems to be that a foreign instrument is not negotiable here, unless negotiable where it was made; but that evidence that it is accustomably transferable from hand to hand in this country is *primâ facie* evidence that it also is so abroad. "If it were necessary to say what would be *primâ facie* evidence of the negotiability of an instrument in this or in a foreign country, I should be disposed to say that evidence that an instrument is by the custom of trade negotiable here would be strong evidence that it is negotiable in the country of its issue;" *per* Lord Esher, *Picker* v. *London & County Bank*, 18 Q. B. D. 515, 518.

Semble, that an English instrument cannot be negotiable except by the ancient law merchant or by statute.

It has been decided by high authority (though the decision has, it will be seen, been shaken) that an English instrument, though it contain nothing on the face of it inconsistent with the character of negotiability, and though it be found by the jury to be at the present day accustomably transferable like cash, still cannot, either by usage or by express stipulation of the parties, be made to have the quality of *negotiability*: that this quality it can have only by the ancient law merchant as distinguished from a mere custom of trade, as in the case of bills of exchange, or by statute, as in the case of East India bonds.

Crouch v. *Crédit Foncier*

Such seems to be the effect of the judgment in *Crouch* v. *Crédit Foncier*, L. R. 8 Q. B. 374. There a company issued an instrument under their seal, called on the face of it a debenture, whereby the company promised, subject to conditions which deprived it of the character of a promissory

Crouch v. *Crédit Foncier.*

note, to pay the bearer 100*l.* and interest. This was issued to one M., from whom it was stolen, and it was afterwards assigned to the plaintiff, who received it *bonâ fide* for value without notice of the theft. The company, on M.'s indemnity, declined to pay the debenture, whereupon the plaintiff brought this action. At the trial it was tacitly admitted that as a fact similar documents are in practice treated as negotiable, and a verdict was found for the plaintiff; but a rule obtained subsequently to enter the verdict for the defendants was made absolute.

The court were sedulous to confine their judgment to the case before them of an English instrument made by an English company in England. They held that the form of the instrument showed that the company contracted with M. to pay the bearer; but, while admitting that the company were competent to make any stipulation with M. that would affect only their rights and his, the court said: "There is no decision or authority that it is competent to a party to create by his own act a transferable right of action on a contract. It is enough to refer to *Dixon* v. *Bovill*, 3 Macq. 1, and *Thompson* v. *Dominy*, 14 M. & W. 403, as authorities that he cannot, irrespective of custom, so create it. We have only further to consider whether the custom or practice of trade to treat such instruments as negotiable makes any difference. We must take it as admitted (whether truly or not, we know not) that such a custom has prevailed of late years; but as the instruments themselves are only of recent introduction, it can be no part of the law merchant. Incidents which the parties are competent by express stipulation to introduce into their contracts may be annexed by custom, however recent, provided that it be general, on the ground that they are tacitly incorporated in the contract. If the wording of an instrument is such as to exclude this tacit incorporation, no usage can annex the incident. But where the incident is of such a nature that the parties are not themselves competent to introduce it by express stipulation, no such incident can be annexed by the tacit stipulation arising from usage. It may be so annexed by the law merchant, which forms part of the law, and of which the courts take notice. Nor if the ancient law annexes the incident can any modern usage take it away." After citing *Edie* v. *East India Co.*, 2 Burr. 1216, and *Partridge* v. *Bank of England*, 9 Q. B. 396, for the above propositions, the court concluded: "We have already intimated our

opinion that it is beyond the competency of the parties to a contract by express words to confer on the assignee of that contract a right to sue in his own name. And we also think it beyond the competency of the parties by express stipulation to deprive the assignee of either the contract or the property represented by it of his right to take back his property from any one to whom a thief may have transferred it even though that transferee took it *bonâ fide* and for value. As these stipulations, if express, would have been ineffectual, the tacit stipulations implied from custom must be equally ineffectual." See also *McLynch* v. *Ekins*, 13 East, 515 note; *Daly* v. *Thompson*, 10 M. & W. 309, 319, *per* Parke, B.

How far qualified by *Goodwin* v. *Robarts*.

In *Goodwin* v. *Robarts*, L. R. 10 Ex. 356, however, Cockburn, C.J., in delivering the judgment of the Exch. Cham., said: "We think the judgment in *Crouch* v. *Crédit Foncier* may well be supported on the ground that in that case there was substantially no proof whatever of general usage. We cannot concur in thinking that, if proof of general usage had been established, it would have been a sufficient ground for refusing to give effect to it that it did not form part of what is called 'the ancient law merchant.'" With regard to the lack of proof of general usage in *Crouch* v. *Crédit Foncier*, it may be observed that the usage, though not proved, was there taken as admitted, which seems to amount to the same thing. Further, as the Q. B. there carefully confined their judgment to the case before them, which was one of an English instrument made by an English company in England, whereas the instrument in *Goodwin* v. *Robarts* was scrip of a foreign government, the above remarks of Cockburn, C.J., might be treated as *obiter dicta* of great weight rather than as an actual decision with regard to English instruments. In *Goodwin* v. *Robarts*, in the H. L., 1 App. Cas. 476, no opinion in terms was expressed with regard to the correctness in this respect of the judgment in *Crouch* v. *Crédit Foncier*, though Lord Selborne was careful to confine his judgment to the case of securities created by a foreign government.

Negotiability by estoppel. *Goodwin* v. *Robarts*.

The effect of the decisions in *Goodwin* v. *Robarts* in the H. L., and *Rumball* v. *Metropolitan Bank*, 2 Q. B. D. 194, seems to be that, on the ground of estoppel (a subject treated at length in the notes to the *Duchess of Kingston's Case*, *post*, vol. ii.), a person who deposits with an agent a security on the face of it payable to bearer is liable to a *bonâ fide*

holder for value, in case the agent fraudulently puts it in circulation, whether it be negotiable or not. Lord Selborne, however, in *France* v. *Clark*, 26 Ch. D. 257, 264, treated the evidence of mercantile usage as essential to the decision in *Goodwin* v. *Robarts*; and in *Fine Art Soc.* v. *Union Bank*, 17 Q. B. D. 705, 710, Lord Esher expressed the opinion that the rule as stated by the H. L. must be confined "to the facts of the special case, which contained a statement that the form of instrument then in question had been treated as a negotiable instrument by the mercantile world and by all parties dealing with it."

Goodwin v. *Robarts.*

In *Goodwin* v. *Robarts*, the plaintiff claimed damages for the conversion of the scrip of loans to the Russian and Hungarian Governments. He had handed the scrip to his broker, to be held subject to his directions, but the broker had fraudulently pledged it with the defendants, who took it *bonâ fide* and for value. By their scrip the governments promised to give *to the bearer* bonds in respect of the loans. Lords Cairns and Hatherley held that the plaintiff was estopped from denying the defendants' title, whether the scrip was or was not negotiable: but they further held, on the authority of *Gorgier* v. *Mieville*, 3 B. & C. 45, that it was negotiable, Lord Selborne concurring upon this latter ground.

Rumball v. *Metropolitan Bank.*

In *Rumball* v. *Metropolitan Bank*, 2 Q. B. D. 194, where the securities in question were scrip certificates of an English company, *Crouch* v. *Crédit Foncier* seems to be treated as overruled by the judgment of the Exch. Cham. in *Goodwin* v. *Robarts*, though *Rumball* v. *Metropolitan Bank* may be supported on the other ground of estoppel, on which the court also rely. See, upon the doctrine of estoppel, *Crouch* v. *Crédit Foncier*, L. R. 8 Q. B. p. 385; *Merchant Bank* v. *Phœnix Co.*, 5 Ch. D. 205; *France* v. *Clark*, 26 Id. 257; *Fine Art Soc.* v. *Union Bank*, 17 Q. B. D. 705; *Colonial Bank* v. *Cady*, 38 Ch. D. 388, 15 App. Cas. 267; *Bentinck* v. *London J. S. Bank*, (1893) 2 Ch. 120.

Estoppel.

Chose in action now assignable at law, by 36 & 37 Vict. c. 66, s. 25, subs. 6.

Here it may be observed that the common law rule by which a chose in action is not assignable at law so as to entitle the assignee to sue upon it in his own name was broken in upon by the Judicature Act, 1873, in the case of "any absolute assignment by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt, or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other

person from whom the assignor would have been entitled to receive or claim such debt or chose in action." Under this enactment, however, a transferee acquires no better title than his transferor had.

Covenant not negotiable. *Quære*, as to effect of 3 & 4 Anne, c. 9, on promissory notes of corporation under seal.

A point of some importance has been raised, but not decided, as to the negotiability of instruments in form promissory notes, but which being under the seal of a corporation are *primâ facie* covenants, and therefore not negotiable. In *Crouch* v. *Crédit Foncier*, L. R. 8 Q. B. 374, 382, the court said: "It is quite clear that a covenant to pay money is not negotiable by the custom of merchants. . . . The negotiability of promissory notes depends in part at least upon 3 & 4 Anne, c. 9; and it seems to have been the opinion of Wood, L.J., in *Re General Estates Co.*, 3 Ch. 762, and of Malins, V.-C., in *Re Imperial Land Co.*, 11 Eq. 490, that, inasmuch as that Act enacts that promissory notes in writing 'made and signed by any person or persons, *body politic or corporate*, or by the servant or agent of any *corporation*, banker, goldsmith, merchant, or trader, who is usually intrusted by him, or them, to sign such promissory notes for him, her, or them, whereby such person or persons, *body politic or corporate*, his, her, or their servant or agent, doth promise to pay any sum of money, shall be indorsable as bills of exchange are by the custom of merchants,' it follows that a corporation fixing its seal to a written promise to pay must be considered as *signing* the promise, not as covenanting under seal to fulfil it; and so, that the statute by implication enacts that what would at common law be their covenant to pay is their promise. But although intimating their opinion neither of the learned persons referred to gave any decision on the point, as it was not necessary for the purpose of the cases before them." The court for like reasons declined to decide the question, but pointed out that in *Glyn* v. *Baker*, 13 East, 509, Le Blanc, J., took a view opposed to that of Wood, L.J., and Malins, V.-C., above cited.

Railway company cannot accept bills of exchange.

A railway company cannot, and it seems that no corporation, except a trading corporation, or one having special powers for that purpose by statute or by its articles of incorporation, can accept bills of exchange or make promissory notes; *Bateman* v. *Mid-Wales R. Co.*, L. R. 1 C. P. 499; *Re General Estates Co.*, 3 Ch. 758; see Bills of Exchange Act, 1882, s. 22.

Effect of negotiability

One class of cases in which the negotiability of an instrument becomes important, is where a question arises whether,

of instruments on probate duty.

upon the holder's death, it be subject to probate duty. Now, as the liability to probate duty depends on the locality of the assets at the testator's death (*A.-G.* v. *Pratt*, L. R. 9 Ex. 140), it has been held that French *rentes*, American stock, and debts due from a foreigner, being transferable abroad only, must be considered as locally situate abroad, and, consequently, as exempt from probate duty; but that foreign bills and bonds, given by the Russian, Dutch, and Prussian governments, accustomably saleable in the market here, are chattels in this country liable to probate duty, although the dividends upon the Dutch bonds were payable solely at Amsterdam; *A.-G.* v. *Bouwens*, 4 M. & W. 171; *A.-G.* v. *Hope*, 1 C. M. & R. 530, 2 Cl. & F. 84; 8 Bligh, 44; *A.-G.* v. *Dimond*, 1 C. & J. 356; *Pearse* v. *Pearse*, 9 Sim. 430.

To gain title to negotiable instrument, transferee must take *bonâ fide* and for value.

It has thus been endeavoured to deduce some rules whereby to ascertain whether a particular instrument is or is not negotiable. If it is negotiable, it is, as has been already stated, exempted from the ordinary rule respecting chattels personal, and property in it may be transferred, by a man who has none in it himself, to a person taking it *bonâ fide* and for value; *Grant* v. *Vaughan*, 3 Burr. 1516; *Peacock* v. *Rhodes*, 2 Dougl. 633; *Collins* v. *Martin*, 1 B. & P. 648; *Lawson* v. *Weston*, 4 Esp. 56; *Wookey* v. *Pole*, 4 B. & Ald. 1; *Snow* v. *Saddler*, 3 Bing. 610; *London J. S. Bank* v. *Simmons*, (1892) A. C. 201. But a party who has not taken it *bonâ fide*, and for value, will not be permitted to retain it; for it stands on the same footing as money, except that it is much more easily identified, and money itself could not be retained under those circumstances.

Title to money received *bonâ fide* for value.

This was decided in *Clarke* v. *Shee*, Cowp. 197, where the plaintiff's clerk received notes and moneys for his master, and laid them out with the defendant in illegal insurances of lottery tickets; and the master, being able to prove their identity, was held entitled to recover them. "When money or notes," said Lord Mansfield, "are paid *bonâ fide*, and upon a valuable consideration, they never shall be brought back by the true owner; but where they come *malâ fide* into a person's hands, they are in the nature of specific property; and if their identity can be traced and ascertained, the party has a right to recover."

Gross negligence formerly held cogent evidence of *mala fides*.

Such being the principle, the contest in each particular case has ever since been whether the circumstances under which the negotiable instrument passed to the party claiming

to hold it afford evidence of *mala fides* so as to bring the case within the latter part of the rule laid down, in *Clarke* v. *Shee*, by Lord Mansfield. Now, it was very early held that there might be, on the part of a person taking a negotiable instrument, negligence of such a description, and so gross, as would afford cogent evidence of *mala fides*; in other words, as would satisfy any reasonable man that the party guilty of it must have suspected that the dealing in which he was engaged was tainted with fraud; see *Solomons* v. *Bank of England*, 13 East, 135.

Gill v. *Cubitt*.

In *Gill* v. *Cubitt*, 3 B. & C. 466, the court went further than this, and approved of the direction given by Abbott, C.J., to the jury, that they were to find a verdict for the defendant, if they thought that the plaintiff took the bill "under circumstances which *ought* to have excited the suspicion of a prudent and careful man." This case was for some time relied on as an authority by persons who sought to invalidate the transfer of a bill on the ground of *want of caution* in taking it; and it was followed in *Down* v. *Halling*, 4 B. & C. 330; *Snow* v. *Peacock*, 3 Bing. 406; *Beckwith* v. *Corrall*, Id. 444; *Strange* v. *Wigney*, 6 Id. 677; *Easley* v. *Crockford*, 10 Id. 243; but the above rule was not accepted in *Crook* v. *Jadis*, 5 B. & Ad. 909, and *Backhouse* v. *Harrison*, Id. 1098; in these cases it was said that gross negligence must be shown.

Now overruled.

Gill v. *Cubitt* must now be considered as overruled. In *Goodman* v. *Harvey*, 4 A. & E. 870, the court laid down the rule that "gross negligence may be evidence of *mala fides*, but is not the same thing," and that "where the bill has passed to the plaintiff without any proof of *bad faith* in him, there is no objection to his title." This decision was adhered to in *Uther* v. *Rich*, 10 A. & E. 784, where it was held that *mala fides* in the holder of a negotiable instrument, if relied on, must be distinctly alleged, and that the only proper mode of implicating him in an alleged fraud is to expressly aver that he had *notice* of it. In *Bank of Bengal* v. *McLeod*, 7 Moo. P. C. 35, the J.C. stated broadly that the rule acted on in *Gill* v. *Cubitt*, and *Down* v. *Halling*, was not law, and that "the *negligence* of the party taking a negotiable instrument does not fix him with the defective title of the party passing it to him." This passage was cited with approval by Willes, J., in *Raphael* v. *Bank of England*, 17 C. B. 161, 175, and by Lord Herschell in *London J. S. Bank* v. *Simmons*, (1892) A. C. 201, 219.

There must be actual *mala fides*, or *notice* of it.

Raphael v. *Bank of England.*

In *Raphael* v. *Bank of England*, 17 C. B. 161, a money changer took, for value, a bank note which had been stolen. A year previously he had received a notice of the theft, but had forgotten this notice when he took the note. The jury found that he had no knowledge, at the time when he took the note, that it had been stolen, but had the means of knowledge if he had taken proper care; and that he had taken the note *bonâ fide*. The court held that he was entitled to the note, his omission to avail himself of his means of knowledge, though it might amount to negligence, not preventing him from being a *bonâ fide* holder.

Meaning of "notice and knowledge."

Willes, J., concurred in the opinion given by Parke, B., in *May* v. *Chapman*, 16 M. & W. 355, "that 'notice and knowledge' means not merely express notice, but knowledge, or the means of knowledge, to which the party wilfully shuts his eyes,—a suspicion in the mind of the party, and the means of knowledge in his power wilfully disregarded;" see also *Oakley* v. *Ooddeen*, 2 F. & F. 656; and *Carlon* v. *Ireland*, 5 E. & B. 765.

Jones v. *Gordon.*

The question was thoroughly discussed in the H. L. in *Jones* v. *Gordon*, 2 App. Cas. 616, where the holder, though he gave some value, was held to have disentitled himself because he wilfully shut his eyes.

Per Lord Blackburn.

Lord Blackburn there said: "I consider it to be fully and thoroughly established that if value be given for a bill of exchange it is not enough to show that there was carelessness, negligence, or foolishness in not suspecting that the bill was wrong when there were circumstances which might have led a man to suspect that. All these are matters which tend to show that there was dishonesty in not doing it, but they do not in themselves make a defence to an action on a bill of exchange. I take it that in order to make such a defence . . . it is necessary to show that the person who gave value for the bill, whether the value given be great or small, was affected with notice that there was something wrong about it when he took it. I do not think it is necessary that he should have notice of what the particular wrong was. . . . But then I think that such evidence of carelessness or blindness, as I have referred to, may, with other evidence, be good evidence upon the question, which, I take it, is the real one, whether he did know that there was something wrong in it. If he was (if I may use the phrase) honestly blundering and careless, and so took a bill of exchange, or a bank-note, when he ought not to have taken it, still he would be

entitled to recover; but if the facts and circumstances are such that the jury, or whoever has to try the question, come to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind, I suspect there is something wrong, and, if I ask questions and make further inquiry, it will no longer be suspecting it, but my knowing it, and then I shall not be able to recover —I think that is dishonesty." See also *per* Fry, J., *Symons* v. *Mulkern*, 30 W. R. 875.

London Joint Stock Bank v. *Simmons*, and *Sheffield* v. *London Joint Stock Bank.*

In *London Joint Stock Bank* v. *Simmons*, (1892) A. C. 201, these principles were again affirmed, and elucidated. It was there laid down that the question of *bona fides* is always one of fact, to be determined in each case upon the facts: that a person, who takes a negotiable instrument for value, honestly believing that the person from whom he takes has a right to dispose of it, acquires a good title: that knowledge that the person dealing with a negotiable instrument is only an agent does not compel the person taking it to inquire into the nature of his title or the extent of his authority: but that, if there be anything which excites his suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith, if he shuts his eyes to the facts presented to him, and puts his suspicion aside without further inquiry, or makes further inquiry which does not remove that suspicion. In that case the decision in *Sheffield* v. *London Joint Stock Bank*, 13 App. Cas. 333, was explained to have been founded upon the fact that there the defendants knew, or suspected, that the person from whom they took was exceeding his authority. In the latter case it was held that the defendants' sincere belief that, as a matter of law, they had a right to hold the securities for an amount beyond that to which the agent's authority was limited did not cure the effect of their knowledge that the authority was limited. See *Marshall* v. *Nat. Provincial Bank*, 61 L. J. Ch. 465; *Bentinck* v. *London J. S. Bank*, (1893) 2 Ch. 120; *Baker* v. *Nottingham Bank*, 60 L. J. Q. B. 542. When an agent accepts or indorses "*per pro*," the taker of the bill or note must inquire whether the agent has authority to do so; and if the agent have authority, his abuse of it does not affect a

Mistake of law.

Acceptance "*Per pro.*"

bonâ fide holder for value; *Bryant* v. *Banque du Peuple*, (1893) A. C. 170; *Bissell* v. *Fox*, 51 L. T. 663, 53 Id. 193.

Pledge by agent with limited authority.

It appears from *London J. S. Bank* v. *Simmons*, and *Sheffield* v. *London J. S. Bank*, *supra*, that if an agent pledges negotiable instruments for an amount beyond the limits of his authority, and the pledgee has notice of the limits of his authority, he is entitled to retain the securities as a pledge for the authorised amount, but for no larger amount.

Bills of Exchange Act, 1882, s. 90.

By the Bills of Exchange Act, 1882, s. 90, it is provided that "a thing is deemed to be done in good faith within the meaning of that Act where it is in fact done honestly, whether it is done negligently or not."

Effect of fraud on subsequent transferee.

Evidence of fraud on the part of a *previous* holder raises a presumption that the plaintiff is agent for that holder without value, and therefore casts on him the burthen of proving that he gave value; *Hall* v. *Featherstone*, 3 H. & N. 284. It was doubted by Lord Blackburn, in *Jones* v. *Gordon*, 2 App. Cas. 616, 628, whether it shifts the onus upon him to show that he gave value *bonâ fide*, so that, although he gave value, he must give some affirmative evidence to show that he was doing it honestly; but it has since been decided that it does; *Tatam* v. *Haslar*, 23 Q. B. D. 345. Notice of fraud, given after delivery of a bill payable to order, and before formal indorsement, affects the indorsee; *Whistler* v. *Forster*, 32 L. J. C. P. 161.

What notice of fraud affects holder.

Whether instrument negotiable before issue.

Questions have arisen as to the negotiability of instruments stolen and fraudulently put into circulation either after an attempted cancellation or before issue by the alleged maker; see *Ingham* v. *Primrose*, 7 C. B. N. S. 82; *Baxendale* v. *Bennett*, 3 Q. B. D. 825; also as to the validity of documents purporting to be acceptances where the acceptor signs his name to an instrument or paper, wholly or in part in blank, and the blank is filled up contrary to his authority; see *Hogarth* v. *Latham*, 3 Q. B. D. 643; *L. & S. W. Bank* v. *Wentworth*, 5 Ex. D. 96; *Garrard* v. *Lewis*, 10 Q. B. D. 30. But as the law on this subject is now fully dealt with by the Bills of Exchange Act, 1882, passed since the date of these decisions, it is not deemed necessary to discuss them, although they are of course still of authority as regards negotiable securities other than bills, notes, and cheques, with which alone that Act deals.

Inchoate instruments.

44 & 45 Vict. c. 61, ss. 20, 21.

On the latter point the law is thus laid down by Lord Selborne in *France* v. *Clark*, 26 Ch. D. 257, 262: "The person who has signed a negotiable instrument in blank, or with blank spaces, is (on account of the negotiable character of that instrument) estopped by the law merchant from disputing any alteration made in the document, after it has left his hands, by filling up blanks (or otherwise in a way not *ex facie* fraudulent), as against a *bonâ fide* holder for value without notice; but it has been repeatedly explained that this estoppel is in favour only of such a *bonâ fide* holder; and a man who, after taking it in blank, has himself filled up the blanks in his own favour without the consent or knowledge of the person to be bound, has never been treated in English courts as entitled to the benefit of that doctrine. He must necessarily have had notice that the documents required to be other than they were when he received them, in order to pass any other or larger right or interest, as against the person whose name was subscribed to them, than the person from whom he received them might then actually and *bonâ fide* be entitled to transfer or to create; and if he makes no inquiry he must at the most take that right (whatever it may happen to be) and nothing more. He cannot, by his own subsequent act, alter the legal character, or enlarge in his own favour the legal or equitable operation, of the instrument."

Holder may indorse to third person to enable him to sue.

The holder of a negotiable instrument may effectually indorse it to a third person without consideration, merely for the purpose of enabling the latter to sue upon it on his, the indorser's, behalf; *Law* v. *Parnell*, 7 C. B. N. S. 282; *Ancona* v. *Marks*, 7 H. & N. 686; *Kleinwort* v. *Comptoir National*, (1894) 2 Q. B. 157.

Effect of 24 & 25 Vict. c. 96, s. 100.

An opinion was once entertained that the effect of the Larceny Act, 1861, s. 100, coupled with the decision in *Scattergood* v. *Sylvester*, 15 Q. B. 506, was to revest in the true owner the property in a stolen negotiable instrument on the conviction of the thief, even though it had passed into the hands of a *bonâ fide* indorsee for value. In *Chichester* v. *Hill*, 52 L. J. Q. B. 160, it was decided that the statute has not this effect.

CARTER *v.* BOEHM.

EASTER.—5 GEO. 3.

[REPORTED 3 BURR. 1905.]

Insurance on Fort Marlborough against foreign capture, effected by its Governor. The weakness of the fort, and the probability of its being taken by the French, and that the insured knew these facts, but had not communicated them, were offered to be proved as a defence to an action on the policy. It was also objected that the insurance was against public policy. The plaintiff proved that the office of Governor was mercantile, not military; and that the fort was never calculated to resist European enemies. Held, that the jury were justified in finding for the plaintiff.

The opinion of an insurance broker as to the materiality of the facts not communicated was thought inadmissible as evidence (*a*).

What concealments vitiate a policy.

THIS was an insurance cause, upon a policy underwritten by Mr. Charles Boehm, of *interest, or no interest, without benefit of salvage* (*b*). The insurance was made by the plaintiff, for the benefit of his brother, Governor George Carter. It was tried before Lord Mansfield at Guildhall; and a verdict was found for the plaintiff by a special jury of merchants.

On Saturday, the 19th of April last, Mr. Recorder Eyre, on behalf of the defendant, moved for a new trial. His objection was, "that circumstances were not sufficiently disclosed." A rule was made to shew cause: and copies of letters and depositions were ordered to be left with Lord Mansfield. N.B. Four other cases depended upon this.

The counsel for the plaintiff, *viz.*, Mr. Morton, Mr. Dunning, and Mr. Wallace, showed cause on Thursday, the first of this month. But first,

Lord MANSFIELD reported the evidence. That it was an action

(*a*) On this point see the notes.

(*b*) A policy containing these words would now be illegal, in consequence of 14 Geo. 3, c. 48, against *wager policies*; *Paterson* v. *Powell*, 9 Bing. 320; see the notes to *Godsall* v. *Boldero*, *post*, vol. ii.

on a policy of insurance for one year, *viz.*, from 16th October, 1759, to 16th October, 1760, for the benefit of the Governor of Fort Marlborough, George Carter, against the loss of Fort Marlborough, in the island of Sumatra, in the East Indies, by its being taken by a foreign enemy. The event happened: the fort was taken by Count d'Estaigne within the year.

The first witness was Cawthorne, the policy-broker, who produced the memorandum given by the Governor's brother, the plaintiff, to him: and the use made of these instructions was to show that the insurance was made "for the benefit of Governor Carter, and to insure him against the taking of the fort by a foreign enemy."

Both sides had been long in Chancery: and the Chancery evidence on both sides was read at the trial.

It was objected, on behalf of the defendant, to be a fraud, by concealment of circumstances which ought to have been disclosed; and particularly the weakness of the fort, and the probability of its being attacked by the French; which concealment was offered to be proved by two letters. The first was a letter from the Governor to his brother Roger Carter, his trustee, the plaintiff in this cause: the second was from the Governor to the East India Company.

The evidence in reply to this objection consisted of three depositions in Chancery, setting forth that the Governor had 20,000*l.* in effects, and only insured 10,000*l.*: and that he was guilty of no fault in defending the fort. The first of these depositions was Captain Tryon's: which proved that this was not a fort proper or designed to resist European enemies; but only calculated for defence against the natives of the island of Sumatra; and also that the Governor's office is not military, but only mercantile; and that Fort Marlborough is only a subordinate factory to Fort St. George.

There was no evidence to the contrary. And a verdict was found for the plaintiff, by a special jury.

After his lordship had made his report, the counsel for the plaintiff proceeded to show cause against a new trial.

They argued that there was no such concealment of circumstances (as the weakness of the fort, or the probability of the attack) as would amount to a fraud sufficient to vitiate this

contract; all which circumstances were universally known to every merchant upon the Exchange of London. And all these circumstances, they said, were fully considered by a special jury of merchants, who are the proper judges of them. And Mr. Dunning laid it down as a rule—"That the insured is only obliged to discover facts; not the ideas or speculations which he may entertain upon such facts." They said this insurance was, in reality, no more than a wager, "whether the French would think it their interest to attack this fort; and if they should, whether they would be able to get a ship of war up the river or not."

Sir Fletcher Norton and Mr. Recorder Eyre argued, *contra*, for the defendant, the underwriter.

They insisted, that the insurer has a right to know as much as the insured himself knows. They alleged, too, that the broker is the sole agent of the insured. These are general, universal principles, in all insurances.

Then they proceeded to argue in support of the present objection. The broker had, they said, on being cross-examined, owned that he *did not believe that the insurer would have meddled with the insurance, if he had seen these two letters.* All the circumstances ought to be disclosed. This wager is not only "whether the fort shall be attacked;" but "whether it shall be attacked and taken." Whatever really increases the risk ought to be disclosed.

Then they entered into the particulars which had been here kept concealed. And they insisted strongly, that the plaintiff ought to have discovered the weakness and absolute indefensibility of the fort. In this case, as against the insurer, he was obliged to make such discovery; though he acted for the Governor. Indeed, a Governor ought not, in point of policy, to be permitted to insure at all: but if he is permitted to insure, or will insure, he ought to disclose all facts. It cannot be supposed that the insurer would have insured so low as 4*l. per cent.*, if he had known of these letters. It is begging the question to say, "that a fort is not intended for defence against an enemy." The supposition is absurd and ridiculous. It must be presumed that it was intended for that purpose; and the presumption was "that the fort, the powder, the guns, &c., were in a good and

proper condition." If they were not (and it is agreed that in fact they were not, and that the Governor knew it), it ought to have been disclosed. But if he had disclosed this he could not have got the insurance. Therefore this was a fraudulent concealment; and the underwriter is not liable. It does not follow that, because he did not insure his whole property, therefore it is good for what he has judged proper to insure. He might have his reasons for insuring only a part, and not the whole.

Cur. adv. vult.

Lord MANSFIELD now delivered the resolution of the Court.

This is a motion for a new trial. In support of it the counsel for the defendant contend, "that some circumstances in the knowledge of Governor Carter, not having been mentioned at the time the policy was underwrote, amount to a concealment, which ought, in law, to avoid the policy." The counsel for the plaintiff insist, "that the not mentioning these particulars does not amount to a concealment which ought, in law, to avoid the policy: either as a fraud, or as varying the contract."

1st. It may be proper to say something, in general, of concealments which avoid a policy.

2ndly. To state particularly the case now under consideration.

3rdly. To examine whether the verdict which finds this policy good, although the particulars objected were not mentioned, is well founded.

First. Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. *The keeping back such circumstance is a fraud, and therefore the policy is void* (*c*). Although the suppression should happen through mistake, without any fraudulent intention, yet still, the underwriter is deceived, and the policy is void: because the risk run is really different from the risk understood and intended to be run at the time of the agreement. The policy would equally be void, against the underwriter, if *he* concealed;

(*c*) *Fitzherbert* v. *Mather*, 1 T. R. 12

as if he insured a ship on her voyage, which he privately knew to be arrived (*d*): and an action would lie to recover the premium.

The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact and his believing the contrary. But either party may be innocently silent as to grounds open to both to exercise their judgment upon. *Aliud est celare; aliud, tacere: neque enim id est celare quicquid reticeas; sed cum quod tu scias, id. ignorare emolumenti tui causâ velis eos, quorum intersit id scire* (*e*).

This definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it void, in favour of the party misled by his ignorance of the thing concealed. There are many matters, as to which the insured may be innocently silent; he need not mention what the underwriter knows—*Scientia utrinque par pares contrahentes facit.* An underwriter cannot insist that the policy is void, because the insured did not tell him what he actually knew; what way soever he came to the knowledge. The insured need not mention what the underwriter ought to know (*f*); what he takes upon himself the knowledge of; or what he waives being informed of. The underwriter needs not be told what lessens the risk agreed and understood to be run by the express terms of the policy. He needs not to be told general topics of speculation: as for instance, *the underwriter is bound to know every cause which may occasion natural perils; as the difficulty of the voyage—the kind of seasons—the probability of lightning, hurricanes, earthquakes, &c. He is bound to know every cause which may occasion political perils; from the ruptures of states, from war, and the various operations of it. He is bound to know the probability of safety, from the continuance or return of peace; from the imbecility of the enemy, through the weakness of their councils, or their want of strength, &c.*

If an underwriter insures private ships of war, by sea and on shore, from ports to ports, and places to places, anywhere, he

(*d*) See *Bradford* v. *Symondson*, 7 Q. B. D. 456.

(*e*) Cicero, *de Officiis*, l. 3, c. 12, 13; see 54 L. T. 374; (1895) 2 Ch. 209.

(*f*) See *Elton* v. *Larkins*, 8 Bing. 198; *Friere* v. *Woodhouse*, Holt, N. P. 572; *Noble* v. *Kennoway*, Dougl. 510; *Vallance* v. *Dewar*, 1 Camp. 503; *Stewart* v. *Bell*, 5 B. & Ald. 238; *Mackintosh* v. *Marshall*, 11 M. & W. 116; *Bates* v. *Hewitt*, L. R. 2 Q. B. 595; *Harrower* v. *Hutchinson*, 5 Id. 584; *Gandy* v. *Adelaide Ins. Co.*, 6 Id. 746.

needs not be told the secret enterprises they are destined upon; because he knows some expedition must be in view; and from the nature of his contract, without being told, he waives the information. If he insures for three years, he needs not be told any circumstance to show it may be over in two: or if he insures a voyage, with liberty of deviation, he needs not be told what tends to show there will be no deviation. Men argue differently, from natural phenomena and political appearances: they have different capacities, different degrees of knowledge and different intelligence. But the means of information and judging are open to both: each professes to act from his own skill and sagacity; and, therefore, neither needs to communicate to the other.

The reason of the rule which obliges parties to disclose is to prevent fraud, and to encourage good faith. It is adapted to such facts as vary the nature of the contract: *which one privately knows*, and the other is ignorant of, and has no reason to suspect. The question, therefore, must always be, "whether there was, under all the circumstances at the time the policy was underwritten, a fair representation; or a concealment; fraudulent, if designed; or, though not designed, varying materially the object of the policy, and changing the risk understood to be run."

This brings me, in the second place, to state the case now under consideration. The policy is against the loss of Fort Marlborough, from being destroyed by, taken by, or surrendered unto, any European enemy, between the 1st of October, 1759, and the 1st of October, 1760. It was underwritten on the 9th of May, 1760.

The underwriter knew at the time that the policy was to indemnify to that amount Roger Carter, the Governor of Fort Marlborough, in case the event insured against should happen. The Governor's instructions for the insurance, bearing date at Fort Marlborough, the 22nd of September, 1759, were laid before the underwriter. Two actions upon this policy were tried before me in the year 1762. The defendants then knew of a letter written to the East India Company, which the Company offered to put into my hands; but would not deliver to the parties, because it contained some matter which they did not think proper to be made public.

An objection occurred to me at the trial, "whether a policy, against the loss of Fort Marlborough, for the benefit of the Governor, was good;" upon the principle which does not allow a sailor to insure his wages (*g*). But considering that this place, though called a fort, was really but a factory or settlement for trade; and that he, though called a Governor, was really but a merchant: considering, too, that the law allows a captain of a ship to insure goods which he has on board, or his share in the ship, if he be a part owner: and the captain of a privateer, if he be a part owner, to insure his share: considering, too, that the objection did not lie upon any ground of justice, in the mouth of the underwriter, who knew him to be the Governor at the time he took the premium—and as, with regard to principles of public convenience, the case so seldom happens (I never saw one before), any danger from the example is little to be apprehended—I did not think myself warranted, upon that point, to nonsuit the plaintiff; especially, too, as the objection did not come from the Bar. Though this point was mentioned, it was not insisted upon at the last trial; nor has it been seriously argued, upon this motion, as sufficient, alone, to vacate the policy: and if it had, we are all of opinion "that we were not warranted to say it is void upon this account."

Upon the plaintiff's obtaining these two verdicts, the underwriters went into a court of equity; where they have had an opportunity to sift everything to the bottom, to get every discovery from the Governor and his brother, and to examine any witnesses who were upon the spot. At last, after the fullest investigation of every kind, the present action came on to be tried at the sittings after last term.

The plaintiff proved, without contradiction, that the place called Bencoolen, or Fort Marlborough, is a factory or settlement, but no military fort or fortress. That it was not established for a place of arms or defence against the attacks of an European enemy, but merely for the purpose of trade and of defence against the natives. That the fort was only intended and built

(*g*) *i.e.* Because of its tendency to diminish his exertions for the safety of the thing insured; *Webster* v. *De Tastet*, 7 T. R. 157; *Wilson* v. *R. E. A. Co.*, 2 Camp. 626. *Quære*, as to the effect on this rule of 17 & 18 Vict. c. 104, ss. 182, 183, now replaced by 57 & 58 Vict. c. 60, ss. 156, 157. The *master's* wages do not depend on the earning of freight; *Hawkins* v. *Twizell*, 5 E. & B. 883.

with an intent to keep off the country blacks. That the only security against European ships of war consisted in the difficulty of the entrance and navigation of the river, for want of proper pilots. That the general state and condition of the said fort, and of the strength thereof, was in general well known by most persons conversant or acquainted with Indian affairs, or the state of the Company's factories or settlements; and could not be kept secret or concealed from persons who should endeavour, by proper inquiry, to inform themselves. That there were no apprehensions or intelligence of any attack by the French, until they attacked Nattal in February, 1760. That on the 8th of February, 1760, there was no suspicion of any design by the French. That the Governor then bought, from the witness, goods to the value of 4,000*l.*, and had goods to the value of above 20,000*l.*, and then dealt for 50,000*l.* and upwards. That on the 1st of April, 1760, the fort was attacked by a French man-of-war of 64 guns, and a frigate of 20 guns, under the Count d'Estaigne, brought in by Dutch pilots; unavoidably taken, and afterwards delivered to the Dutch, and the prisoners sent to Batavia.

On the part of the defendant, after all the opportunities of inquiry, no evidence was offered that the French ever had any design upon Fort Marlborough before the end of March, 1760; or that there was the least intelligence or alarm "that they might make the attempt" till the taking of Nattal in the year 1760. They did not offer to disprove the evidence that the Governor had acted, as in full security, long after the month of September, 1759, and had turned his money into goods, so late as the 8th of February, 1760. There was no attempt to show that he had not lost by the capture very considerably beyond the balance of the insurance. But the defendant relied upon a letter, written to the East India Company, bearing date the 16th of September, 1759, which was sent to England by the Pitt, Captain Wilson, who arrived in May, 1760, together with the instructions for insuring; and also a letter bearing date the 22nd of September, 1759, sent to the plaintiff by the same conveyance, and at the same time (which letters his lordship repeated) (*h*).

(*h*) The former of them notifies to the East India Company, that the French had, the preceding year, a design on foot, to attempt taking that settlement by surprise; and that it was very probable they might revive that design. It

They relied, too, upon the cross-examination of the broker, who negotiated the policy, that, in his opinion, these letters ought to have been shown, or the contents disclosed; and if they had, the policy would not have been underwritten.

The defendant's counsel contended at the trial, as they have done upon this motion, "that the policy was void."

1st. Because the state and condition of the fort, mentioned in the Governor's letter to the East India Company, was not disclosed.

2ndly. Because he did not disclose that the French, not being in a condition to relieve their friends upon the coast, were more likely to make an attack upon this settlement, rather than remain idle.

3rdly. That he had not disclosed his having received a letter of the 4th of February, 1759, from which it seemed that the French had a design to take this settlement, by surprise, the year before.

They also contended that the opinion of the broker was almost decisive.

The whole was laid before the jury; who found for the plaintiff.

Thirdly—It remains to consider these objections, and to examine "whether this verdict is well founded."

To this purpose it is necessary to consider the nature of the contract, at the time it was entered into. The policy was signed in *May*, 1760. The contingency was, whether Fort Marlborough was or would be taken by an European enemy, between October, 1759, and October, 1760. The computation of the risk depended upon the chance, "whether any European power would attack the place by sea." If they did, it was incapable of resistance. The underwriter at London, in May, 1760, could judge much better of the probability of the contingency than Governor Carter could, at Fort Marlborough, in September, 1759. He knew the success of the operations of the war in Europe. He

confesses and represents the weakness of the fort; its being badly supplied with stores, arms, and ammunition; and the impracticability of maintaining it (in its then state) against an European enemy. The latter letter (to his brother) owns that he is "now more afraid than formerly that the French should attack and take the settlement; for, as they cannot muster a force to relieve their friends at the coast, they may, rather than remain idle, pay us a visit. It seems they had such an intention last year." And therefore he desires his brother to get an insurance made upon his stock there.

knew what naval force the English and French had sent to the East Indies. He knew from a comparison of that force, whether the sea was open to any such attempt by the French. He knew, or might know, everything which was known at Fort Marlborough, in September, 1759, of the general state of affairs in the East Indies, or the particular condition of Fort Marlborough, by the ship which brought the orders for the insurance. He knew that ship must have brought many letters to the East India Company; and particularly from the Governor. He knew what probability there was of the Dutch committing or having committed hostilities.

Under these circumstances, and with this knowledge, he assures against the general contingency of the place being attacked by an European power.

If there had been any design on foot, or any enterprise begun in September, 1759, to the knowledge of the Governor, it would have varied the risk understood by the underwriter; because, not being told of a particular design or attack then subsisting, he estimated the risk upon the foot of an uncertain operation, which might or might not be attempted. But the Governor had no notice of any design subsisting in September, 1759. There was no such design, in fact: the attempt was made without premeditation, from the sudden opportunity of a favourable occasion, by the connivance and assistance of the Dutch, which tempted Count d'Estaigne to break his parole.

These being the circumstances under which the contract was entered into, we shall be better able to judge of the objections upon the foot of concealments. The first concealment is, that he did not disclose the condition of the place. The underwriter knew the insurance was for the Governor. He knew the Governor must be acquainted with the state of the place. He knew the Governor could not disclose it, consistent with his duty. He knew the Governor, by insuring, apprehended at least the possibility of an attack. With this knowledge, without asking a question, he underwrote. By so doing, he took the knowledge of the state of the place upon himself. It was a matter as to which he might be informed various ways—*It was not a matter within the private knowledge of the Governor only.*

But, not to rely upon that, the utmost which can be contended

is, that the underwriter trusted to the fort being in the condition in which it ought to be: in like manner as it is taken for granted, that a ship insured is seaworthy (*i*). What is that condition? All the witnesses agree "that it was only to resist the natives, and not a European force." The policy insures against a total loss; taking for granted "that if the place was attacked it would be lost." The contingency, therefore, which the underwriter has insured against is, "whether the place would be attacked by an European force;" and not "whether it would be able to resist such an attack, if the ships could get up the river."

It was particularly left for the jury to consider, "whether this was the contingency in the contemplation of the parties;" they have found that it was. And we are all of opinion, "that, in this respect, their conclusion is agreeable to the evidence." In this view, the state and condition of the place was material only in case of a land attack by the natives.

The second concealment is, his not having disclosed, that, from the *French* not being able to relieve their friends upon the coast, they might make them a visit.

This is no part of the fact of the case: it is mere speculation of the Governor's from the general state of the war. The conjecture was dictated to him from his fears. It is a bold attempt for the conquered to attack the conqueror in his own dominions. The practicability of it, in this case, depended upon the *English* naval force in those seas: which the underwriter could better judge of at *London*, in May, 1760, than the Governor could, at Fort Marlborough, in September, 1759.

The third concealment is that he did not disclose the letter from Mr. Winch, of the 4th of February, 1759, mentioning the design of the *French* the year before. What the letter was, how he mentioned the design, or upon what authority he mentioned it, or by whom the design was supposed to be imagined, does not appear. The defendant has had every opportunity of discovery; and nothing has come out upon it, as to this letter, which he thinks makes for his purpose. The plaintiff offered to read the account Winch wrote to the East India Company; which was objected to; and, therefore, not read. The nature of that intelligence, therefore, is very doubtful. But taking it in

(*i*) Except in the case of a *time* policy; *Gibson* v. *Small*, 4 H. L. C. 353.

the strongest light, it is a report of a design to surprise, the year before; but then dropped. This is a topic of mere general speculation; which made no part of the facts of the case upon which the insurance was to be made.

It was said, if a man insured a ship, knowing that two privateers were lying in her way, without mentioning that circumstance, it would be a fraud; I agree to it (*k*). But if he knew that two privateers had been there the year before, it would be no fraud not to mention that circumstance; because it does not follow that they will cruise this year at the same time, in the same place; or that they are in a condition to do it. If the circumstance of "this design laid aside" had been mentioned, it would have tended rather to lessen the risk than increase it; for, the design of a surprise which has transpired, and been laid aside, is less likely to be taken up again: especially by a vanquished enemy.

The jury considered the nature of the Governor's silence as to these particulars; they thought it innocent; and that the omission to mention them did not vary the contract. And we are all of opinion, "that, in this respect, they judged extremely right." There is a silence, not objected to at the trial, nor upon this motion, which might with as much reason have been objected to as the last two omissions; rather more. It appears by the Governor's letter to the plaintiff, "that he was principally apprehensive of a *Dutch* war." He certainly had what he thought good grounds for this apprehension. Count d'Estaigne, being piloted by the *Dutch*, delivering the fort to the *Dutch*, and sending the prisoners to *Batavia*, is a confirmation of those grounds. And probably the loss of the place was owing to the *Dutch*. The *French* could not have got up the river without *Dutch* pilots: and it is plain the whole was concerted with them. And yet, at the time of underwriting the policy, there was no intimation about the *Dutch*. The reason why the counsel have not objected to his not disclosing the ground of this apprehension is, because it must have arisen from political speculation, and general intelligence; therefore, they agree it is not necessary to communicate such things to an underwriter.

(*k*) Acc. *Beckwaite* v. *Nalgrove*, cited 3 Taunt. 41; see *Durrell* v. *Bederley*, Holt, N. P. C. 263.

Lastly: great stress was laid upon the opinion of the broker. But we all think the jury ought not to pay the least regard to it. It is mere opinion; which is not evidence. It is opinion after an event. It is opinion without the least foundation from any previous precedent, or usage. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the court and jury were to determine the cause; and, therefore, it is improper and irrelevant in the mouth of a witness.

There is no imputation upon the Governor as to any intention of fraud. By the same conveyance which brought his orders to insure, he wrote to the Company everything which he knew or suspected; he desired nothing to be kept a secret which he wrote either to them or his brother. His subsequent conduct, down to the 8th of February, 1760, showed that he thought the danger very improbable.

The reason of the rule against concealments is to prevent fraud and encourage good faith. If the defendant's objections were to prevail in the present case, the rule would be turned into an instrument of fraud. The underwriter here, knowing the Governor to be acquainted with the state of the place; knowing that he apprehended danger, and must have some ground for his apprehension; being told nothing of either; signed this policy, without asking a question.

If the objection "that he was not told" is sufficient to vacate it, he took the premium, knowing the policy to be void; in order to gain, if the alternative turned out one way; and to make no satisfaction, if it turned out the other. He drew the Governor into a false confidence, "that if the worst should happen, he had provided against total ruin;" knowing, at the same time, "that the indemnity to which the Governor trusted was void."

There was not a word said to him of the affairs of India, or the state of the war there, or the condition of Fort Marlborough. If he thought that omission an objection at the time, he ought not to have signed the policy with a secret reserve in his own mind to make it void; if he dispensed with the information, and did not think this silence an objection then, he cannot take it up now, after the event.

What has often been said of the Statute of Frauds may, with more propriety, be applied to every rule of law, drawn from the

principles of natural equity, to prevent fraud, "that it should never be so turned, construed, or used, as to protect or be a means of fraud (*l*)."

After the fullest deliberation, we are all clear that the verdict is well founded; and there ought not to be a new trial; consequently that the rule for that purpose ought to be discharged.

Rule discharged.

(*l*) See *Bristol Aërated Bread Co.* v. *Maggs*, 44 Ch. D. 616, 622; and *ante*, p. 302.

Controversy as to admissibility of insurance broker's opinion on the materiality of facts not communicated to an underwriter.

THIS case is inserted on account of the masterly exposition of some of the leading principles of insurance law contained in the judgment of Lord Mansfield. It would not be proper to pass from it without informing the reader that a great deal of controversy has since taken place upon one of the subjects incidentally touched upon by his lordship, *viz.*, the admissibility of the broker's evidence as to his opinion on the materiality of the facts not communicated. "Great stress," says his lordship, "was laid on the opinion of the broker: but we all think the jury ought not to pay the least regard to it. It is mere opinion, which is not evidence. It is opinion after an event. It is opinion, without the least foundation from any previous precedent or usage. It is an opinion which, if rightly formed, could be drawn only from the same premises from which the court and jury were to determine the cause; and, therefore, it is improper and irrelevant in the mouth of a witness."

Very similar were the expressions of Gibbs, C.J., in *Durrell* v. *Bederley*, Holt, N. P. C. 283: "It is my opinion that the evidence of the underwriters, who were called to give their opinion of the materiality of the rumours, and the effect they would have had upon the premium, is not admissible. It is not a question of science, upon which scientific men will mostly think alike, but a question of opinion, liable to be governed by fancy, and in which the diversity might be endless." And upon the ground thus stated by Gibbs, C.J., it has been frequently sought to distinguish *Lindenau* v. *Desborough*, 8 B. & C. 586, an action on a life policy, in which the evidence of medical men as to the materiality of certain symptoms which had not been communicated was received, from the question as to the admissibility of the opinions of brokers and underwriters.

Evidence admitted in *Rickards* v. *Murdock*.

In *Rickards* v. *Murdock*, 10 B. & C. 527, such evidence was, however, admitted. That was an action on a policy,

Controversy as to admissibility of insurance broker's opinion on the materiality of facts not communicated to an underwriter.

effected by the plaintiff, as agent for Campbell, of Sydney, upon goods by the ship *Cumberland*. Campbell, having shipped the goods in question by the *Cumberland*, wrote by a later ship (the *Australia*), to the plaintiff, desiring him to effect an insurance on them, but telling him that, in order to give every chance for the *Cumberland's* arrival beforehand, he had directed the person intrusted with the letter not to deliver it till thirty days after the *Australia's* reaching London. These instructions were obeyed: the *Cumberland* not having arrived at the end of the prescribed period, the letter was delivered to the plaintiff, who thereupon handed the letter to his broker, desiring him to effect the insurance, which he accordingly did with the defendant. But he read to the defendant that part of the letter only which contained the instruction to insure, the nature of the goods, and the time of their sailing. At the trial it was contended that the other circumstances respecting the mode in which the letter was conveyed to England, and the time it had remained there, were material, and ought to have been communicated, and that their suppression vitiated the policy; and several underwriters were called, who deposed that, in their opinion, the whole of the letter ought to have been communicated, and that the parts suppressed were material. This evidence was objected to, but admitted; and, on a motion for a new trial, after a verdict for the defendant, Lord Tenterden, delivering the judgment of the court, said, "Several witnesses were examined, who stated that they thought the letter material; but it has been contended that no such evidence ought to have been received. I know not how the materiality of any matter is to be ascertained but by the evidence of persons conversant with the subject-matter of the inquiry."

Admitted in *Chapman* v. *Walton*.

This opinion seems to be embraced by the Court of Common Pleas, in *Chapman* v. *Walton*, 10 Bing. 57. In that case the defendant, a broker, effected policies for R., in which the voyage was described to be "at and from London to *St. Thomas*, with leave to call at *Madeira* and *Teneriffe*." R. afterwards received a letter from his supercargo, who stated that he intended to sail the next day "*for the Canaries*," and thence to one or more of the West Indian Islands, say *Barbadoes*, *St. Kitt's*, and *St. Thomas*, where he was told that he should be able to dispose of the part of his cargo unsold "*in the Canaries*." With respect to linens he said he had no fear, "as in *Canary* any reasonable

quantity is desirable." This letter R. handed to the defendant, telling him "that the voyage was altered, and that he left him to do the needful with it." The defendant got the policies altered by adding leave to proceed to *St. Kitt's* and *Barbadoes* for all purposes. The vessel was lost at the *Grand Canary Island*. Actions were brought on the policies, which failed on account of the voyage not being covered by the alterations, and this action was then brought by the assignees of R., who had become bankrupt, against the defendant, for negligence in not having procured the proper alterations to be made. The plaintiffs contended that it was the defendant's duty to have procured the insertion of "liberty to proceed or touch at any of the *Canary Islands*." The defendant's counsel, on the other hand, called several policy-brokers, and putting into their hands the policies, the bills of lading, and invoices of the goods, and the supercargo's letter, asked them *what alterations of the policies a skilful insurance broker ought, in their judgment, to have procured, having these documents in his possession, and being instructed to do the needful.* To which question they replied, that they thought he would do ample justice by procuring the alterations as made. The jury having found for the defendant, the court discharged a rule for a new trial, moved on the ground that this evidence was improperly admitted.

Controversy as to admissibility of insurance broker's opinion on the materiality of facts not communicated to an underwriter.

"It is objected," said Tindal, C.J., delivering the judgment of the court, "that to allow this question to be put to the witnesses is, in effect and substance, to allow them to be asked, what is the meaning of the letter?—that is, to ask them whether the letter told the defendant that the vessel was going to the Canaries, whereas the letter ought to be allowed to speak for itself, or, if there were any doubt upon the meaning, it ought to be determined by the court and jury, and not by the evidence of insurance-brokers, or any other witnesses. It may be admitted that, if such were the real nature of the question, the evidence offered would have been inadmissible. . . . But it is not a simple abstract question, as supposed by the plaintiffs, what the words of the letter mean? it is what others conversant with the business of a policy-broker would have understood it to mean, and how they would have acted upon it under the same circumstances. The time of year at which the voyage is performed—the nature of the cargo on board—the objects of the voyage, as disclosed in the letter—above all, the

Controversy as to admissibility of insurance broker's opinion on the materiality of facts not communicated to an underwriter.

circumstances that the original voyage described in the policy itself comprehended Teneriffe, the greatest and most important of the Canary Islands, would all operate in the minds of experienced men in determining whether it was intended that the alteration should include a liberty to touch and stay at the Canaries in general; and this conclusion, it appears to us, neither judge nor jury could arrive at from the simple perusal of the letter, unassisted by evidence, because they would not have the experience upon which a judgment could be formed. The decision in this case appears to be consistent with the principle laid down by Holroyd, J., in *Berthon* v. *Loughman*, 2 Stark. N. P. 258, that a witness conversant with the subject of insurance might give his opinion, as a matter of judgment, whether particular facts, if disclosed, would make a difference as to the amount of the premium—a principle which has been confirmed by the later case of *Rickards* v. *Murdock*, 10 B. & C. 527; and it is difficult to reconcile the opinion given by Gibbs, C.J., in *Durrell* v. *Bederley*, Holt, N. P. C. 283, with the judgment of the Court of King's Bench in the case last above referred to. We think, therefore, both on principle, and on the authority of the decided cases, the evidence was properly admitted."

It is remarkable that the above case, which was decided in 1833, and contains a recognition of the opinion of the K. B. in *Rickards* v. *Murdock*, should not have been alluded to in any stage of *Campbell* v. *Rickards*, 5 B. & Ad. 840, decided later in the same year.

Evidence rejected in *Campbell* v. *Rickards*.

Campbell v. *Rickards* arose out of the same transaction as *Rickards* v. *Murdock*. The action brought against the insurance-office having, as we have seen, failed in consequence of the suppression by the broker, who was employed by *Rickards* to effect the policy, *Campbell*, the merchant of Sydney, upon whose goods the policy had been effected, brought this action against *Rickards*, to recover compensation for the loss which he had sustained by his negligence in not taking care that the policy effected should be valid. At the trial several brokers and underwriters were called for the plaintiff, and the same letter which was produced in *Rickards* v. *Murdock* being put into their hands, they were asked "*whether it was material to have communicated the fact that that letter had arrived in this country thirty days before effecting this insurance?*" The answer was, that it was material. The jury having found a verdict for the

plaintiff, and a new trial being moved for, on the ground that the evidence had been improperly admitted, the rule was made absolute.

Controversy as to admissibility of insurance broker's opinion on the materiality of facts not communicated to an underwriter.

Lord Denman, delivering the judgment of the court, referred to the opinion of Lord Mansfield in *Carter* v. *Boehm*, and that of Gibbs, C.J., in *Durrell* v. *Bederley*. "In some more recent cases," he continued, "such questions have certainly been proposed to witnesses, but they have passed without objection, and it may be observed that the answers will imply no more than scientific witnesses may properly state—their opinion on some question of science. This is especially true of medical opinions. In *Rickards* v. *Murdock*, indeed, out of which the present case arises, this kind of testimony was received. In giving judgment on the motion for a new trial, Lord Tenterden did not expressly defend its admissibility, but his words are in the alternative. 'If such evidence be rejected, the court and jury must decide the point by their own judgment, unassisted by that of others. If they are to decide, all the court agree in thinking the letter was material, and ought to have been communicated, and that a jury would have been bound to come to that conclusion.' Now this mode of disposing of the question does not appear to the court, on reflection, to be quite correct; but we think that, as the jury are to decide on the materiality of facts, and the duty of disclosing them, this verdict, founded in some degree on evidence that could not be legally received, ought to be set aside. The rule for a new trial must therefore be made absolute."

Question hardly now settled.

Such being the state of the authorities, the question of admissibility can be hardly even now considered as settled; for opposed to the decision of the K. B., in *Campbell* v. *Rickards*, is the opinion of the judges in that court in *Rickards* v. *Murdock*, recognized by the court of C. P. in *Chapman* v. *Walton*. The difference is, however, perhaps less upon any point of law than on the application of a settled law to certain states of facts; for, on the one hand, it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it; see *Folkes* v. *Chadd*, 3 Doug. 157; *R.* v.

Controversy as to admissibility of insurance broker's opinion on the materiality of facts not communicated to an underwriter.

Searle, 2 M. & M. 75; *Thornton* v. *R. E. Ass. Co.*, Peake, 25; *Chaurand* v. *Angerstein*, Id. 43; *McNaghten's Case*, 10 Cl. & Fin. 200; *Greville* v. *Chapman*, 5 Q. B. 731; and *Fenwick* v. *Bell*, 1 C. & K. 312, Coltman, J.; but see *Sills* v. *Brown*, 9 C. & P. 601, Coleridge, J.; while, on the other hand, it does not seem to be contended that the opinions of witnesses can be received when the inquiry is into a subject-matter, the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it. Now, the question of materiality in an assurance seems one which may possibly happen to fall within either of the above two classes, for, setting out of the question the cases of life-policies, where the medical evidence is unquestionably scientific, and necessary in order to enable the jury to come to a right conclusion, it is submitted that it may happen, even in cases of sea-policies, that a communication, the materiality of which is in question, may be one respecting the importance of which no one except an underwriter can, in all probability, form a correct opinion. If such a case were to occur, it possibly would not be considered as falling within the decision in *Campbell* v. *Rickards*. In that case the facts concealed were of the very simplest nature; a vessel, which sailed after the one insured, had arrived thirty-nine days before it, and it was easy, without much experience in the business of an underwriter, to divine the probable fate of the ship insured under those circumstances.

Summary of authorities on the point.

In Mr. Arnould's valuable work on the law of marine insurance and average, Vol. I. pp. 591—593, 6th ed., the conflicting opinions on the subject of the above note are considered, and the American decisions are stated to be in the same unsettled state as our own. The author marshals the authorities in both countries as follows: Lord Mansfield in *Carter* v. *Boehm*; Gibbs, C.J., in *Durrell* v. *Bederley*; and Lord Denman in *Campbell* v. *Rickards*, *supra*, against receiving the evidence; Lord Kenyon in *Chaurand* v. *Angerstein*; Holroyd, J., in *Berthon* v. *Loughman*; Lord Tenterden in *Rickards* v. *Murdock*; and Tindal, C.J., in *Chapman* v. *Walton*, *supra* (see also *Elton* v. *Larkins*, 5 C. & P. 392), expressly in favour of its reception; and tacitly so, by receiving and acting upon it without objection, Mansfield, C.J., *Littledale* v. *Dixon*, 1 B. & P. N. R. 151; and Lord Ellenborough, *Haywood* v. *Rodgers*, 4 East, 590. In America there are the opinions of Chancellor Kent, 3 Kent's Com. 285, note (e), ed. 1873; Judge Story, in *M'Lanahan* v.

Universal Ins. Co., 1 Peters, 188; and Mr. Duer, in his work on Representations, 184—191, n. xix., to the same effect. The latter writer has pointed out that the evidence was refused in *Carter* v. *Boehm*, on account of the *unusual* nature of the risk, namely, the capture of a fort in the East Indies; so that in the language of Lord Mansfield, the evidence was "mere opinion, *without the least foundation from any previous precedent or usage*." And Mr. Arnould concludes that the arguments in favour of the admission of the evidence far outweigh those which have been urged against it. In *Ionides* v. *Pender*, L. R. 9 Q. B. 531, the evidence was admitted without objection.

Controversy as to admissibility of insurance broker's opinion on the materiality of facts not communicated to an underwriter.

KEECH *v.* HALL.

MICH.—19 *GEO.* 3.

[REPORTED, 1 DOUGL., 21.]

A mortgagee may recover in ejectment, without giving notice to quit, against a tenant who claims under a lease from the mortgagor, granted *after* the mortgage without the privity of the mortgagee (*a*).

EJECTMENT tried at Guildhall, before Buller, J., and a verdict for the plaintiff. After a motion for a new trial or leave to enter up judgment of nonsuit, and cause shown, the court took time to consider; and now Lord Mansfield stated the case, and gave the opinion of the court as follows:

Lord MANSFIELD—This is an ejectment brought for a warehouse in the City, by a mortgagee, against a lessee under a lease in writing for seven years, made, *after the date of the mortgage*, by the mortgagor, who had continued in possession. The lease was at a rack-rent. The mortgagee had no notice of the lease, nor the lessee any notice of the mortgage. The defendant offered to attorn to the mortgagee before the ejectment was brought. The plaintiff is willing to suffer the defendant to redeem. There was *no notice* to quit: so that, though the written lease should be bad, if the lessee is to be considered as tenant from *year to year*, the plaintiff must fail in this action. The question, therefore, for the court to decide is, whether by the agreement understood between mortgagors and mortgagees, which is that the latter shall receive interest, and the former keep possession, the mortgagee has given an implied authority to the mortgagor to let from year to year at a rack-rent; or whether he may not treat the defendant as a trespasser, disseisor, and wrongdoer. No case has been cited where this question has been agitated, much less decided.

(*a*) See now the Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 18, *post*, *in notis*, p. 510.

The only case at all like the present, is one that was tried before me on the home circuit (*Belchier* v. *Collins*); but *there the mortgagee was privy to the lease*, and afterwards by a knavish trick wanted to turn the tenant out. I do not wonder that such a case has not occurred before. Where the lease is not a beneficial lease, it is for the interest of the mortgagee to continue the tenant; and where it is, the tenant may put himself in the place of the mortgagor, and either redeem himself, or get a friend to do it (*b*). The idea that the question may be more proper for a court of equity goes upon a mistake. It emphatically belongs to a court of law, in opposition to a court of equity; for a lessee at a rack-rent is a purchaser for a valuable consideration, and in every case between purchasers for a valuable consideration a court of equity must follow, not lead the law. On full consideration we are all clearly of opinion, that there is no inference of fraud or consent against the mortgagee, to prevent him from considering the lessee as a wrongdoer. It is rightly admitted that if the mortgagee had encouraged the tenant to lay out money he could not maintain this action (*c*); but here the question turns upon the agreement between the mortgagor and the mortgagee: when the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises *at will* in the *strictest sense*, and therefore no notice is ever given him to quit, and he is not even entitled to reap the crop as the other tenants at will are, because *all is liable to* the debt; on payment of which the mortgagee's title ceases. The mortgagor has no power, express or implied, to let leases not subject to every circumstance of the mortgage. If, by implication, the mortgagor had such a power, it must go to a great extent to leases where a fine is taken on a renewal for lives. The tenant stands exactly in the situation of the mortgagor. The possession of the mortgagor cannot be considered as holding out a false appearance. It does not induce a belief that there is no mortgage; for it is the nature of the transaction that the mortgagor shall continue in possession. Whoever wants to be secure, when he takes a lease, should inquire after and examine

(*b*) See *Turn* v. *Turner*, 39 Ch. D. 456; *post*, p. 509.

(*c*) See 2 Cowp. 473.

the title-deeds (*d*). In practice, indeed (especially in the case of great estates), that is not often done, because the tenant relies on the honour of his landlord; but, whenever one of two innocent persons must be a loser, the rule is, *qui prior est tempore potior est jure*. If one must suffer it is he who has not used due diligence in looking into the title. It was said at the bar, that if the plaintiff in a case like this can recover, he will also be entitled to the mesne profits from the tenant, in an action of trespass (*e*), which would be a manifest hardship and injustice, as the tenant would then pay the rent twice. I give no opinion on that point; but there may be a distinction, for the mortgagor may be considered as receiving the rents in order to pay the interest, by an implied authority from the mortgagee, till he determine his will. As to the lessee's right to reap the crop which he may have sown previous to the determination of the will of the mortgagee, that point does not arise in this case, the ejectment being for a warehouse; but, however that may be, it could be no bar to the mortgagee's recovering in ejectment. It would only give the lessee a right of ingress and egress to take the crop; as to which, with regard to tenants at will, the text of Littleton is clear. We are all clearly of opinion that the plaintiff is entitled to judgment (*f*).

The Solicitor-General (*Wallace*) for the defendant.—*Dunning* and *Cowper* for the plaintiff.

The rule discharged.

(*d*) See *Baynes* v. *Lloyd* (1895), 1 Q. B. 820, 823.

(*e*) In *Litchfield* v. *Ready*, 5 Exch. 939, it was held that such action would not lie; but see *Barnett* v. *Guilford*, 11 Exch. 19; and *post*, p. 508.

(*f*) When the question was argued at the bar, Lord Mansfield said he entirely approved of what had been done by Nares, J., upon the Oxford Circuit, and afterwards confirmed by this court, in *White* v. *Hawkins*, *viz.*, not to suffer a lessee under a lease *prior* to the mortgage to avail himself of such lease on an ejectment by the mortgagee, if he has had notice before the action that the mortgagee did not intend to turn him out of possession. *This doctrine is, however, long since overruled.* See *Roe* v. *Reade*, 8 T. R. 118; *Doe* v. *Staple*, 2 Id. 684.

The notes to this case are now incorporated with the notes to *Moss* v. *Gallimore*, which follows.

MOSS *v.* GALLIMORE AND ANOTHER.

MICHAELMAS.—20 *GEO.* 3.

[REPORTED, 1 DOUGL. 279.]

A mortgagee, after giving notice of the mortgage to a tenant in possession under a lease *prior* to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards, and he may distrain for it after such notice.

In a notice for the sale of a distress, it need not be mentioned when the rent fell due (*a*).

IN an action of trespass, which was tried before Nares, J., at the last assizes for Staffordshire, on not guilty pleaded, a verdict was found for the plaintiff, subject to the opinion of the court, on a case reserved. The case stated as follows: One Harrison being seised in fee, on the 1st January, 1772, demised certain premises to the plaintiff for 20 years, at the rent of 40*l.*, payable yearly on the 12th May; and in May, 1772, he mortgaged the same premises, in fee, to the defendant Mrs. Gallimore. Moss continued in possession from the date of the lease, and paid his rent regularly to the mortgagor, all but 28*l.* which was due on and before the month of November, 1778, when the mortgagor became a bankrupt, being at the time indebted to the mortgagee in more than that sum for interest on the mortgage. On the 3rd January, 1779, one Harwar went to the plaintiff, on behalf of Gallimore, showed him the mortgage deed, and demanded from him the rent then remaining unpaid. This was the first demand that Gallimore made of the rent. The plaintiff told Harwar that the assignees of Harrison had demanded it before, *viz.*, on the 31st December; but, when Harwar said that Gallimore would distrain for it if it was not paid, he said he had some cattle to sell, and hoped she would not distrain till they were sold, when

(*a*) A man is not bound by his notice of distress; *Crowther* v. *Ramsbottom*, 7 T. R. 654, *per* Lord Kenyon; *Phillips* v. *Whitsed*, 2 E. & E. 804; see *ante*, p. 427. A notice of distress must be in writing; *Wilson* v. *Nightingale*, 8 Q. B 1034.

he would pay it. The plaintiff not having paid according to this undertaking, the other defendant, by order of Gallimore, entered, and distrained for the rent, and thereupon gave a written notice of such distress to the plaintiff, in the following words: "Take notice, that I have this day seized and distrained, &c., by virtue of an authority, &c., for the sum of 28*l.*, being rent, and arrears of rent, due to the said Esther Gallimore, at Michaelmas last past, for, &c., and unless you pay the said rent, &c." He accordingly sold cattle and goods to the amount of 22*l.* 2*s.* The question stated for the opinion of the court was, whether, under all the circumstances, the distress could be justified?

Wood for the plaintiff. *Bower* for the defendants.

Wood.—The plaintiff's case rests upon two grounds: 1st, The defendant, Gallimore, not being, at the time when the rent distrained for became due, in the actual seisin of the premises, nor in the receipt of the rents and profits, she had no right to distrain. 2nd. The notice was irregular, being for rent due at Michaelmas, whereas this rent was only due and payable in May.—1. Before the statute of 4 Anne, c. 16 (*b*), a conveyance by the reversioner was void without the attornment of the tenant (*c*), which was necessary to supply the place of livery of seisin. Since that statute I admit that attornment is no longer necessary to give effect to the deed; but it does not follow from thence, that a grantee has now a right to distrain, before he turns his title into actual possession. The mortgagor (according to a late case (*d*)) is tenant at will to the mortgagee, and has a right to the rents and profits due before his will is determined. Nothing in this case can amount to a determination of the will before the demand of the rent on behalf of the mortgagee, and the whole of that for which the distress was made became due before the demand. If the mortgagor himself had been in possession, he could not have been turned out by force: the mortgagee must have brought an ejectment. The assignees had called upon the plaintiff for the rent, as well as Gallimore, and how could he take upon himself to decide between them? The mortgagee should have brought an ejectment, when any objection there might have been to the title could have been discussed. It

(*b*) Sect. 9.
(*c*) Co. Litt. 309 a, b.
(*d*) *Keech* v. *Hall*, M. 19 Geo. 3, *ante*, p. 494.

does not appear from the case that the interest in arrear had ever been demanded of the mortgagor, and there is a tacit agreement that the mortgagor shall continue in possession and receive the rents till default is made in paying the interest. 2. The notice is irregular, and, on that account, the distress cannot be justified. By the common law, the goods could not be sold. The power to sell was introduced by the statute of William and Mary (*e*); but it is thereby required that notice shall be given thereof; "with the cause of taking," &c. These requisites are in the nature of conditions precedent, and, if not complied with, the proceedings are illegal. It is true, this irregularity, since the statute of 11 Geo. 2 (*f*), does not make the defendants trespassers *ab initio*, but the action of trespass is still left by that statute, for special damages incurred in consequence of the irregularity (*g*).

Lord Mansfield observed, that the plaintiff was precluded by the case from going for special damages arising from any supposed irregularity in the sale, no such special damages being found, and the question stated being only, whether the distress was justifiable; and Buller, J., said that it was not necessary, by the statute of William and Mary, to set forth in the notice at what time the rent became due.

Bower.—If the law of attornment remained still the same as it was at common law, the conversation stated to have taken place between the plaintiff and Harwar would amount to an attornment; and, when there has been an attornment, its operation is not restrained to the time when it was made: it relates back to the time of the conveyance, and makes part of the same title; like a feoffment and livery, or a fine or recovery and the deed declaring the uses; *Long* v. *Hemming* (*h*). Now, however, any doubts there might have been on this subject are entirely removed by the statute of Queen Anne, the words of which are very explicit, *viz.* (*i*): "that all grants or conveyances of any manors, rents, reversions, or remainders, shall be as good and effectual to all intents and purposes, without any attornment of the tenants, as if their attornment had been had and made."

(*e*) 2 W. & M. Sess. 1, c. 5, s. 2.
(*f*) Cap. 19, s. 19.
(*g*) See on this point, *ante*, p. 132, in note to *Six Carpenters' Case*.
(*h*) 1 Anders. 256; Cro. Eliz. 209.
(*i*) 4 Anne, c. 16, s 9.

The proviso in the same statute (*k*), which says that the tenant shall not be prejudiced by the payment of any rent to the grantor before he shall have received notice of the grant, shows that it was meant that all the rent which had not been paid at the time of the notice should be payable to the grantee. The mortgagor is called a tenant at will to the mortgagee. That may be true in some respects, but it is more correct to consider him as acting for the mortgagee in the receipt of the rents as a trustee, subject to have his authority for that purpose put an end to, at whatever time the mortgagee pleases. It is said, the proper method for the mortgagee to have followed would have been to have brought an ejectment, but it is only a very late practice to allow a mortgagee to get into the possession of the rents by an ejectment against a tenant under a lease prior to the mortgage (*l*). The interest, it is said, is not stated to have been demanded: but the case states, that, at the time of the notice and distress, more than the amount of the rent in arrear was due. It is said the tenant could not decide between the mortgagor (or, which is the same thing, his assignees) and the mortgagee; but that is no excuse. He would have had the same difficulty in the case of an absolute sale; a mortgage in fee being, at law, a complete sale, and only differing from it in respect of the equity of redemption, which is a mere equitable interest.

The court told him it was unnecessary for him to say anything on the other point.

Lord Mansfield.—I think this case, in its consequences, very material. It is the case of lands let for years and afterwards mortgaged, and considerable doubts, in such cases, have arisen in respect to the mortgagee when the tenant colludes with the mortgagor; for, the lease protecting the possession of such a tenant, he cannot be turned out by the mortgagee. Of late years the courts have gone so far as to permit the mortgagee to proceed by ejectment, if he has given notice to the tenant that he does not intend to disturb his possession, but only requires the rent to be paid to him, and not the mortgagor (*m*). This, however, is entangled with difficulties. The question here is, whether the mortgagee was

(*k*) Sect. 10.

(*l*) *White* v. *Hawkins*, M. 19 Geo. 3. This practice was anomalous, and no longer exists. See note, *ante*, p. 496.

(*m*) But this is at present never permitted. See *ante*, p. 496.

or was not entitled to the rent in arrear. Before the statute of Queen Anne attornment was necessary, on the principle of notice to the tenant; but, when it took place, it certainly had relation back to the grant, and, like other relative acts, they were to be taken together. Thus, livery of seisin, though made afterwards, relates to the time of the feoffment. Since the statute, the conveyance is complete without attornment; *but there is a provision, that the tenant shall not be prejudiced for any act done by him as holding under the grantor, till he has had notice of the deed. Therefore, the payment of rent before such notice is good.* With this protection, he is to be considered, by force of the statute, as having attorned at the time of the execution of the grant; and, here, the tenant has suffered no injury. No rent has been demanded which was paid before he knew of the mortgage. He had the rent in question still in his hands, and was bound to pay it according to the legal title. But having notice from the assignees, and also from the mortgagee, he dares to prefer the former, or keeps both parties at arm's length. In the case of executions, it is uniformly held that, if you act after notice, you do it at your peril. He did not offer to pay one of the parties on receiving an indemnity. As between the assignees and the mortgagee, let us see who is entitled to the rent. The assignees stand exactly in the place of the bankrupt. Now, a mortgagor is not properly tenant at will to the mortgagee, for he is not to pay him rent. He is only *quodam modo*. Nothing is more apt to confound than a simile. When the court or counsel call a mortgagor a tenant at will, it is barely a comparison. He is like a tenant at will. The mortgagor receives the rent by a tacit agreement with the mortgagee, but the mortgagee may put an end to this agreement when he pleases. He has the legal title to the rent, and the tenant in the present case cannot be damnified, for the mortgagor can never oblige him to pay over again the rent which has been levied by this distress. I therefore think the distress well justified; and I consider this remedy as a very proper additional advantage to mortgagees, to prevent collusion between the tenant and the mortgagor.

Ashurst, J.—The statute of Queen Anne has rendered attornment unnecessary in all cases, and the only question here arises upon the circumstance of the notice of the mortgage not having

been given till after the rent distrained for became due. Where the mortgagor is himself the occupier of the estate, he may be considered as tenant at will; but he cannot be so considered if there is an under-tenant; for there can be no such thing as an under-tenant to a tenant at will. *The demise itself would amount to a determination of the will.* There being in this case a tenant in possession, the mortgagor is, therefore, only a receiver of the rent for the mortgagee, who may, at any time, countermand the implied authority, by giving notice not to pay the rent to him any longer.

Buller, J.—There is in this case a plea of the general issue, which is given by statute (*n*), but if the justification appeared upon the record in a special plea, the distress must be held to be legal. Before the act of Queen Anne, in a special justification, attornment must have been pleaded; but since that statute it is never averred in a declaration in covenant, nor pleaded in an avowry. In the case of *Keech* v. *Hall*, referred to by Mr. Wood, the court did not consider the mortgagor as tenant at will to all purposes. If my memory do not fail me, my Lord distinguished mortgagors from tenants at will in a very material circumstance, namely, that a mortgagor would not be entitled to emblements. *Expressions used in particular cases are to be understood with relation to the subject-matter then before the court.*

The *postea* to be delivered to the defendants.

(*n*) 11 Geo. 2, c. 19, s. 21.

Under these two cases of *Keech* v. *Hall* and *Moss* v. *Gallimore*, the position of a mortgagor, and of his tenants, whether let in before or after the mortgage, will be considered. The position of the tenants of the mortgagor who were let in *before* the mortgage will be considered first.

Position of tenant under lease made by mortgagor *before* mortgage.

Moss v. *Gallimore* is the leading case upon a point which seems so clear in principle that, were it not for its general importance, it would be perhaps a matter of surprise that any case should have been requisite to establish it. The mortgagor having conveyed his estate to the mortgagee, the tenants of the former become of course the tenants of the latter.

Effect of 4 Anne, c. 16, ss. 9, 10.

The necessity of their attornment was removed by the act of Anne, which, though it provides that they shall not be prejudiced by the abolition of attornment, and consequently renders valid any payments they may make to the mortgagor without notice of the mortgage, nevertheless places the mortgagee in the situation of the mortgagor, immediately upon the execution of the mortgage-deed, subject only to that proviso in the tenants' favour, and enables him, by giving them notice of the conveyance, to place himself to every intent in the same situation towards them as the mortgagor previously occupied; *Rawson* v. *Eicke*, 7 A. & E. 451; *Burrowes* v. *Gradin*, 1 D. & L. 213. Payments made by the tenants to a mortgagor after the mortgage, but before notice of it, must, in order to be valid against the mortgagee, have been made in respect of rent which was due at the time of payment or became due before notice of the mortgage; *De Nicholls* v. *Saunders*, L. R. 5 C. P. 589; *Cook* v. *Guerra*, L. R. 7 C. P. 132.

Such being the situation of the tenant with respect to the mortgagee, it was considered unfair that he should not be proportionably exonerated from his liabilities to the mortgagor; therefore, where a lessor, after the execution of the lease, mortgaged the premises, it was held that he could not afterwards maintain ejectment for a forfeiture; *Doe* v. *Edwards*, 5 B. & Ad. 1065.

Although a tenant cannot dispute the title of his landlord, yet he may confess and avoid it by showing that it has been determined by the conveyance to the mortgagee; *Doe* v. *Edwards*, *supra*.

Effect of 36 & 37 Vict. c. 66, s. 25, sub-s. 5.

Now, however, the Judicature Act, 1873, provides (s. 25, sub-s. 5) that "a mortgagor entitled for the time being to the possession, or receipt of the rents and profits, of any land as to which no notice of his intention to take possession, or to enter into the receipt of the rents and profits thereof, shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent, or recover damages in respect of, any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person."

By virtue of the above provision it seems that the mortgagor may now sue to recover possession or rent from tenants let in before the mortgage, until the mortgagee has

given notice of his intention to take possession or to receive the rents and profits.

Authority of mortgagor of reversion to distrain as bailiff for mortgagee.

In *Trent* v. *Hunt*, 9 Exch. 14, it was laid down as a general principle of law that, if a lessor who has mortgaged his reversion is permitted by the mortgagee to continue in the receipt of the rent incident to that reversion, he is *presumptione juris* authorised during such permission to realise the rent, if necessary, by distress, and to distrain for it in the mortgagee's name and as his bailiff. In *Snell* v. *Finch*, 13 C. B. N. S. 651, and *Reece* v. *Strousberg*, 54 L. T. 133, this principle was adopted and acted upon; and in the latter case it seems to have been held that the distress need not be in the name of the mortgagee; see also *Christchurch* v. *Buckingham*, 17 C. B. N. S. 391, 413. This implied authority is limited to a distress upon a lawful occasion; *Trent* v. *Hunt*, *supra*; *Snell* v. *Finch*, *supra*, *per* Willes, J.; and continues only until the mortgagee interferes by giving notice; *Delaney* v. *Fox*, 2 C. B. N. S. 768, 774, *per* Willes, J.

Tenant under lease by mortgagor made *after* mortgage.

Such being the situation of a tenant who comes in under the mortgagor *before* the mortgage, let us now examine a subject which seems to involve more difficulty, namely, that of a tenant who has entered under the mortgagor *subsequently* to the mortgage.

44 & 45 Vict. c. 41.

First, it must be observed that the Conveyancing Act, 1881, has introduced a material difference, for that Act gives to the mortgagor or mortgagee, while respectively in possession, a statutory power of leasing, unless otherwise provided by the mortgage (see *post*, p. 510). But it seems to have become a common practice to provide in the mortgage deed that the mortgagor shall not have that statutory power of leasing, and therefore the common law as to the position of tenants who have entered under the mortgagor is still of great importance.

Situation of mortgagor's tenant at common law.

At common law the mortgagee may eject, without notice to quit, a tenant who claims under a lease from the mortgagor granted after the mortgage without the privity of the mortgagee. This was the point decided in *Keech* v. *Hall*, which has been since frequently confirmed; see *Doe* v. *Giles*, 5 Bing. 421; *Doe* v. *Maisey*, 8 B. & C. 767; *Thunder* v. *Belcher*, 3 East, 449; *Smartle* v. *Williams*, 3 Lev. 387; *Gibbs* v. *Cruickshank*, L. R. 8 C. P. 454; *Lows* v. *Telford*, 1 App. Cas. 414.

At common law it was once alleged that, unlike a tenant

who had entered previous to the mortgage, a tenant who had entered since the mortgage was estopped from disputing the title of the mortgagor unless he was actually evicted by the mortgagee, and could not confess and avoid it, inasmuch as it had never really existed during the period of his possession, and this idea derived a good deal of countenance from the decision in *Alchorne* v. *Gomme*, 2 Bing. 54, though in that case the decision, upon demurrer, turned upon the fact that the plea denied the title of the lessor at the time of the demise.

Early doctrine that mortgagee, by giving notice to tenant, becomes substituted for mortgagor as landlord.

This subject was afterwards fully discussed in *Pope* v. *Biggs*, 9 B. & C. 245, and in that case, followed in *Waddilove* v. *Barnett*, 4 Dowl. 348, it was held that a "mortgagee, by giving notice of the mortgage to the tenant, may thereby make him his tenant, and entitle himself to receive the rents." "The mortgagor," said Parke, J., "may be considered as acting in the nature of a bailiff or agent for the mortgagee. His receipt of rent will, therefore, be good until the mortgagee interferes, and he may recover on the contracts he has himself entered into in his own name with the tenants. But where the mortgagee determines the implied authority by a notice to the tenants to pay their rents to him, the mortgagor can no longer receive or recover any unpaid rent, whether already due or no;" see also *Burrowes* v. *Gradin*, 1 D. & L. 213, *per* Wightman, J.

Pope v. *Biggs*.

Above doctrine shaken.

The doctrine thus promulgated in *Pope* v. *Biggs* was, however, shaken by *Partington* v. *Woodcock*, 6 A. & E. 690, and *Rogers* v. *Humphreys*, 4 Id. 313. And at length, in *Evans* v. *Elliot*, 9 Id. 342, it was expressly decided by the Queen's Bench, on a question whether the mortgagee had a right to distrain, *that the mortgagee cannot by the mere fact of giving the mortgagor's tenant a notice, cause him to hold of himself, the mortgagee, and that even a subsequent attornment by the tenant to the mortgagee will not have the effect of setting up his title as landlord by relation.*

Evans v. *Elliot*.

Now, to create a tenancy to mortgagee, there must be evidence of agreement.

The result of this decision and of that in *Brown* v. *Storey*, 1 Scott, N. R. 91, seems to be that at common law, in order to create a tenancy between the mortgagee and the tenant let into possession by the mortgagor, there must be some evidence whence it may be inferred that such relation has been raised by mutual agreement, and that in such case the terms of the tenancy are to be ascertained (as in an ordinary case) from the same evidence as proves its existence, and that it does not lie in the power of the mortgagee by a mere

notice to cause the tenant in possession to hold under him *on the same terms* on which he held under the mortgagor—or indeed upon any terms at all without his, the tenant's, consent. And that, where the tenant does consent to hold under the mortgagee, *a new tenancy* is created, not a continuation of the old one between him and the mortgagor. These decisions were approved and followed by the C. A. in *Towerson* v. *Jackson*, (1891) 2 Q. B. 484, where the principle was affirmed that the relation of landlord and tenant between the mortgagee and a tenant of the mortgagor can be created only by agreement.

And, if any, a *new* tenancy is created.

In *Brown* v. *Storey*, indeed, the Court of Common Pleas expressed an opinion that, if the mortgagor's tenant, after receiving notice from the mortgagee to pay rent to him, continued in possession, it might fairly be inferred that he assented to continue as tenant to the mortgagee. This opinion was followed by the Q. B. D. in *Underhay* v. *Read*, 20 Q. B. D. 209, but the decision was affirmed upon another ground in the C. A. (see *post*, p. 507). The question was subsequently considered in *Towerson* v. *Jackson*, (1891) 2 Q. B. 484, and the C. A. held that the mere fact of the tenant remaining in possession after notice from the mortgagee was no evidence of an agreement that he would become tenant to the mortgagee, and that the view taken in *Brown* v. *Storey*, *supra*, and *Underhay* v. *Read*, *supra*, was wrong and contrary to the principle laid down in *Evans* v. *Elliot*, *supra*.

Terms of such tenancy.

It would seem that when a new tenancy is thus created by agreement the terms of such new tenancy must be proved by evidence, and that the mere fact that the tenant has paid rent to the mortgagee after notice is no evidence that the tenancy is to be upon the same terms on which the tenant held under the mortgagor; see *Oakley* v. *Monck*, 1 Ex. D. 159.

Case where agreement with mortgagor after mortgage, tenancy having commenced before it.

In *Burrowes* v. *Gradin*, 1 D. & L. 213 (which may be considered a middle case), Wightman, J., held that an agreement made after the mortgage between the mortgagor and a tenant from year to year, whose tenancy commenced before the mortgage, for payment of an additional annual sum as rent, in consideration of improvements made by the mortgagor, had not the effect of so changing the situation of the parties, that the tenant could be considered as no longer holding of the mortgagee; and further, that the mortgagee might adopt the dealing of the mortgagor as his agent, and (after notice of the mortgage) recover not merely the amount

of rent originally payable, but the additional sum also, which, in consequence of the improvement of the land, the tenant agreed to pay; a remarkable decision, so far as relates to the additional sum agreed to be paid, because it appears from *Donellan* v. *Read*, 3 B. & Ad. 899, and *Lambert* v. *Norris*, 2 M. & W. 334, that that sum was not rent properly so called, but a sum in gross, for which an assignee of the reversion could not sue, nor could an assignee of the term be sued. The reasoning of Wightman, J., though expressly limited to the peculiar circumstances of the case, and especially founded on that of the tenancy having existed at the time of the mortgage, tended in some degree to confirm the erroneous conclusions formerly drawn from *Pope* v. *Biggs*, *supra*, p. 505.

Tenant, if evicted by mortgagee, may dispute mortgagor's title.

It would seem that the cases on this subject might be reconciled to ordinary principles, without straining after any peculiar rule applicable to the case of mortgagor and mortgagee, by observing that a tenant of the mortgagor, whose tenancy has commenced since the mortgage, may at common law, in case of an eviction by the mortgagee, either actual or constructive, dispute the mortgagor's title to either the land or the rent, in the same way as any tenant may do upon an eviction by title paramount. Such a tenant is constructively evicted by the mortgagee, if he has been compelled by the mortgagee to become his tenant; *Corbett* v. *Plowden*, 25 Ch. D. 678; see *Doe* v. *Barton*, 11 A. & E. 314; *Poole* v. *Whitt*, 15 M. & W. 571; *Delaney* v. *Fox*, 2 C. B. N. S. 768; and *Carpenter* v. *Parker*, 3 Id. 237. And further, he can, although there have been no eviction, defend an action for rent by proof of a payment, under constraint, in discharge of the mortgagee's claim; *Johnson* v. *Jones*, 9 A. & E. 809, which was approved and followed by the C. A. in *Underhay* v. *Read*, 20 Q. B. D. 209. This right is analogous to that of an ordinary tenant in respect of payments on account of rent-charges, and other claims issuing out of the land, of which examples are cited in the note to *Lampleigh* v. *Braithwaite*, *ante*. But a tenant who has come in under the mortgagor after the mortgage, and has neither paid the rent to the mortgagee, nor been evicted by him either actually or constructively before the day of payment, cannot defend an action by the mortgagor for that rent; *Wheeler* v. *Branscombe*, 5 Q. B. 373.

Tenant may also plead payment of rent to mortgagee.

But otherwise cannot defend action by mortgagor for rent.

As the mortgagor ceases to be entitled to the rents upon the mortgagee's giving the tenant notice, and the tenant's paying them to him, it follows that the mortgagor cannot

No action for rent accruing due after notice by

mortgagee, or due when notice given, but unpaid, if paid to mortgagee.

afterwards maintain any action for use and occupation against the tenant, either for rent which accrued due after the notice, or for rent which accrued due before the notice, but was unpaid at the time when the notice was given. In the former case the defence amounts to a denial of the contract alleged, which avers the defendant to have used and occupied the land by the permission of the plaintiff, the mortgagor. But in the latter case, *viz.*, where the rent became due *before* notice, but was unpaid at the time of notice, the tenant confesses that the right of action once existed, but avoids it by matter *ex post facto*, *viz.*, by the subsequent notice from the mortgagee; *Waddilove* v. *Barnett*, 2 B. N. C. 538.

Notice without payment or eviction no defence.

It appears to be now settled that at common law the mere notice without payment or eviction is not a defence to an action by the mortgagor against the tenant, either for rent due before (*Wilton* v. *Dunn*, 17 Q. B. 294; *Hickman* v. *Machin*, 4 H. & N. 716), or after the notice (*Hickman* v. *Machin*).

Mortgagee's right as to mesne profits.

In *Litchfield* v. *Ready*, 5 Exch. 919, it was held that the mortgagee could not, after entry, maintain trespass for mesne profits before entry against the mortgagor's tenant let in after the mortgage. It is to be observed, however, that Parke, B., in giving judgment in that case, proceeds upon the ground that the doctrine of relation back of possession to title is confined entirely to the case of disseisor and disseisee, a view which the same learned judge modified in the later case of *Barnett* v. *Guilford*, 11 Exch. 19, where the doctrine was applied in the case of entry by the heir on an abator. In the case of *Anderson* v. *Ratcliffe*, E. B. & E. 806—819, the doctrine was applied in the case of entry by the assignee of a term; but in the judgment of the Exch. Cham. the case of mortgagor and mortgagee seems to be put upon a distinct and special footing; S. C. 29 L. J. Q. B. 128.

Six months' notice by mortgagee necessary under 53 & 54 Vict. c. 57.

Under the Tenants' Compensation Act, 1890, a person who occupies land under a contract of tenancy with the mortgagor, which is not binding on the mortgagee of the land, can be deprived of the land by the mortgagee only in accordance with the contract of tenancy, or after six months' notice in writing from the mortgagee (s. 2, sub-s. 2). This provision applies only where the holdings come within the Agricultural Holdings Act, 1883, or the Allotments and Cottage Gardens Compensation for Crops Act, 1887 (s. 1), *and* where the contract is for a yearly tenancy, or for a term

46 & 47 Vict. c. 61.

50 & 51 Vict. c. 26.

of years not exceeding twenty-one, at a rack-rent (s. 2, subs. 2).

Tenant's right to redeem.

A tenant who has entered after the mortgage can protect himself from eviction by the mortgagee by redeeming the mortgage. In *Keech* v. *Hall*, Lord Mansfield says: "Where the lease is not a beneficial lease, it is for the interest of the mortgagee to continue the tenant; and where it is, the tenant may put himself in the place of the mortgagor, and either redeem himself or get a friend to do it." No instance, however, is to be found of a tenant having taken this course until the case of *Tarn* v. *Turner*, 39 Ch. D. 456. In that case a tenant who had entered under an agreement with the mortgagor for a lease for a term of years brought an action to redeem the mortgage, and the C. A. held that he was clearly entitled to redeem, because he had an interest in the equity of redemption. A tenant who holds under an agreement for a lease is entitled to redeem, if he has an undisputed right to specific performance of the agreement; *Tarn* v. *Turner*, *supra*.

Mortgagee cannot treat tenant as lawfully in possession and as tortfeasor.

When once it has been proved that the mortgagee has recognised that the tenant of the mortgagor is lawfully in possession, he cannot afterwards treat him as being a tortfeasor at the time of such recognition; nor, if he elect to treat him as a tortfeasor, can he maintain any demand against him in which he is charged as being a tenant at any time during which he elected to treat him as a trespasser. The case of *Birch* v. *Wright*, 1 T. R. 378, clearly establishes that a man cannot be treated at once both as a tenant and a trespasser.

Recognition of lawful possession.

In *Doe* v. *Cadwalader*, 2 B. & Ad. 473, it was held that the receipt of interest from the mortgagor was no recognition by the mortgagee that the mortgagor or his tenants were in lawful possession at the time of such receipt; but in *Doe* v. *Hales*, 7 Bing. 322, the court held, that where the mortgagee had demanded from a tenant of the mortgagor rent to pay the interest and had threatened a distress, and the rent had been paid to him, he thereby recognised that the tenant was lawfully in possession at the time of such payment, and could not afterwards treat him as having been then a trespasser; see *Doe* v. *Lewis*, 13 M. & W. 241; *Doe* v. *Goodier*, 10 Q.B. 957.

Situation of tenant under the Conveyancing Act, 1881. 44 & 45 Vict. c. 41.

There now remains to be considered the situation, relatively to the mortgagee, of the mortgagor's tenant where the lease has been made by the mortgagor under the statutory power given by s. 18 of the Conveyancing Act, 1881.

S. 18. This section applies to all mortgages made after 1 January, 1882 (sub-s. 16). The powers given by this section may be excluded or modified by the mortgage deed or a written agreement (sub-s. 13), or may be enlarged by the mortgage deed (sub-s. 14); they may also be made to apply to a mortgage made before 1 January, 1882, by a written agreement for that purpose (sub-s. 16).

The powers conferred by s. 18 are as follows. The mortgagor, while in possession, has power to make from time to time, (1.) An agricultural or occupation lease for any term not exceeding 21 years; (2.) A building lease for any term not exceeding 99 years (sub-ss. 1 and 3). Every such lease must be made to take effect in possession not later than 12 months after its date (sub-s. 5), and must reserve the best rent reasonably obtainable, without any fine being taken (sub-s. 6); and must contain a covenant by the lessee to pay the rent, and a condition for re-entry on non-payment thereof within a specified time not exceeding 30 days (sub-s. 7). A counterpart of the lease must be executed by the lessee and delivered to the lessor, and the execution of the lease by the lessor is, in favour of the lessee, sufficient evidence of such execution and delivery (sub-s. 8); the counterpart must be delivered by the mortgagor to the first mortgagee within one month after making the lease, but the lessee is not concerned to see that this is done (sub-s. 11). Building leases must be made in consideration of the lessee having built, improved, or repaired, or having agreed so to do, within 5 years from the date of the lease (sub-s. 9); and the rent reserved thereon, for the first 5 years, or a less part of the term, may be a peppercorn or nominal rent, or other rent less than the rent ultimately payable (sub-s. 10).

The provisions of s. 18 are to be construed to extend and apply, so far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting (sub-s. 17); and a contract to make or accept a lease under s. 18 may be enforced by or against every person on whom the lease, if granted, would be binding (sub-s. 12).

This enactment does not enable a mortgagor to make a lease for a longer term, or on any other conditions, than he could have granted or imposed, with the concurrence of all the incumbrancers, if the Act had not been passed (sub-s. 15).

S. 10. The same Act provides by s. 10, with reference to leases made after 1 January, 1882 (sub-s. 2), that "rent reserved by

a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to, and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant upon the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased." And s. 11 provides that the obligation of the lessor's covenants with reference to the subject-matter of the lease shall in like manner run with the reversion, if and so far as the lessor has power to bind the reversionary estate. S. 11.

The effect of the above sections is, that a lease made by a mortgagor in possession, which complies with the provisions of s. 18, is good against the mortgagee, and that the mortgagee, upon giving notice to the tenant, or going into possession, is entitled to enforce the covenants and conditions in the lease as reversioner, and is bound by the lessor's covenants; *Municipal Soc.* v. *Smith*, 22 Q. B. D. 70; *Wilson* v. *Queen's Club*, (1891) 3 Ch. 522. In *Municipal Soc.* v. *Smith*, the mortgagor had granted a lease under s. 18, and the mortgagee was held to be entitled to re-enter for non-payment of rent after he had given notice to the tenant to pay the rent to him; and in *Wilson* v. *Queen's Club* the mortgagor leased a part of the land, and the mortgagee subsequently conveyed another part of the land adjoining to other persons, and it was held, that the grantees of the mortgagee could not obstruct the access of light to houses built by the lessee upon the land leased to him by the mortgagor, the mortgagee being bound by the lease as if he had joined in it. The mortgagee is not bound or affected by any collateral or independent agreement which the mortgagor may have made with the lessee; *Municipal Soc.* v. *Smith*, *supra*. Effect of ss. 10 and 11.

I will conclude this part of the note by taking notice of a case which sometimes occurs; *viz.*, that of a lease purporting to be by mortgagor and mortgagee jointly. Such an instrument operates as a lease by the mortgagee, with a confirmation by the mortgagor, until the estate of the former has been determined by paying off the mortgage-money, and then it becomes the lease of the mortgagor, and the confir- Leases by mortgagor and mortgagee jointly.

mation of the mortgagee. It followed, before the Common Law Procedure Act, 1852, that, if ejectment was brought against the tenant during the mortgagee's estate, the demise must have been laid in the name of the mortgagee; if afterwards, in that of the mortgagor; but a joint demise laid in the declaration would not have been improper; *Doe* v. *Adams*, 2 Tyr. 289; *Doe* v. *Goldsmith*, Id. 710.

Right of entry in such leases.

A right of re-entry reserved only to the mortgagor in a lease by mortgagor and mortgagee was (before the Conveyancing Act, 1881) held not to be available to the plaintiffs in ejectment by the mortgagor and mortgagee; *Saunders* v. *Merryweather*, 3 H. & C. 902. The mortgagee could not re-enter, because no right of re-entry was reserved to him; the mortgagor could not, because he had no legal interest in the reversion, and the facts of the case excluded an estoppel.

Covenants in such leases.

When a mortgagor and mortgagee join in a lease, and the covenants to pay rent and repair are only with the mortgagor and his assigns, the mortgagee's assign cannot (unless by virtue of the Conveyancing Act, 1881) sue on those covenants, because collateral to his interest in the land; *Webb* v. *Russell*, 3 T. R. 393; though the mortgagor might sue on them as covenants in gross; *Stokes* v. *Russell*, Id. 678. Where the mortgagor and mortgagee join in a lease, containing an express covenant by the mortgagor for quiet enjoyment, no covenant from both can be implied; *Smith* v. *Pocklington*, 1 Tyrwh. 313. In *Harold* v. *Whitaker*, 11 Q. B. 147, 163, in a lease by the mortgagor and mortgagee which recited the mortgage, the reddendum was to the mortgagee, his executors, &c., during the continuance of the mortgage, and after satisfaction thereof, to the mortgagor, his executors, &c., and the lessee covenanted with the mortgagee, and also with the mortgagor, to pay the rent "on the several days and times, and in manner as the same was reserved and made payable." The covenant was held to be several.

Cases where mortgage operates as a re-demise to mortgagor.

Next, there is a class of cases to be considered, in which it has been held that the mortgage, though not expressly creating a tenancy, contained provisions which operated as a re-demise by the mortgagee to the mortgagor, thus giving the latter a right to retain possession, and the power to make a valid demise.

Effect of covenant that mortgagor shall remain in possession for a fixed period.

It often happens that there is an express covenant in a mortgage deed, that the mortgagor shall remain in possession of the premises until default in payment of the mortgage-money at a certain date. Up to that date he seems to have

an interest in the nature of a term of years; and, of course, during the interval he has a right to possession, and cannot be legally ejected; *Wilkinson* v. *Hall*, 3 B. N. C. 508; the stipulation that he should remain in possession operating as a redemise. When the fixed period has expired, he becomes, if the money has not been paid, *tenant at sufferance* to the mortgagee. "We must look," said Best, C.J., delivering judgment in such a case, "at the covenant he has made with the mortgagee, to ascertain what his real situation is. We find, from the deed between the parties, that possession of his estate is secured to him until a certain day, and that, if he does not redeem his pledge by that day, the mortgagee has a right to enter and take possession. From that day the possession belongs to the mortgagee; and there is no more occasion for his requiring that the estate should be delivered up to him before he brings an ejectment, than for a lessor to demand possession on the determination of a term. The situation of a lessee on the expiration of a term, and a mortgagor who has covenanted that the mortgagee may enter on a certain day, is precisely the same;" *Doe* v. *Giles*, 5 Bing. 427.

Distinction between agreement that mortgagor shall remain in possession for a *time certain*, and *until default*, in operating as redemise.

Attending to the distinction between an agreement to be collected from the mortgage deed that the mortgagor shall remain in possession for a *time certain*, which operates as a redemise, and an agreement that the mortgagee may enter upon, or the mortgagor hold until, a default, the time of which is uncertain, which agreement cannot operate as a redemise *for want of certainty* (Com. Dig., *Estate*, G. 12), the view taken in *Wilkinson* v. *Hall* seems not to be at variance with the later decisions in *Doe* v. *Lightfoot*, 8 M. & W. 564, and *Doe* v. *Day*, 2 Q. B. 147, though extended too widely in *Doe* v. *Goldwin*, 2 Q. B. 143.

Mortgagee of term cannot bring trespass before entry.

As for *Wheeler* v. *Montefiore*, 2 Q. B. 133, explained by the court in *Doe* v. *Day*, Id. 155, it has no bearing upon the question; because in that case the mortgage was for a term of years, the mortgagee had never entered, and his action was for *trespass*; which form of action a lessee for years cannot maintain before entry; although he may bring ejectment, because in ejectment the *right* to the possession only is in question; *Harrison* v. *Blackburn*, 34 L. J. C. P. 109.

Semble, nor can mortgagee in fee.

In *Turner* v. *Cameron's Coal Co.*, 5 Exch. 932, the mortgage does not appear to have been for years or a less estate, and the court was of opinion that the mortgagee could not maintain trespass before entry, because he had

not entered; and see *per* Parke, B., *Litchfield* v. *Ready*, 5 Exch. 919, 945; Com. Dig., *Trespass*, B. 3.

In *Doe* v. *Goldwin*, though time for which mortgagor was to hold uncertain, held a redemise; but as to this case *quære*.

In *Doe* v. *Goldwin*, 2 Q. B. 143, a conveyance of the legal estate was made by Lyster and his wife, in order "to secure an annuity upon which money had been advanced;" and it was in trust, amongst other things, to permit Mrs. Lyster to receive the rents until default made for sixty days in payment of the annuity; and, no default appearing, it was held that the legal estate remained by way of redemise in Lyster. But, to cite the observation of the court in a subsequent judgment (*Doe* v. *Day*, 2 Q. B. 155), "it may be questionable whether sufficient attention was paid in that case to the point as to the *certainty of the time*: at all events, it was not decided upon any ground that such certainty was immaterial." It may be further observed, upon *Doe* v. *Goldwin*, that the nature of the transaction does not appear very distinctly, and the conveyance seems not unlikely to have been simply a demise or assignment of a term to secure the annuity, and so to have admitted of considerations different from those which govern the case of an ordinary mortgage; see *Jenkins* v. *Milford*, 1 J. & W. 629; *Doe* v. *Kensington*, 8 Q. B. 429.

Doe v. *Lightfoot*. Time uncertain, no redemise.

In *Doe* v. *Lightfoot*, 8 M. & W. 553, the proviso was, that if the mortgagor should pay the principal and interest on the next 25th March, the mortgagee should reconvey, and there were covenants that *after default* the mortgagee might enter, and also, *after default*, for further assurance. The court, referring to the passage in Shepherd's Touchstone presently to be stated in full, and observing that it was not brought to the attention of the court in *Wilkinson* v. *Hall*, held that the estate was in the mortgagee from the time of the *execution of the mortgage*, and that the statute of limitations began to run from that time; see also *Rogers* v. *Grazebrook*, 8 Q. B. 895.

Doe v. *Day*. Same doctrine.

In *Doe* v. *Day*, 2 Q. B. 147, freeholds and leaseholds were conveyed in mortgage with a proviso that, upon payment on the next 5th October, the conveyance should be void, but in case of non-payment it was to be lawful for the mortgagee, after a month's notice in writing demanding payment, to enter into possession, and to make leases and sell, and the mortgagee covenanted not to sell or lease until after such notice. The court, following the authority of the passage in the Touchstone, referred to in *Doe* v. *Lightfoot*, and acceding to the doctrine of that case, came to the

conclusion that, inasmuch as, after the day of payment, the time, if any, during which the mortgagor was to hold was not determinate, but altogether uncertain, and as there was no affirmative covenant whatever that he should hold at all, "the covenant, therefore, that the mortgagee should not *sell* or *lease*, or even if it be construed should not *enter*, until a month's notice, was a covenant only and no lease."

Shep. Touch. 272.

The passage in Shep. Touch. (8th ed.) 272, referred to in *Doe* v. *Lightfoot*, and cited and commented upon in *Doe* v. *Day*, is as follows:—"If A. do but grant and covenant with B., that B. shall enjoy such a piece of land for twenty years; this is a good lease for twenty years. So, if A. promise to B. to suffer him to enjoy such a piece of land for twenty years; this is a good lease for twenty years. So, if A. license B. to enjoy such a piece of land for twenty years; this is a good lease for twenty years. And therefore it is the common course, if a man make a feoffment in fee, or other estate upon condition, that if such a thing be or be not done at such a time, that the feoffor, &c., shall re-enter, to the end that in this case the feoffor, &c., may have the land, and continue in possession until that time, to make a covenant that he shall hold, and take the profits of the land until that time; and this covenant in this case will make a good lease for that time, if the *uncertainty of the time*, whereunto care must be had, do not make it void. (Mr. Preston adds, 'The limitation of a certain term, with a collateral determination on the event, would meet the difficulties of the case.') And, therefore, if A. bargain and sell his land to B. on condition to re-enter if he pay him 100*l.*, and B. doth covenant with A. that he will not take the profits until default of payment; or that A. shall take the profits until default of payment; in this case, howbeit this may be a good covenant, yet it is no good lease ('for want,' says Mr. Preston, 'of a more formal contract, and also for want of certainty of time'). And if the mortgagee covenant with the mortgagor, that he will not take the profits of the land until the day of payment of the money; in this case, albeit the time be certain, yet this is no good lease, but a covenant only ('since,' says Mr. Preston, 'the words are negative only, and not affirmative'). Precisely the same law is laid down in *Powsely* v. *Blackman*, Cro. Jac. 659; *Evans* v. *Thomas*, Cro. Jac. 172; *Jemmot* v. *Cooly*, 1 Lev. 170; S. C., 1 Saund. 112 b., 1 Sid. 223,

262, 344; Sir T. Raymond, 135, 158; 1 Keb. 784, 915; 2 Keb. 20, 184, 270, 295."

What necessary to make a redemise.

It may perhaps be concluded, on this review of the authorities, that in order to make a redemise, there must be an *affirmative* covenant, that the mortgagor shall hold for a *determinate* time; and that where either of those elements is wanting, there is no redemise.

Agreement in mortgage for tenancy by mortgagor, or power of distress to mortgagee.

A mortgage deed sometimes contains an express agreement that the mortgagor shall be tenant to the mortgagee at a rent; or a power enabling the mortgagee to distrain, by which no tenancy is created. The object of such provisions is generally to further secure payment of the interest, and, if so provided, of the principal; see *Ex p. Harrison*, 18 Ch. D. 127; an object more completely effected by adopting the former than the latter mode of framing the deed. The former makes the mortgagor tenant to the mortgagee and creates a rent properly so called, with all its incident remedies; *Anderson* v. *Midland R. Co.*, 30 L. J. Q. B. 94; see *Jolly* v. *Arbuthnot*, 4 De G. & J. 224; *West* v. *Fritche*, 3 Exch. 216; *Morton* v. *Woods*, L. R. 4 Q. B. 293; *Daubuz* v. *Lavington*, 13 Q. B. D. 347; *Re Threlfall*, 16 Ch. D. 274; *Ex p. Voisey*, 21 Id. 442; *Kearsley* v. *Philips*, 11 Q. B. D. 621, where Brett, M.R., quoted this passage with approval. The latter mode operates merely by way of personal licence from the mortgagor, and affects his interest only. The former mode, however, is open to the objection that the tenancy created, unless apt words to the contrary are used (see *Re Threlfall, supra*), is at will, and consequently the rent precarious; and to the more practical one, that the deed may possibly be held to require a lease stamp; see 18 Jurist, part 2, p. 150.

Effect on mortgagee's right to bring ejectment depends in each case on the terms of the deed.

The effect of either mode of framing the deed upon the right of the mortgagee to bring ejectment must, in each case, depend upon the terms in which it is framed. Further, the terms of the deed are important in considering a series of cases noted later on, in which the question is discussed whether instruments of mortgage purporting to create the relation of landlord and tenant between mortgagee and mortgagor have really had that effect so as to give the mortgagee the rights of a landlord as *against other creditors* of the mortgagor *on the bankruptcy* of the latter.

Doe v. *Olley*.

In *Doe* v. *Olley*, 12 A. & E. 481, it was agreed that the mortgagor, during his occupation of the premises, should pay the mortgagee a *rent* of 50*l.* a year, with such power of

distress as landlords have on common demises, provided that the reservation of rent should not prejudice the mortgagee's right to enter after default in payment of the moneys secured. The mortgagee, after the principal had fallen due, distrained for half a year's rent, and upon a subsequent default in payment of rent, the principal still remaining due, he, without any notice to quit, brought ejectment, and succeeded. Patteson, J., in that case, expressed his opinion that it could not be meant that the 50*l.* should be a rent-charge, because the mortgagor had no estate in him, and that it seemed "as if the relation of landlord and tenant was contemplated, but with liberty for the landlord to treat the tenant as a trespasser at any time after any default." That decision was confirmed and acted on in *Doe* v. *Tom*, 4 Q. B. 615.

Doe v. *Cox.*

In *Doe* v. *Cox*, 11 Q. B. 122, the mortgagor agreed to become tenant "henceforth at the will and pleasure of the mortgagee, at the yearly rental of 25*l.* 4*s.* payable quarterly," which agreement was held to create a tenancy at will, not converted into a tenancy from year to year by occupation and payment of rent for two years.

Metropolitan Counties Society v. *Brown.*

In *Metropolitan, &c., Society* v. *Brown*, 4 H. & N. 428, powers of sale and entry after default on a certain day were given by the mortgage deed, which provided that, "to the intent that the mortgagees might have for the recovery of interest on the principal money the same powers of entry and distress as are given to landlords for the recovery of rent in arrear," the mortgagor "did thereby attorn and become tenant *from year to year* of the premises to the mortgagees at a yearly rent, payable half-yearly. Nevertheless, in the event of any *sale* under the powers thereinbefore contained," the attornment and tenancy thereby created was, "as regards such portion of the premises as should be sold, to be at an end; and that *without any previous notice to put an end to the same*." The assignees of the mortgagees after default in payment on the day named, without giving the mortgagor a half year's notice to quit served him with a notice of entry, and on his refusal to give up possession brought ejectment against him, which action was held maintainable. "The clause of attornment," said Pollock, C.B., "did not create a *tenancy from year to year with all its incidents*, and, looking at the deed in its entirety, the true construction is that the right of entry overrides the other provision, and therefore, notwithstanding the tenancy

thereby created, the mortgagee may re-enter on default of payment of the interest." The majority of the court seem to have been of opinion that such form of mortgage creates a tenancy from year to year, determinable on the part of the mortgagee without notice to quit.

Morton v. *Woods.*

Where a mortgage deed, which was never executed by the mortgagee, contained an attornment by the mortgagor for the term of ten years, with a proviso that the landlord might enter and determine the term at his will, it was urged, on the authority of Brooke's Abr., tit. *Lease*, 13, that the proviso must be rejected as repugnant, and that as there was no deed executed the term for ten years was void. But the court held that, though this might be so in the case of an ordinary lease, yet, looking at the whole object and scope of the deed in question, a tenancy was thereby created so as to support a distress by the mortgagee; *Morton* v. *Woods*, L. R. 4 Q. B. 293. As to the exact nature of the tenancy, see *per* Lush, L.J., in *Ex p. Punnett*, 16 Ch. D. 226, where this case was expressly followed by the C. A.

In re Threlfall.

Similarly, in *Re Threlfall*, 16 Ch. D. 274, where the mortgage deed contained an attornment clause whereby the mortgagors "did attorn and become tenants from year to year to" the mortgagees, with a proviso that the mortgagees might at any time after a certain date, without notice, take possession of the mortgaged premises, it was held by the C. A. that there was no repugnancy between these two clauses, and that a tenancy from year to year in the mortgagors was created which supported a distress by the mortgagees; see also *Ex p. Voisey*, 21 Ch. D. 442.

Clowes v. *Hughes.*

Where a mortgage deed provided that the mortgagor in the event of his making default should "*immediately or at any time* after such default" hold the mortgaged premises as yearly tenant to the mortgagees from the date of the deed, at a specified rent, it was held that the mortgagor did not, upon default, become tenant so as to give the mortgagees a right of distress, until after some notice from them to him of the change they had resolved to make in the terms upon which his possession was suffered to continue; *Clowes* v. *Hughes*, L. R. 5 Ex. 160.

Where by an attornment clause the mortgagor became tenant at will to the mortgagee, at a rent equal to the amount of the interest, payable half-yearly, and upon the mortgagor's death his heir-at-law entered into possession,

and for some time paid the interest due under the mortgage, it was held that no tenancy existed between the mortgagee and the heir-at-law; *Scobie* v. *Collin*, (1895) 1 Q. B. 375.

Cases in which personal licence to distrain, or rent-charge given to mortgagee.

In these cases, the relation of landlord and tenant appears to have at first existed; but there have been others of a like character, in which a mere personal licence to distrain, or a rent-charge (afterwards merged by the acquisition of the legal estate), has been given to the mortgagee. Thus in *Doe* v. *Goodier*, 10 Q. B. 957, there was a power in the mortgagee to distrain for interest if in arrear twenty-one days, "in like manner as for rent reserved on a lease;" and though the mortgagee had entered and distrained after the day of the demise in ejectment, but for interest due before that day, he was considered not to have recognised the mortgagor as his tenant, and to be entitled to maintain ejectment.

Freeman v. *Edwards*.

In *Freeman* v. *Edwards*, 2 Exch. 732, the mortgage, which was of copyholds, contained a similar power to distrain for interest; the mortgagee was admitted to the copyholds; the mortgagor became bankrupt, and, whilst he still remained in possession, the mortgagee distrained for interest in arrear; for which act the assignees of the mortgagor sued in trespass. The mortgagee pleaded justification under the deed, which plea was held bad after verdict. The arguments advanced on either side, and the view taken by the court of the operation of such a power, appear fully in the following passage from the judgment of Parke, B., as reported 17 L. J. Ex. 261—"The utmost effect that can be given to this deed is to consider it as operating as a covenant that the mortgagee may seize such goods of the mortgagor as shall be on the premises at the time the distress is made, and treat them as if distrained; such a covenant would not affect any specific goods before seizure, and therefore the goods came to the assignees not subject to any equity. Probably, the argument that the grant operated so as to create a rent-charge is correct; and if so, the rent-charge continued until the surrender and admittance. But it is not necessary to decide that, for as soon as the grantee of the rent-charge, if it was one, became entitled to the fee simple in possession, the rent-charge was gone, and the covenant ceased to exist as an obligation binding the land. It might, however, still exist as a personal covenant, binding the covenantor, though it would not affect third persons. The argument of the plaintiff's

counsel, that the effect of the deed was exhausted by the creation of the rent, may make this doubtful; and it is not necessary to decide it, for, giving the covenant this effect, it will not make this a good plea. The covenant at most is to be construed as an agreement that all goods belonging to Leedham (the mortgagor) at the time of the distress, and then upon the land, might be seized. This would affect his own goods when seized. Up to the seizure the whole is contingent, and gives no lien on specific goods. Before the distress was made, Leedham became bankrupt; at that time the whole of the goods which were his property, and then upon the land, were contingently liable to be seized, but no specific portion was liable more than the rest. There was, therefore, no lien on any portion of the goods, according to the principle of the decision in *Carvalho* v. *Burn*, 4 B. & Ad. 382, 1 A. & E. 883. Then, at the moment of the distress the goods had ceased to belong to Leedham, and became the property of the assignees, and, as goods not belonging to the covenantor, were not subject to the covenant;" see also *Chapman* v. *Beecham*, 3 Q. B. 723.

Personal licence to distrain.

A personal licence to distrain would seem not to be transferable, and the assignee of the mortgage could not justify a seizure under it as a servant of the mortgagee; *Brown* v. *Metropolitan, &c., Soc.*, 1 E. & E. 832; *Re Davis*, 22 Q. B. D. 193.

Cases where mortgage held not to create a tenancy.

Walker v. *Giles.*

In certain cases the courts have held, on various grounds, that the mortgage deed, though purporting to create a tenancy in the mortgagor, had not that effect. Thus, in *Walker* v. *Giles*, 6 C. B. 662, where a conveyance to the trustees of a building society, to secure payment of subscriptions, contained a clause whereby the mortgagor agreed to become thenceforth tenant of the premises to the trustees "during their will, at the net yearly rent of 200*l.*, payable on the usual quarter days," the court held that there was no tenancy, the general scope of the deed being inconsistent with such a construction, since, if there was a tenancy, the mortgagor might be called upon to pay both the subscriptions and the rent. This case seems, however, open to the animadversion which it called forth in the 13 Jurist, part 2, p. 463, and 17 Jurist, part 2, p. 149; and the court appears to have disregarded the express intention of the parties, in order to avoid the fancied injustice of the trustees having power (subject to the control of a court of equity) to recover their debt twice over, in other words, to treat the rent as

Quære as to this case.

security for payment of the subscriptions. And in the subsequent case of *Pinhorn* v. *Souster*, 8 Exch. 763, where the deed more fully, though scarcely more clearly, than in *Walker* v. *Giles*, expressed the intention that a tenancy at will should be created, and stipulated that the mortgagee should apply the rent in satisfaction of the rent due from the mortgagor to his superior landlord, and in satisfaction of the principal and interest, and pay the surplus, if any, to the mortgagor, *Walker* v. *Giles* was distinguished, and it was held that a tenancy at will was created, in respect of which the mortgagee might distrain; and further, that such tenancy was not put an end to by assignment of the mortgagor's interest without notice to the mortgagee. In *Brown* v. *Metropolitan, &c., Soc.*, 1 E. & E. 832, the court expressed an opinion that *Walker* v. *Giles* could only be supported, if at all, on the ground, pointed out by Parke, B., in *Pinhorn* v. *Souster*, that the tenancy and power of distress were inconsistent with the other provisions of the deed; see also *Doe* v. *Davies*, 7 Exch. 89; *Turner* v. *Barnes*, 2 B. & S. 435; *Ex p. Harrison*, 18 Ch. D. 127. *Pinhorn* v. *Souster.*

Again, there have been cases in which the courts have held that no tenancy was created so as to support a distress, when it appeared, from the terms of the mortgage, that it was never the intention of the parties to create a real tenancy, but that the attornment clause was a mere device to defeat the bankruptcy law by giving the mortgagee a preference over the mortgagor's other creditors. This was held to be the case where the rent nominally reserved was extravagantly high as compared with the real value of the mortgaged premises; *Ex p. Williams*, 7 Ch. D. 138; *Ex p. Jackson*, 14 Id. 725, distinguished in *Ex p. Voisey*, 21 Id. 442, where the subject is fully discussed by the C. A.; see also *Re Stockton Co.*, 10 Id. 335.

In *Hampson* v. *Fellows*, L. R. 6 Eq. 575, the mortgagor assigned the lease for twenty-one years of a house in which he resided, together with policies of insurance on his life, to secure repayment of 250*l.* and interest, and the premiums on the policies. By the deed the mortgagor attorned tenant to the mortgagee at the yearly rent of 175*l.*, with a proviso for the determination of the tenancy at the will of the mortgagee. Malins, V.-C., restrained by injunction a distress under this clause for the *principal*, holding, however, that the mortgagee would have been justified in distraining under it for any "outgoings under the deed," i.e., for interest on the *Hampson* v. *Fellows.*

advance, premiums on the policies, or the landlord's rent of the house. The ground on which the Vice-Chancellor came to the conclusion that such was the intention of the clause, was apparently that the 175*l.* was, in round numbers, the aggregate amount of those outgoings.

Ex parte Harrison.

This case, however, was not followed in *Ex p. Harrison,* 18 Ch. D. 127. The attornment clause there provided for a yearly rent of 593*l.* 15*s.*, which was equal to the annual interest at $4\frac{3}{4}$ per cent. primarily covenanted for, though such interest was reducible on punctual payment to $3\frac{3}{4}$ per cent. In the C. A., notwithstanding those circumstances, it was held that the fruits of a distress under the clause were properly applicable to *principal* as well as interest.

Mortgagor sometimes made tenant to receiver.

Jolly v. *Arbuthnot.*

Another mode of securing the mortgagor's possession of the mortgaged premises is to make him tenant to a third person appointed by him and the mortgagee to receive the rents. This was done in *Jolly* v. *Arbuthnot,* 4 De G. & J. 224. In that case, by a deed, executed at the same time as the mortgage, and made between the mortgagor, mortgagee, and Aplin, after reciting that it was agreed that, for the purpose of securing payment of the interest, and providing a fund for repayment of the principal, the mortgagor should attorn as tenant to Aplin, it was witnessed that the mortgagor and mortgagee in pursuance of the agreement constituted Aplin receiver of the rents and profits of the premises, with powers of entry and distress, and that the mortgagor attorned to Aplin and became his tenant from year to year; provided that, on default in payment, the mortgagee might enter and avoid the tenancy created by the attornment, and that nothing contained in the deed should abridge his rights or powers under the mortgage. After execution of this deed, and after default in payment on the appointed day of the principal sum secured by the mortgage, the mortgagor was adjudicated bankrupt, and thereupon Aplin distrained for a year's rent on his goods on the premises. The chief question was, which of the two parties—the mortgagee, or the assignees in bankruptcy of the mortgagor—was entitled to the proceeds of this distress.

Romilly, M.R., decided in favour of the assignees, holding that the relation of landlord and tenant did not exist between the bankrupt and the receiver, for, as the receivership deed recited the true state of the title, it could not by estoppel constitute that relation, and that consequently no estate was conferred on Aplin to which the right of distress could be

annexed so as to be available against an assignee of the mortgagor. It seems, however, that his Honour, in referring to *Dancer* v. *Hastings*, 4 Bing. 2, (where a demise by a receiver appointed in Chancery was held to be a good lease to entitle him to distrain, and to estop the tenant from denying the tenancy,) did not notice the report of that case in 12 B. Moore, 34, which report shows that there the lease, setting out the title of the lessor as receiver appointed by the court, disclosed the fact that he had no interest in the land.

Against this decision the mortgagee appealed, and the appeal was allowed by Lord Chelmsford, whose judgment contains a learned review of the authorities upon the subject. The Lord Chancellor held that the fact that the truth of the case appeared on the deed was a reason why the agreement of the parties should be carried out, either by giving effect to their intentions in the manner prescribed, or by way of estoppel to prevent their denying the right to do the acts which they had authorized to be done; and that even if the creation of the tenancy did not admit the scintilla of a reversion to which the right of distress might be annexed, yet there was nothing in such cases to prevent the power from being exercised, although there might be no reversion in the person to whom the attornment was made; that the relation of landlord and tenant was in fact created by the intention of the parties, and that consequently the power of distress was not a mere power in gross, but might be exercised against the assignee; see also *Evans* v. *Mathias*, 7 E. & B. 590. In *Morton* v. *Woods*, L. R. 4 Q. B. 293, the Exch. Cham. expressly followed the above decision of Lord Chelmsford, and the last-mentioned case was followed by the C. A. in *Ex p. Punnett*, 16 Ch. D. 226.

Effect of Bills of Sale Acts upon attornment clauses. 41 & 42 Vict. c. 31.

By the Bills of Sale Act, 1878, s. 6, it is provided that "every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given, or agreed to be given, by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress. Provided that nothing in this section shall extend to any mortgage of any estate or

interest in any land, tenement, or hereditament, which the mortgagee, *being in possession*, shall have demised to the mortgagor as his tenant at a fair and reasonable rent."

44 & 45 Vict. c. 43.

Under the provisions of the above Act, and of the Bills of Sale Act, 1882, any attornment which comes within the terms of s. 6, and is not excepted by the proviso, is void as a bill of sale unless it is registered, though it need not be in the form prescribed by the Act of 1882; *Green* v. *Marsh*, (1892) 2 Q. B. 330.

In *Re Willis*, 21 Q. B. D. 384, it was held by the majority of the judges in the Court of Appeal that an attornment clause in a mortgage which, by creating the relation of landlord and tenant between the mortgagee and mortgagor, gave a power of distress to the mortgagee for the rent at which the mortgagor had attorned tenant, was a bill of sale, and void so far as it gave a power of distress. With respect to the proviso to s. 6, Lindley, L.J., said: "It appears impossible to bring within this proviso any case except one in which the mortgagee has been in possession, and, being in possession, has demised to the mortgagor at a fair and reasonable rent." Lord Esher, while not disagreeing with this decision, expressed great doubts whether it was right. In *Green* v. *Marsh*, (1892) 2 Q. B. 330, the mortgage deed, executed in 1886, contained an ordinary attornment clause at a quarterly rent, and expressly gave a power of distress. In 1890, after the decision in *Re Willis*, the mortgagor wrote a letter to the mortgagee, acknowledging that he held the premises as his tenant at a weekly rent slightly higher than the rent specified in the attornment clause, and undertaking to deliver up possession of the premises at any time on four weeks' notice. The C. A. held that the attornment clause did not make the mortgagee "a mortgagee in possession" within the meaning of the proviso to s. 6, and that the attornment clause and subsequent letter were void for want of registration.

The provisions of s. 6 of the Bills of Sale Act, 1878, do not, however, in other respects, render void the ordinary attornment clause in mortgages, so as to prevent the relation of landlord and tenant being created by such clause between the mortgagee and mortgagor; *Daubuz* v. *Lavington*, 13 Q. B. D. 347; *Hall* v. *Comfort*, 18 Id. 11; *Mumford* v. *Collier*, 25 Id. 279.

Position of mortgagor in

With respect to the nature of the mortgagor's possession after the mortgage, where there is no stipulation that he

should be allowed to remain in possession for any certain time, there seems to be more difficulty. Messrs. Coote and Morley, in an elaborate note to Watkins on Conveyancing, deliver it as their opinion, that "if there be no express agreement originally as to the period of possession, and the mortgagor, being the occupant, remain in possession *with the consent* of the mortgagee, it seems that, in such a case, he ought to be considered strictly as tenant at will."

possession where there is no stipulation that he may remain in for a time certain.

This is true, if it be admitted that he has remained in possession *with the consent of the mortgagee*. But the more difficult question seems to be under what circumstances is the mortgagee's consent to be taken to exist, and whether it is to be implied merely from the fact of his abstaining from ousting the mortgagor immediately after the execution of the mortgage. Certainly neither the case of *Thunder* v. *Belcher*, 3 East, 450, nor that of *Smartle* v. *Williams*, 1 Salk. 246, 3 Lev. 387, which are cited by Messrs. Coote and Morley, have any tendency in favour of such an implication; for, in the former, ejectment was brought against a tenant let into possession by the mortgagor after the mortgage; and, as there had been no recognition of him by the mortgagee, there was judgment against him; and so far was the court from considering that the mortgagor would, under the circumstances above supposed, have been tenant at will, had he remained himself in possession instead of letting, that Lord Ellenborough says, "A mortgagor is no more than a *tenant at sufferance*, nor entitled to any notice to quit; and one tenant at sufferance cannot make another."

Question is, what implies consent by mortgagee.

In *Smartle* v. *Williams* the mortgagor certainly remained in possession, and that with the *express consent* of the mortgagee, for Holt, C.J., says: "Upon executing the deed of mortgage, the mortgagor, *by the covenant to enjoy till default of payment*, is tenant at will." But in that case the mortgagee had assigned the mortgage; and the question was, whether, by doing so, he had determined his will, and whether the mortgagor's subsequent continuance in possession divested the estate of the assignee, and turned it to a right so as to prevent a person to whom the assignee afterwards assigned, and who brought the ejectment, from taking any legal interest; upon which point the court held that it had no such effect, since the mortgagor was, at all events, *tenant at sufferance* after the assignment.

And it is believed that no *decision* exists in which a

No decision

that mortgagor in possession without consent is more than tenant at sufferance.

mortgagor remaining in possession, after an absolute conveyance away of his estate, by way of mortgage, without any consent on the part of the mortgagee, express or to be implied otherwise than from his silence, has been considered in any other light than as *tenant at sufferance*, to the definition of whom he seems strictly to answer, being a person who *comes in by right, and holds over without right*; see Co. Litt. 57, and Lord Hale's MSS., note 5, where the following case is put, which seems analogous: —" if tenant for years surrenders, and still continues possession, he is tenant at sufferance or disseisor at election."

Mortgagor in possession sometimes described as tenant at will *quodammodo*.

This subject has been treated at some length, because the reader will find it often *said* that a mortgagor in possession is *tenant at will quodammodo*; an idea which Lord Mansfield especially seems to have countenanced, for in *Keech* v. *Hall* he says, "when the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises *at will*, in the strictest sense: and, therefore, no notice is ever given him to quit, and he is not even entitled to reap the crop, as other tenants at will are, because all is liable to the debt;" and in *Moss* v. *Gallimore*, he calls the mortgagor "tenant at will *quodammodo*." Whereas Lord Ellenborough, in *Thunder* v. *Belcher*, denominated him "tenant at sufferance;" and it is submitted that it is more convenient to range his possession under some one of the ancient and well-known descriptions of tenancy than to invent the new and anomalous class of *tenants at will quodammodo*, for the only purpose of including it. See Litt. s. 381.

Dicta of judges on the point.

"A mortgagor is not in all respects a mere bailiff; he is much like a bailiff; he is not a mere tenant at will; in fact, he can be described merely by saying he is a mortgagor;" *per* Parke, B., *Litchfield* v. *Ready*, 20 L. J. Exch. 51. "He is not a tenant at all;" *per* Patteson, J., *Wilton* v. *Dunn*, 17 Q. B. 299, and Watson, B., *Hickman* v. *Machin*, 4 H. & N. 722. "The case of *Keech* v. *Hall* established the doctrine that (in the absence of any contract or conduct to vary the application of the law) a mortgagee having the legal estate may, without any notice to quit, treat the tenant or lessee of the mortgagor as a trespasser or wrongdoer; and that the possession held by the mortgagor, or those holding under him, until the mortgagee thinks fit to take it, is in the strictest sense precarious, and held at the mere will of the mortgagee," *per* Lord Selborne, *Lows* v.

Telford, 1 App. Cas. 426; and see *Jolly* v. *Arbuthnot*, 4 De G. & J. 224; *Powell* v. *Aiken*, 4 K. & J. 343; *Thorp* v. *Facey*, 35 L. J. C. P. 349; *Ex p. Isherwood*, 22 Ch. D. 391, *per* Jessel, M.R.

Gibbs v. *Cruickshank*.

In *Gibbs* v. *Cruickshank*, L. R. 8 C. P. 454, the court seem to adopt the view that the mortgagor is a tenant at sufferance, but that at any rate he cannot create a sub-tenancy; his sub-tenants are mere tort feasors and cannot sue the mortgagee in trespass.

Judicature Act, 1873, 36 & 37 Vict. c. 66.

The Judicature Act, 1873, s. 25, provides that a mortgagor in possession may, until the mortgagee has given notice of intention to take possession, sue for possession, or to recover rents, or to recover damages for trespass or other wrong, in his own name; see *ante*, p. 503.

Rules to be collected from foregoing cases.

Upon the whole it is concluded, 1st. That if there be in the mortgage-deed an agreement that the mortgagor shall continue in possession till default of payment on a certain day, he is in the meanwhile tenor of the intervening term. 2ndly. That if default be made on that day, he becomes tenant at sufferance. 3rdly. That when there is no such agreement he is tenant at sufferance immediately upon the execution of the mortgage, unless the mortgagee expressly or impliedly consented to his remaining in possession. 4thly. That such consent renders him tenant at will. 5thly. That if in any of the last three cases he let in tenants, they may, in cases not falling within the Conveyancing Act, 1881, s. 18, be treated by the mortgagee, if he think proper, as *tort feasors*. 6thly. That they may, by agreement with the mortgagee, become his tenants under a new tenancy. Lastly, that the mere receipt of interest by the mortgagee from the mortgagor, or a mere notice from the mortgagee to pay rent to him, even if the tenant continues in possession, is not evidence of such an agreement.

WIGGLESWORTH *v.* DALLISON.

TRINITY.—19 *GEO.* 3.

[REPORTED, 1 DOUGL. 201.]

A custom that the tenant, whether by parol or deed, shall have the way-going crop, after the expiration of his term, is good, if not repugnant to the lease by which he holds (*a*).

THIS was an action of trespass for mowing, carrying away, and converting to the defendant's own use, the corn of the plaintiff, growing in a field called Hibaldstow Leys, in the parish of Hibaldstow, in the county of Lincoln. The defendant Dallison pleaded *liberum tenementum*, and the other defendant justified as his servant. The plaintiff replied, that true it was that the *locus in quo* was the close, soil, and freehold of Dallison; but, after stating that one Isabella Dallison, deceased, being tenant for life, and Dallison, the reversioner in fee, made a lease on the 2nd March, 1753, by which the said Isabella demised, and the said Dallison confirmed, the said close to the plaintiff, his executors, administrators, and assigns, for 21 years, to be computed from the 1st May, 1755, and that the plaintiff, by virtue thereof, entered and continued in possession till the end of the said term of 21 years—he pleaded a custom in the following words, *viz.*, "that within the parish of Hibaldstow, there now is, and, from time whereof the memory of man is not to the contrary, there hath been a certain ancient and laudable custom, there used and approved of, that is to say, that every tenant and farmer of any lands within the same parish, for any term of years which hath expired on the first day of May in any year, hath been used and accustomed, and of right ought, to have, take, and enjoy, to his own use, and to reap, cut, and carry away, when ripe and fit to be reaped

(*a*) As to the possession remaining in the tenant, where he is entitled by custom to the way-going crop, he keeping the fences in repair, see *Griffiths* v. *Paleston*, 13 M. & W. 359.

and taken away, his way-going crop, that is to say, all the corn growing upon the said lands which hath before the expiration of such term been sown by such tenant upon any part of such lands, not exceeding a reasonable quantity thereof in proportion to the residue of such lands, according to the course and usage of husbandry in the same parish, and which hath been left standing and growing upon such lands at the expiration of such term of years." He then stated that, in 1775, he sowed with corn part of the said close, being a reasonable part in proportion to the residue thereof, according to the course and usage of husbandry in the said parish, and that the corn produced and raised by such sowing of the corn so sown as aforesaid, being the corn in the declaration mentioned, at the end of the term, and at the time of the trespass committed, was standing and growing in the said close, the said time not exceeding a reasonable time for the same to stand, in order to ripen and become fit to be reaped, and that he was during all that time lawfully possessed of the said corn, as his absolute property, by virtue of the custom. The defendant, in his rejoinder, denied the existence of any such custom, and concluded to the country. The cause was tried before Eyre, B., at the last assizes for Lincolnshire, when the jury found the custom in the words of the replication.

Baldwin moved, in arrest of judgment, that such a custom was repugnant to the terms of the deed, and therefore, though it might be good in respect to parol leases, could not have a legal existence in the case of cases by deed. He relied on *Trumper* v. *Carwardine*, before Yates, J. (*b*), the circumstances of which case were these:

"The plaintiff had been lessee under the corporation of Hereford for a term of 21 years, which expired on the 4th Dec. 1767. In the lease there was no covenant that the tenant should have his off-going crop. In the seed-time, before the expiration of the term, he sowed the fallow with wheat. The succeeding tenant obstructed him in cutting the wheat when it became ripe, and cut and housed it himself, for his own use. Upon this the plaintiff brought an action on the case, and declared on a custom in Herefordshire for tenants to quit their

(*b*) At the summer assizes for Herefordshire, 1769.

farms at Christmas or Candlemas to reap the corn sown the preceding autumn. Yates, J., held that the custom could not legally extend to lessees by deed, though it might prevail, by implication, in the case of parol agreements: that, in the case of a lease by deed, both parties are bound by the express agreements contained in it, as that the term shall expire at such a day, &c., and, therefore, all implication is taken away: that, if such a custom could be set up, the Statute of Frauds would be thereby superseded in Herefordshire (*c*). Accordingly the plaintiff did not recover on the custom, although on another count in trover, in the same declaration, he had a verdict."

A rule to show cause was granted.

The case was argued on Tuesday, the 8th June, by *Hill*, Serj., *Chambre*, and *Dayrell*, for the plaintiff, and *Cust*, *Baldwin*, *Balguy*, and *Gough*, for the defendants; when three objections were made on the part of the defendants, *viz.*: 1. That the custom was unreasonable. 2. That it was uncertain. 3. That, as had been contended on moving for the rule, it was repugnant to the deed under which the plaintiff had held.

For the plaintiff it was argued. 1. That it was not an unreasonable custom, because, without an express agreement, or such a custom as this, there could be no crop the last year of a term, but the tenant would not sow if he could not reap, and the landlord would not have a right to enter till the expiration of the term. That it was for the advantage of the public as much as customs for turning a plough, or drying nets, on another person's land, which had been held to be good (*d*). That it bore a great analogy to the right of emblements, and was founded on the same principle, namely, the encouragement of agriculture. It was not prejudicial to any one; not to the landlord, because without it his land must be unemployed and unproductive for a whole season; nor to the succeeding tenant, because he would have his turn at the end of his term. 2. That it was sufficiently certain, by the reference to the residue of the lands not sown, and to the course and usage of husbandry

(*c*) *Quære.* This argument seems more applicable to parol leases, because, if a parol lease for three years could be extended in some degree for half a year longer by such a custom, it might be said that this would be repugnant to the Statute of Frauds. (See *post*, *in notis*, p. 539.)

(*d*) See Davis, 32 b.

in the parish. This is as much certainty as the nature of the subject will admit of; for, if it had been that so many acres might be sown and reaped, that would have been incompatible with those variations in the proportion of ploughed land, which arise, at different times, from circumstances in the course of cultivation and husbandry. Reasonable is an epithet which sufficiently qualifies the extent of customs, and is generally used in pleading them; as with regard to customary fines paid to the lord of the manor, estovers prescribed for by a party to be taken for the use of his house, &c. In *Bennington* v. *Taylor* (*e*), where the defendant, in an action of trespass, had pleaded a right to distrain for twelve pence for stallage, due by prescription, for the land near every stall, in a fair, and on a motion in arrest of judgment, it was objected, that the prescription was uncertain, and therefore void, the quantity of land not being ascertained, the court held it to be certain enough, because the quantity was to be ascertained by the common usage of the fair. In all such cases, whether the quantity or amount is in truth reasonable or not, is for the jury to decide. 3. That the circumstance of the plaintiff's lease in this case having been by deed made no difference. There was no agreement contained in the deed, that the defendant would depart from the custom, although the parties must have known of it when the lease was executed. He did not claim under any parol contract express or implied; and, therefore, the argument of repugnancy did not apply; and the *nisi prius* case which had been cited, went upon mistaken reasoning. *Hill*, Serj., admitted that he knew of no instance in the Reports, of a similar custom to this, in the case of freehold property; but he said that there were several with regard to copyholds that went much farther; and he cited *Eastcourt* v. *Weekes* (*f*), where a custom, that the executors and administrators of every customary tenant for life, if he should die between Christmas and Lady-day, should hold over till the Michaelmas following, is stated on the pleadings (*g*); and no objection taken to it on the argument of the case.

(*e*) C. B., E. or T. 12 W. 3; 2 Lutw. 1517, 1519.

(*f*) T. 10 W. 3: 1 Lutw. 799, 801.

(*g*) It is found by the special verdict, the action being *ejectment*.

For the defendant were cited, *Grantham* v. *Hawley* (*h*) ; *White* v. *Sayer* (*i*), in which last case a custom for a lord of a manor "to have common of pasture in all the lands of his tenants for life or years," which had been pleaded in justification of a trespass in the land of a tenant for years, was held to be void and against law, for that such a privilege is contrary to the lease, being part of the thing demised, and different from a prescription to have a heriot from every lessee for life, because that is only collateral (*k*) ; a case relied on by Houghton, J., in *White* v. *Sayer* (*i*), in which he said the court had decided that a custom for lessees for years to have half a year after the end of their term, to remove their utensils, was void, as being against law ; *Startup* v. *Dodderidge* (*l*), where the court refused to grant a prohibition, on the suggestion of a *modus* "to pay, upon request, at the rate of two shillings for every pound of the improved yearly rent or value of the land," because the yearly rent or value was variable and uncertain ; *Nailor, qui tam*, v. *Scott* (*m*), where a custom having been found by a jury, "that every housekeeper in the parish of Wakefield having a child born there, should, at the time when the mother was churched, or at the usual time after her delivery when she should be churched, pay tenpence to the vicar," the court, on a motion in arrest of judgment, determined that the custom was void, being, 1. Uncertain, because, the usual time for women to be churched was not alleged (*n*) ; 2. Unreasonable, because it obliged the husband to pay if the woman was not churched at all, or if she removed from the parish, or died, before the time of churching ; *Carleton* v. *Brightwell* (*o*), where the defendant, on a bill of tithes, set up a *modus* that "the inhabitants of such a tenement, with the lands usually enjoyed therewith, should pay such a sum for tithe corn," and it was

(*h*) T. 13 Jac. 1 ; Hob. 132. That case, if at all applicable, seems to me to make for the plaintiff. It is curious in one respect, *viz.*, that the question was brought on in an action of debt on a common bond conditioned for the payment of 20*l.* to the plaintiff if a certain crop of corn did of right belong to him ; or, in other words, if the question of law was in his favour.

(*i*) B. R. : M. 19 Jac. 1 : Palm. 211.

(*k*) Cites 21 H. 7, 14.

(*l*) E. 4 Ann. : 2 Ld. Raym. 1158 ; 2 Salk. 657 ; 12 Mod. 563.

(*m*) E. 2 G. 2 : 2 Ld. Raym. 1558.

(*n*) In that case the custom, as suggested, did not refer to the usage of the parish.

(*o*) Canc. T. 1728 : 2 P. W. 462.

held by the Master of the Rolls to be void for uncertainty: *Harrison* v. *Sharp* (*p*), where a *modus* that, "when any of the inclosed pastures in a certain vill were ploughed and sown with corn or grain of any kind, or laid for meadow, and mown and made into hay, tithes in kind were paid to the rector, but when eaten and depastured, then the occupier paid to the vicar one shilling in the pound of the yearly rent or value thereof, and no more, upon some day after Michaelmas yearly," was held void, on the authority of *Startup* v. *Dodderidge*; *Wilkes* v. *Broadbent* (*q*), where the Court of Common Pleas, and afterwards, on error brought, the Court of King's Bench, held a custom found by verdict, "for the lord of a manor, or the tenants of his collieries who had sunk pits, to throw the earth and coals on the land near such pits, such land being customary tenement and part of the manor, there to continue, and to lay and continue wood there for the necessary use of the pits, and to take coals so laid away in carts, and to burn and make into cinders coals laid there, at their pleasure," to be void, because, among other reasons, the word *near* was too vague and uncertain; *Oland* v. *Burdwick* (*r*), where a *feme*, copyholder *durante viduitate*, having sowed the land, and then married, it was determined that the lord should have the corn, upon the principle, that, when the interest in land is determined by the act of the party, he shall not have the crop; an anonymous case in Moore (*s*), where it was held, that a custom "that lessee for years should hold for half a year over his term" was bad; *Roe, lessee of Bree* v. *Lees* (*t*), where, in an ejectment to recover a farm of about 60 acres, of which 51 were enclosed, and 9 lay in certain open fields, a special case was reserved which stated a custom, "that when a tenant took a farm, in which there was any open field, more or less for an uncertain term, it was considered as a holding from three years to three years;" and though the court decided against the custom on other grounds, yet, by their reasoning, it clearly appeared that they thought it void for uncertainty, because the quantity of open ground was not ascertained, and one rood might determine the

(*p*) T. 1724: Bunb. 174.
(*q*) B. R.: E. 18 G. 2, 2 Str. 1224.
(*r*) B. R.: H. 37 Eliz., Cro. Eliz. 460; 5 Co. 116.
(*s*) H. 3 Ed. 6, Moore 8, pl. 27.
(*t*) C. B.: M. 18 G. 3: 2 W. Bl. 1171.

tenure of 100 acres of land inclosed. Besides the above authorities (*u*), the case before Yates, J., was much relied on. It was admitted, that, in cases where the usual crop of the country is such, that it cannot come to maturity in one year, a right to hold over after the end of the term, in a parol demise, may be raised by implication; as where saffron is cultivated, in Cambridgeshire; liquorice, near Pontefract; or tobacco, which formerly used to be planted in Lincolnshire; but it was contended, that, in such case, a lease by deed would preclude such implication, as the parties must be supposed to have described all the circumstances relative to the intended tenure in the written instrument. Such a custom as that set up in the present case, could not, it was said, be of sufficient antiquity with respect to leases by deed, as in the time of Richard I., and long afterwards, tenants had no permanent interest in their lands; or, if there could be such a custom, the plaintiff's lease could not be within it, because the custom must have applied to the 1st of May, old style, and this lease was made and commenced after the alteration was introduced by 24 Geo. 2, c. 23 (*x*).

The Court took time to consider; and this day, Lord Mansfield delivered their opinion as follows:

Lord Mansfield.—We have thought of this case and we are all of opinion, that the custom is good. It is just, for he who sows ought to reap, and it is for the benefit and encouragement of agriculture. It is, indeed, against the general rule of law concerning emblements, which are not allowed to tenants who know when their term is to cease, because it is held to be their fault or folly to have sown, when they knew their interest would expire before they could reap (*y*). But the custom of a particular place may rectify what otherwise would be imprudence or folly. The lease being by deed does not vary the

(*u*) 4 Co. 51 b; 1 Roll. Abr., 563, pl. 9; and Co. Litt. 55, were also cited for the general principles concerning customs and emblements.

(*x*) The new style commenced the 1st Jan., 1753. But if this argument were admitted in its full extent, no custom could exist where a certain day of the month made part of it, as, from the errors in the former method of computation, the nominal day was continually deviating, by degrees, from the natural day.

(*y*) See 14 & 15 Vict. c. 25, s. 1, giving the tenant in lieu of emblements a right to occupy until the end of the current year of his tenancy.

case. The custom does not alter or contradict the agreement in the lease; it only superadds a right which is consequential to the taking, as a heriot may be due by custom although not mentioned in the grant or lease (*z*).

The rule discharged (*a*).

(*z*) See *Doe* v. *Snowden*, C. B., M. 19 Geo. 3, 2 W. Bl. 1225, where it is said by the court, that if there is a taking from Old Lady-day (5th April), the custom of most countries would entitle the lessee to enter upon the arable at Candlemas (2nd Feb.), to prepare for the Lent corn, without any special words for that purpose, *i.e.*, in a written agreement for seven years, for the court were speaking of such an agreement.

(*a*) Judgment was accordingly entered for the plaintiff, upon which a writ of error was brought in the Exch. Cham., and the defendant assigned for errors, "that the custom contained and set forth, &c., is a custom void in law, and is contrary to and inconsistent with the said indenture of lease in the said replication mentioned." The case was argued at Serjeants' Inn, before the Judges of C. B., and the Barons of the Exch., by Balguy, for the plaintiff in error, and Chambre for the defendant. The objection to the reasonableness of the custom was abandoned. In T. 21 G. 3 (27th June, 1781), Lord Loughborough delivered the unanimous opinion of the Court of Exch. Cham., that the custom was good, and the judgment was affirmed.

Few questions are of more frequent practical occurrence than those which involve the admissibility of parol evidence of custom and usage for the purpose of annexing incidents to, or explaining the meaning of, written contracts. In *Hutton* v. *Warren*, 1 M. & W. 474, the following luminous account of this head of the law was given by Parke, B.:—

Judgment of Parke, B., in *Hutton* v. *Warren*.

"It has long been settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle *of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages.* Whether such a relaxation of the common law was wisely applied where formal instruments have been entered into, and particularly leases under seal, may well be doubted; but the contrary has been established by such authority, and the relations between landlord and tenant have so long been regulated upon the supposition that all customary

Judgment of Parke, B., in *Hutton* v. *Warren*.

obligations not altered by the contract are to remain in force, that it is too late to pursue a contrary course; and it would be productive of much inconvenience if this practice were now to be disturbed. The common law, indeed, does so little to prescribe the relative duties of landlord and tenant, since it leaves the latter at liberty to pursue any course of management he pleases, provided he is not guilty of waste, that it is by no means surprising that the court should have been favourably inclined to the introduction of those regulations in the mode of cultivation, which custom and usage have established in each district to be the most beneficial to all parties.

"Accordingly, in *Wigglesworth* v. *Dallison*, afterwards affirmed on a writ of error, the tenant was allowed an away-going crop, though there was a formal lease under seal. There the lease was entirely silent on the subject of such a right; and Lord Mansfield said the custom did not alter or contradict the lease, but only added something to it.

"The question subsequently came under the consideration of the King's Bench in *Senior* v. *Armytage*, Holt. N. P. C. 197. In that case, which was an action by a tenant against his landlord for a compensation for seed and labour, under the denomination of tenant-right, Bayley, J., on its appearing that there was a written agreement between the parties, nonsuited the plaintiff. The court afterwards set aside that nonsuit, and held, as appears by a manuscript note of that learned Judge, that, though there was a written contract between landlord and tenant, the custom of the country would still be binding, if not inconsistent with the terms of such written contract; and that, not only all common obligations, but those imposed by custom, were in full force where the contract did not vary them. Mr. Holt appears to have stated the case too strongly when he said that the court held the custom to be operative, 'unless the agreement in express terms excluded it;' and probably he has not been quite accurate in attributing a similar opinion to Thompson, C.B., who presided on the second trial. It would appear that the court held that the custom operated, unless it could be collected from the instrument, *either expressly or impliedly*, that the parties did not mean to be governed by it.

"On the second trial, Thompson, C.B., held that the custom prevailed, although the written instrument contained an express stipulation that all the manure made

on the farm should be spent on it, or left at the end of the tenancy, without any compensation being paid. Such a stipulation certainly does not exclude by implication the tenant's right to receive a compensation for seed and labour.

"The next reported case on this subject is *Webb* v. *Plummer*, 2 B. & Ald. 746, in which there was a lease of down lands, with a covenant to spend all the produce on the premises, and to fold a flock of sheep upon the usual part of the farm; and also, in the last year of the term, to carry out the manure on parts of the fallowed farm pointed out by the lessor, the lessor paying for the fallowing land and carrying out the dung, but nothing for the dung itself, and paying for grass on the ground and threshing the corn. The claim was for a customary allowance for *foldage* (a mode of manuring the ground); but the court held, as there was an express provision for some payment, on quitting, for the things covenanted to be done, and an omission of *foldage*, the customary obligation to pay for the latter was excluded. No doubt could exist on that; the language in the lease was equivalent to a stipulation that the lessor should pay for the things mentioned, and no more.

"The question then is, whether, from the terms of the lease now under consideration, it can be collected that the parties meant to exclude customary allowance for seed and labour."

Hutton v. *Warren*.

In the above case of *Hutton* v. *Warren*, a custom by which the tenant, cultivating according to the course of good husbandry, was entitled, on quitting, to receive a reasonable allowance for seed and labour bestowed on the arable land in the last year of his tenancy, and was bound to leave the manure for the landlord, if he would buy it, was held not to be excluded by a stipulation in the lease that he would consume three-fourths of the hay and straw on the farm, and spread the manure arising therefrom, and leave such of it as should not be so spread on the land, on receiving a reasonable price for it.

Cases in which evidence of custom receivable to annex incidents to written contracts.

From the above luminous judgment of Parke, B., it may be collected, that evidence of custom or usage will be received to annex incidents to written contracts on matters with respect to which they are silent:

1. In contracts between landlord and tenant:
2. In commercial contracts:
3. In contracts in other transactions of life, in which known usages have been established and prevailed:

Evidence must be consistent with written instrument.

But that such evidence is only receivable when the incident which it is sought to import into the contract is consistent with the terms of the written instrument. If inconsistent, the evidence is not receivable, and this inconsistency may be evinced:

1. By the express terms of the written instrument:
2. By implication therefrom.

The above rules were cited with approval by Blackburn, J., in *Myers* v. *Sarl*, 3 E. & E. 306.

Customs in contracts of tenancy.

The first class of cases in which the evidence has been received, *viz.*, cases of contracts between landlord and tenant, is so thoroughly discussed in *Hutton* v. *Warren*, *supra*, and *Wigglesworth* v. *Dallison*, that little remains to be said on that head of the subject. A custom which regulates the terms on which the tenant is to *quit* is not excluded by express stipulations regulating the terms on which he is to *hold*; *Holding* v. *Pigott*, 7 Bing. 465; *Muncey* v. *Dennis*, 1 H. & N. 216. Thus, in the latter case, the custom of the country, that the outgoing tenant should be paid for straw left on the farm on *quitting*, was held not to be excluded by a provision in the lease that, *during the term*, he should consume all straw with stock, and use the manure on the farm. A custom which makes the incoming tenant alone liable to the outgoing tenant, and exempts the landlord from all liability, is bad in law as unreasonable; *Bradburn* v. *Foley*, 3 C. P. D. 129; see *Faviell* v. *Gaskoin*, 7 Exch. 273, which shows that where there is no incoming tenant, there is an implied contract by the landlord to pay according to the custom; and *Stafford* v. *Gardner*, L. R. 7 C. P. 242. A custom for a tenant to sell flints turned up on the surface of the land and removed in the course of good husbandry is reasonable, and not inconsistent with the terms of a lease which provides that "the lessor reserves all mines and minerals, sand, quarries of stone, brick-earth, and gravel-pits, with liberty to enter to dig, take, and carry away the same, doing no unnecessary damage;" *Tucker* v. *Linger*, 8 App. Cas. 508. By custom the tenant may be entitled to hold over a part of the land after the expiration of the notice to quit provided for by the lease; *Re Paul*, 24 Q. B. D. 247. A custom, not of the country, but prevalent between owner and tenants of a particular landed estate, is not binding on a tenant who becomes such without notice of its existence; *Womersley* v. *Dally*, 26 L. J. Ex. 219. As to the evidence of contract between the outgoing

and incoming tenant to pay for tillages at a valuation, and the right of the latter to pay the amount of such valuation to the landlord for rent due from the outgoing tenant, see *Stafford* v. *Gardner*, L. R. 7 C. P. 242. The half-year's notice required to determine a yearly tenancy, which commenced on one of the ordinary feast-days, must by custom be from feast-day to feast-day, irrespective of the number of days intervening; *Morgan* v. *Davies*, 3 C. P. D. 260. See also *post*, pp. 552, 556.

Usages of trades in commercial contracts.

With respect to contracts commercial, it has been long established that evidence of a *usage of trade* applicable to the contract, which the parties making it knew, or may be reasonably presumed to have known, is admissible for the purpose of importing terms into the contract respecting which the written instrument is silent.

Evidence of usage admissible notwithstanding s. 17 of Statute of Frauds.

The objection that to admit evidence of a usage in the case of a contract required by the Statute of Frauds to be in writing would be to contravene that statute by introducing into the contract a term not included in the written memorandum of it, was disposed of in *Humfrey* v. *Dale*, 7 E. & B. 266, E. B. & E. 1004; see *Wilson* v. *Hart*, 7 Taunt. 295.

Distinction between usage of trade and general custom of merchants.

It was laid down in former editions of these notes that the words "*usage* of trade" are to be understood as referring to a particular usage to be established by evidence, and perfectly distinct from that general custom of merchants, which is the universal established law of the land, which is to be collected from decisions, legal principles, and analogies, not from evidence *in pais*, and the knowledge of which resides in the breasts of the judges; see *Vallezjo* v. *Wheeler*, Lofft. 631; *Edie* v. *E. I. Co.*, 1 W. Bl. 299; *Brandao* v. *Barnett*, 3 C. B. 519, 530; *Suse* v. *Pompe*, 8 C. B. N. S. 538 (*post*, p. 555); *Crouch* v. *Crédit Foncier*, L. R. 8 Q. B. 374.

This distinction, indeed, between the general custom of merchants, which is part of the law of the realm, and the particular usages of certain particular businesses, was not, it seems, so clearly marked in former times as it is now: thus we find Buller, J., saying in 1787, 2 T. R. 73, that "within the last thirty years the commercial law of this country has taken a very different turn from what it did before. Before that period we find that, in courts of law, all the evidence in mercantile cases was thrown together; they were left generally to a jury, and produced no established principle. From that time, we all know, the great

study has been to find some certain general principles which shall be known to all mankind; not only to rule the particular case then under consideration, but to serve as a guide for the future." The subject was, however, after full consideration, thus dealt with by Cockburn, C.J., in delivering the judgment of the Exch. Cham. in *Goodwin* v. *Robarts*, L. R. 10 Ex. 337, 346: "It is true that the law merchant is sometimes spoken of as a fixed body of law, forming part of the common law, and, as it were, coeval with it. But, as a matter of legal history, this view is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body of the *lex mercatoria*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law, with a view to the interests of trade and the public convenience, the court proceeding herein on the well-known principle of law that, with reference to transactions in the different departments of trade, courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process what before was usage only, unsanctioned by legal decision, has become engrafted upon or incorporated into the common law, and may thus be said to form part of it." The judgment in *Goodwin* v. *Robarts* was affirmed, 1 App. Cas. 476, but the meaning of the phrase, "the law merchant," was not there specially adverted to.

It must not be taken that when a usage has once been proved as a matter of fact, it is to be in all subsequent cases judicially noticed as a matter of law; see *Southwell* v. *Bowditch*, 1 C. P. D. 374; "but," as Mellish, L. J., said in *Ex p. Powell*, 1 Ch. D. 506, "there is no doubt that a mercantile custom may be so frequently proved in courts of common law, that the courts will take judicial notice of it, and it becomes part of the law merchant." Accordingly in *Crawcour* v. *Salter*, 18 Ch. D. 53, and *Ex p. Turquand*, 14 Q. B. D. 636, the C. A. took judicial notice of the custom of hotel-keepers to hire furniture so as to exclude the operation of the reputed ownership clause in the Bankruptcy Act. See also the observations of Brett, L. J.,

Lohre v. *Aitchison*, 3 Q. B. D. 558, 562, on the meaning attached by often proved custom to various clauses in a Lloyd's policy. At what period or by what process the transformation takes place it is not easy precisely to determine.

In *Alexander* v. *Vanderzee*, L. R. 7 C. P. 530, followed in *Ashford* v. *Redford*, 9 Id. 20, a question was left to the jury as to the *mercantile meaning* of "For shipment in June and (or) July" apart from any usage. The former case, however, was commented upon in *Bowes* v. *Shand*, 2 App. Cas. 455; see also *Birch* v. *Depeyster*, 4 Camp. 385.

Evidence of commercial usages admissible.

With regard to particular *commercial usages*, evidence of them is admissible either to ingraft terms into the contract, or to explain its terms.

(1) To ingraft terms.

In the first of these two sub-divisions come the cases concerning the time for which the underwriters' liability in respect of the cargo continues after the arrival of the ship; *Noble* v. *Kennoway*, 2 Dougl. 510; see the observations on this case in *Ougier* v. *Jennings*, 1 Camp. 505, n.; *Moon* v. *Witney Union*, 3 B. N. C. 817; see further *Bottomley* v. *Forbes*, 5 B. N. C. 123; *Vallance* v. *Dewar*, 1 Camp. 503, *et notas*; *Cochran* v. *Retberg*, 3 Esp. 121; *Birch* v. *Depeyster*, 1 Stark. 210, 4 Camp. 385; *Donaldson* v. *Forster*, Abb. on Shipp. part 3, cap. 1; *Baker* v. *Paine*, 1 Ves. sen. 459; *Raitt* v. *Mitchell*, 4 Camp. 146; *Lethulier's Case*, 2 Salk. 443; *Bowman* v. *Horsey*, 9 M. & Rob. 85; *Allan* v. *Sundius*, 1 H. & C. 123.

Usages as to general average and freight.

And as to evidence of a usage not to pay general average on deck cargo, see *Miller* v. *Titherington*, 6 H. & N. 278; nor for damage caused by water used to extinguish a fire, *Stewart* v. *West India Co.*, L. R. 8 Q. B. 88, 362 (*post*, p. 559), a usage which since this decision has, it is believed, ceased to obtain; to pay freight according to the measurement at the port of loading, *Buckle* v. *Knoop*, L. R. 2 Ex. 125; for general steamships unloading in the London Docks to unload their cargoes on the quay, *Marzetti* v. *Smith*, C. & E. 6. See also, as to the various rules which have been imported into the contract by a policy of marine insurance, *Lohre* v. *Aitchison*, 3 Q. B. D. 558; *Knight* v. *Cotesworth*, C. & E. 48.

Marine insurance.

In *Brown* v. *Byrne*, 3 E. & B. 703, a case very elaborately argued at the bar, a bill of lading which made the goods deliverable at Liverpool to order or assigns, "he or they paying freight for the said goods five-eighths of a penny per pound, with 5 per cent. primage and average accustomed,"

was held not to exclude the operation of a custom in the trade at Liverpool, by which three months' discount was deducted from bill of lading freights of goods coming from, amongst others, the port of shipment. In the marginal note, the court are said to have held that this custom controlled the bill of lading; perhaps it would be better to have said that it was not inconsistent with it. See *per* Lord Campbell, *Hall* v. *Janson*, 4 E. & B. 510; *Cuthbert* v. *Cumming*, 10 Exch. 809, 11 Id. 405; and *Falkner* v. *Earle*, 32 L. J. Q. B. 124, where *Brown* v. *Byrne* was followed.

"Own manufacture."

Evidence has been held admissible of a custom in the iron trade that a manufacturer contracting to supply iron plates must supply them of his own manufacture; *Johnson* v. *Raylton*, 7 Q. B. D. 438.

Commercial usages held admissible.

As to indorsement of iron warrants.

In *Merchant Bank* v. *Phœnix Co.*, 5 Ch. D. 205, a custom was upheld whereby, in the iron trade, where warrants were given stating on the face of them that they were deliverable to the purchasers or their assigns, by indorsement thereon, it was understood that they were to be free from any vendor's lien for unpaid purchase-money, that they passed from hand to hand by indorsement, and conveyed to the holder a title to the goods represented by them.

As to payment for shares.

In *Field* v. *Lelean*, 6 H. & N. 617, evidence of a usage amongst brokers that on the sale of mining shares the seller is not bound to deliver without contemporaneous payment, was held admissible to show that the defendant was not entitled to have the shares which he had bought from the plaintiff delivered to him before payment, although by the bought and sold notes payment of the price was to be made, half in two, half in four months, and nothing was there said as to the time of delivery. This case is a strong one, but it can be questioned only in the H. L. Upon the question whether it overrules *Spartali* v. *Benecke*, 10 C. B. 212, see *per* Williams, J., in *Field* v. *Lelean*. See also *Godts* v. *Rose*, 17 C. B. 229.

Usages as to factors and brokers.

And as to evidence of a usage to pay an agent, see *Heisch* v. *Carrington*, 5 C. & P. 471; for a factor to sell in his own name, see *Johnston* v. *Usborne*, 11 A. & E. 549; for a broker employed to buy to make himself personally responsible for the price, *Cropper* v. *Cook*, L. R. 3 C. P. 194; for a broker employed to buy to become a seller in the transaction without his employer's knowledge, *Robinson* v. *Mollet*, L. R. 7 H. L. 802 (*post*, p. 557); or to buy without making a binding contract of purchase on his employer's behalf, *Id.*;

as to an introducing broker's rights to subsequent commissions, *Allan* v. *Sundius*, 1 H. & C. 123; *Gibson* v. *Crick*, Id. 142. In *Baines* v. *Ewing*, L. R. 1 Ex. 329, it was held that the presumption which would have arisen of an insurance broker's authority to underwrite *generally* for the defendant at Liverpool was rebutted by the custom proved to exist at Liverpool, by which an assurance broker's authority to underwrite is always, or nearly always, limited to a certain sum. And, therefore, where the defendant's broker had taken a risk in excess of his authority, the defendant was held not liable as principal on the contract, although the plaintiff, the assured, had not been aware that the broker had exceeded his limit.

Commercial usages held admissible.

In *Humfrey* v. *Dale*, 7 E. & B. 266, E. B. & E. 1004, it seems that not merely a term, but a *party*, was on oral evidence of a custom added to a contract in writing. The action was against D. & Co., brokers, for not accepting ten tons of oil alleged in the declaration to have been sold to them by the plaintiff, and it was held to be maintainable, first by the Q. B., and afterwards in the Exch. Cham., Martin, B., Willes, J., and Channell, B., dissenting. These were the facts: The plaintiff had employed T. & M., brokers, to sell the oil for him, and one S. employed the defendants to buy it. The brokers met, and the sale was effected, but the only written documents which could be produced as evidence of it were, first, a sale note of the oil, signed by the defendants, which commenced thus, "Sold this day *for Messrs. T. & M. to our principals*," and ended with the signature, "D. & Co., brokers," and "a quarter per cent. brokerage to D. & Co.;" secondly, a sale note signed by T. & M., "brokers," which commenced thus, "Sold to *D. & Co., for account of Mr. Humfrey*" (the plaintiff), and ended with the clause, "quarter per cent. brokerage to D. & Co., half to us." The first of these notes was sent by the defendants to T. & M., the second by T. & M. to the plaintiff. There was evidence of usage of the particular trade that, whenever a broker buys or sells without disclosing his principal, he is himself personally liable to be looked to as buyer or seller, and that it was in accordance with the usual practice in such cases that T. & M. had not sent the defendants a note of the contract. The defendants did not disclose their principal till an unreasonable time after the contract made, nor until after tender of the oil and after he had become insolvent.

Humfrey v. *Dale*. Broker liable by usage as party to contract.

Commercial usages held admissible.

Humfrey v. *Dale.*

The Q. B. held the evidence of usage to be admissible. They considered that by necessary implication the defendants had in the first note said that they had *bought* for their principals, and though they said they had sold for T. & M. the plaintiff had shown, as he might, that T. & M. were only his agents. The court then said that "the plaintiff did not seek, by the evidence of usage, to contradict what the tenor of the note primarily imported, namely, that this was a contract which the defendants made as brokers. The evidence indeed is based on this: the usage can have no operation except on the assumption of their having so acted, and of there having been a contract made with their principal. But the plaintiff, by the evidence, seeks to show that according to the usage of the trade, and as those concerned in the trade understand the words used, they import something more; namely, that if the buying broker did not disclose the name of his principal it might become a contract with him if the seller pleased. Supposing this incident had been expressed on the face of the note, there would have been no objection to it, as affecting the validity of the contract; for the effect of it would only have been that the sale might be treated by the vendor as a sale to the broker, unless he disclosed the name of his principal; if he did that, it remained a sale to the principal, assuming, of course, the broker's authority to bind him."

The court admitted that in *one* sense the evidence varied the contract. "In a certain sense every material incident which is added to a written contract varies it, makes it different from what it appeared to be, and so far is inconsistent with it. If by the side of the written contract *without*, you write the same contract *with* the added incident, the two would seem to import different obligations and be different contracts. The truth is, that the principle on which the evidence is admissible is that the parties have not set down on paper the whole of their contract in all its terms, but *those only which were necessary to be determined in the particular case* by specific agreement, and which of course might vary infinitely, leaving to implication and tacit understanding all those general and varying incidents which a uniform usage would annex, and according to which they must in reason be understood to contract, unless they expressly exclude them."

It is perhaps to be regretted that this case was not taken to the H. L. But it has been constantly acted upon, and

seems now firmly established; though the usage must, in each case, be proved; *Southwell* v. *Bowditch*, 1 C. P. D. 374. *Fleet* v. *Murton*, L. R. 7 Q. B. 126, was a very similar case to *Humfrey* v. *Dale*. See also *Imperial Bank* v. *London Docks*, 5 Ch. D. 195; and *Bacmeister* v. *Fenton*, C. & E. 121; and *post*, p. 556. Commercial usages held admissible.

The case of *Hutchinson* v. *Tatham*, L. R. 8 C. P. 482, seems a still stronger one. There the defendant, acting as agent for one L., with due authority to do so, effected a charter-party, which was expressed in the body of it to be made between the plaintiff who was a ship-owner, and the defendant "as agent to merchants." The defendant signed "as agent to merchants." The court, admitting that but for the custom the defendant would not have been personally liable on the charter, held on the authority of the two last cited cases that evidence was admissible of a usage to make him so liable if he did not disclose his principal's name within a reasonable time. See also *Pike* v. *Ongley*, 18 Q. B. D. 708. *Hutchinson* v. *Tatham*. Agent liable by custom as principal.

The Sale of Goods Act, 1893, provides (s. 55), "where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied . . . by usage, if the usage be such as to bind both parties to the contract." Sale of Goods Act, 1893, 56 & 57 Vict. c. 71.

In *Wildy* v. *Stephenson*, C. & E. 3, it was endeavoured to prove a custom on the London Stock Exchange that a broker was personally liable to his employer on a contract for the sale of shares where the name of the principal was not disclosed, but the jury were unable to agree as to the existence of such a custom. Stock Exchange cases.

Questions have arisen upon the right of members of the Stock Exchange to rely upon its usages to relieve themselves of liability upon contracts made there. The courts have upheld the custom of the Stock Exchange, whereby a jobber, who has bought shares from one of the public through a broker on the Stock Exchange, is relieved from liability to take the shares and to indemnify the vendor against calls, if he passes the name and address of a nominee able and willing to take the shares, and such nominee is not objected to within ten days after the name was passed: *Grissell* v. *Bristowe*, L. R. 4 C. P. 36, where the Exch. Cham. reversed the decision below; *Coles* v. *Bristowe*, 4 Ch. 3; and the custom has been held to relieve the jobber, where the names, though given *bonâ fide* by the jobber, were those *Grissell* v. *Bristowe*.

Commercial usages held admissible.

merely of men of straw put forward to shield the real buyer; *Maxted* v. *Paine* (No. 2), L. R. 6 Ex. 132, *diss.* Cleasby, B., and Lush, J. But it does not relieve the jobber, if he gives the name of a person who has not authorized its use; *Maxted* v. *Paine* (No. 1), L. R. 4 Ex. 81; or who is under legal disability to take the shares: *e.g.*, an infant; *Nickalls* v. *Merry*, L. R. 7 H. L. 530. The effect of the custom seems to be that a contract arises between the vendor and the nominee, whereby the latter is bound to indemnify the former against calls; *Bowring* v. *Shepherd*, L. R. 6 Q. B. 309; but see *per* Blackburn, J., in *Maxted* v. *Paine* (No. 2), *supra*; and if the nominee is a man of straw with a real buyer behind him, the vendor is entitled, at any rate in equity, to be indemnified by the real buyer; *Castellan* v. *Hobson*, 10 Eq. 47. It may be observed that in both *Grissell* v. *Bristowe* and *Bowring* v. *Shepherd* the transfers had in fact been accepted, and the price of the shares been paid, by the transferees' brokers, but the transfers had not been executed by the transferees.

A person who employs a broker to sell shares on the Stock Exchange is bound to indemnify the broker against any liability he may incur, in consequence of carrying out his instructions, under any rules of the Stock Exchange, provided they are reasonable; *Smith* v. *Reynolds*, 66 L. T. 808.

Building trade.

In *North* v. *Bassett*, (1892) 1 Q. B. 333, it was proved that, by the usage of the building trade, the builder whose tender was accepted was liable to pay the quantity surveyor his fees, and the surveyor was held to be entitled to sue the builder, who had received payment of the first instalment under the building contract, to recover the amount of his fees.

(2) Commercial usages *to explain* contracts.

The second subdivision of cases in which evidence of commercial usages is receivable consists of cases where it is admitted to explain the terms of a contract: on the ground that by the custom of the trade the terms bear a peculiar meaning. Thus in *Uhde* v. *Walters*, 3 Camp. 16, evidence was admitted to show that the Gulf of Finland, though not so treated by geographers, is considered by mercantile men part of the Baltic; and in *Hutchinson* v. *Bowker*, 5 M. & W. 535, to show that *good* barley and *fine* barley signified in mercantile usage different things. See further *Robertson* v. *Clarke*, 1 Bing. 445; *Moxon* v. *Atkins*, 3 Camp. 200; *Cochran* v. *Retberg*, 3 Esp. 121; *Chaurand*

"Gulf of Finland."

"Good barley."

v. *Angerstein*, Peake, 61; *Bold* v. *Rayner*, 1 M. & W. 343; *Powell* v. *Horton*, 2 B. N. C. 668. Commercial usages held admissible.

As to evidence, that "sold 18 pockets Kent hops at 100*s*." means in the hop trade 100*s*. per cwt., see *Spicer* v. *Cooper*, 1 Q. B. 424; that "in turn to deliver," in a charter-party to Algiers, means at a particular spot in the port for a particular purpose, *Robertson* v. *Jackson*, 2 C. B. 412; as to the term "to load in regular turn," see *Hudson* v. *Clementson*, 18 *Id.* 213; *Lawson* v. *Burness*, 1 H. & C. 396; *Leidemann* v. *Schultz*, 14 C. B. 38; *King* v. *Hinde*, 12 L. R. Ir. 113; of the meaning of "Liverpool" in a charter-party as a port of arrival, *Norden Steam Co.* v. *Dempsey*, 1 C. P. D. 654; of "no St. Lawrence" in a policy of insurance, *Birrell* v. *Dryer*, 9 App. Cas. 345; of "running days" in a charter-party, *Nielsen* v. *Wait*, 16 Q. B. D. 67; that "bale" in the Gambier trade means a compressed package, weighing on the average 2 cwt., *Gorrisen* v. *Perrin*, 2 C. B. N. S. 681; that oil is "wet" if it contains any water, however little, *Warde* v. *Stewart*, 1 *Id.* 88; to show the meaning of "about" so many quarters, in a delivery order, *Moore* v. *Campbell*, 10 Exch. 323; and "about" so many barrels in a charter-party, *Alcock* v. *Leeuw*, C. & E. 98; to explain the sense in which the word "London" was employed, *Mallan* v. *May*, 13 M. & W. 511; that a "full and complete" cargo of sugar and molasses means at Trinidad a cargo packed in the ordinary way there, *Cuthbert* v. *Cumming*, 10 Exch. 809, 11 *Id.* 405; the meaning of "the next two months" in the iron trade, *Bissell* v. *Beard*, 28 L. T. 740; the meaning of "statuary" in the carrying trade, *Sutton* v. *Ciceri*, 15 App. Cas. 144.

"At 100*s*."

"In turn to deliver."

"To load in regular turn."

"Liverpool."

"No St. Lawrence."

"Running days."

"Bale."

"Wet oil."

"About."

"London."

"Full cargo."

"Next two months."

A question has sometimes been raised as to how far it is necessary, in order to affect a person with the usage of a trade or market, that he should be actually cognisant of it. Whether usage must be known to party to be charged.

It was said in *Kirchner* v. *Venus*, 12 Moo. P. C. 361, that, when evidence of the usage of a particular place is admitted to add to or in any manner to affect the construction of a written contract, it is *only* on the ground that the parties *who made the contract* are both cognisant of the usage, and must be presumed to have made their agreement with reference to it, and that no such presumption can arise when one of the parties is ignorant of it. And that is adopted in the marginal note as the statement of a general rule of law. It seems, however, that the proposition must *Kirchner* v. *Venus*.

Whether usage must be known to party to be charged.

be restrained to subject matters like that before the court, namely, the condition of the holder for value of a negotiable instrument showing upon the face of it a clear right of the ordinary and usual kind unaffected by the custom; and the subsequent part of the judgment dwelt upon the special circumstances as being important. In *Kirchner* v. *Venus*, the indorsees, resident in Sydney, of bills of lading, made in Liverpool, for the carriage of goods from Liverpool to Sydney by the "Countess of Elgin," brought an action of trover against the master of the ship for having refused to deliver the goods at Sydney unless paid freight, and they were held not to be bound by an alleged custom in Liverpool, of which they were ignorant, that, though by the terms of the bills the freight was payable in Liverpool at a certain time after sailing, still the ship-owner, if it was not paid, had a lien for it at the port of discharge; see some remarks on this case in *Buckle* v. *Knoop*, L. R. 2 Ex. 125, *per* Kelly, C. B.; and see *Hathesing* v. *Laing*, 17 Eq. 92; and *Norden Steam Co.* v. *Dempsey*, 1 C. P. D. 662, *per* Brett, J.

In *Sutton* v. *Tatham*, 10 A. & E. 27, it was laid down that a person, who employs a broker on the Stock Exchange, impliedly gives him authority to act in accordance with the rules there established, though he is himself ignorant of them. And in *Bayliffe* v. *Butterworth*, 1 Exch. 425, *Sutton* v. *Tatham* was expressly approved of by Parke and Rolfe, BB.; and Alderson, B., laid down the law generally, that "a person who deals in a particular market must be taken to deal according to the custom of that market, and he who directs another to make a contract at a particular place must be taken as intending that the contract may be made according to the usage of that place." Parke, B., there distinguished *Gabay* v. *Lloyd*, 3 B. & C. 793, and *Bartlett* v. *Pentland*, 10 *Id.* 760, where the usage of Lloyd's Coffee-house was held not to be binding on persons who were not shown to have been cognisant of, or to have assented to it, on the ground that in *Bayliffe* v. *Butterworth*, the question was as to the *authority* which the broker received; see, however, as to this distinction, *per* Williams, J., *Sweeting* v. *Pearce*, 7 C. B. N. S. 482; 9 *Id.* 534. See also *Smith* v. *Reynolds*, 66 L. T. 808.

A person must be taken to deal according to the custom of the market.

Sweeting v. *Pearce*.

In *Sweeting* v. *Pearce*, the principal was held not bound by a usage of Lloyd's of which he was ignorant, but principally on the ground that Lloyd's is a mere private place of business, and not a general market so as to come within

the above rule; see *per* Bovill, C.J., *Grissell* v. *Bristowe*, L. R. 3 C. P. 127. But the court seem to have gone also upon the ground that the usage sought to be established would, if not known to the principal, be an unreasonable one, (see *per* Bramwell, B., in Cam. Scacc.,) following in this respect the decision in *Scott* v. *Irving*, 1 B. & Ad. 612, that a usage, which would have the effect of making the broker and not the underwriter the debtor of the assured for a loss on a policy of insurance, can only bind those who are acquainted with it. See also *per* Fry, J., *Pearson* v. *Scott*, 9 Ch. D. 198, where an alleged custom of the Stock Exchange was held bad, whereby it was contended that a broker employed by a solicitor whom he knew to be an agent could settle in account with such solicitor (otherwise than by payment) behind the back of the principal. As will be presently stated more fully, a custom if unreasonable is not binding; and the knowledge of the person to be bound may be an important element in deciding whether a custom is reasonable or not; see *per* Bowen, L.J., *Perry* v. *Barnett*, 15 Q. B. D. 388, 397.

Whether usage must be known to party to be charged.

In *Robinson* v. *Mollett*, L. R. 7 H. L. 836, 838, Lord Chelmsford stated the rule to be that, "if a person employs a broker to transact for him upon a market with the usages of which the principal is unacquainted, he gives authority to the broker to make contracts upon the footing of such usages, provided they are such as regulate the mode of performing the contracts, and do not change their intrinsic character." In that case he "hesitated to say that the usage in question would not apply in the case of persons knowing of its existence, and employing a broker to act for them in the market where it prevailed. But the usage was of such a peculiar character, and so completely at variance with the relations between the parties, converting a broker employed to buy into a principal selling for himself, and thereby giving him an interest wholly opposed to his duty, that he thought no person who was ignorant of such an usage could be held to have agreed to submit to its condition, merely by employing the services of a broker, to whom the usage was known, to perform the ordinary and accustomed duties belonging to such employment."

Qualification of this rule in *Robinson* v. *Mollett*.

Subject to the above qualification, and to the custom not being unreasonable or otherwise objectionable in law, the rule above cited and laid down in *Sutton* v. *Tatham*, and *Bayliffe* v. *Butterworth*, has been constantly adopted and

followed. See *Stewart* v. *Aberdein*, 4 M. & W. 211; *Taylor* v. *Stray*, 2 C. B. N. S. 175; *Stray* v. *Russell*, 1 E. & E. 888, approved in *London Founders' Assoc.* v. *Clarke*, 20 Q. B. D. 576; *Graves* v. *Legg*, 2 H. & N. 216; *Lloyd* v. *Guibert*, 35 L. J. Q. B. 74; *Grissell* v. *Bristowe*, L. R. 4 C. P. 36; *Duncan* v. *Hill*, L. R. 8 Ex. 242. In the latter case the plaintiffs, stockbrokers on the London Stock Exchange, had been employed by the defendant, a non-member, to carry over certain shares from one settling day to a later one. In the interval between the two days the plaintiffs became defaulters, whereupon, according to the rules of the Stock Exchange, their transactions were closed, and their accounts, including that of the defendant, were made up at the prices current on that day, without any communication with the defendant. It was held, in the Exch. Cham., reversing the decision below, that the defendant was not liable to indemnify the plaintiffs for the "difference" or loss caused by the closing of his account, which had been forced on by the rules of the Stock Exchange, inasmuch as this had been caused by the plaintiffs' own default. See *Hartas* v. *Ribbons*, 22 Q. B. D. 254; *Davis* v. *Howard*, 24 *Id.* 691.

Usage as evidence of what was reasonable.

In *Stewart* v. *Cauty*, 8 M. & W. 160, a rule of the Liverpool Stock Exchange was admitted in evidence between parties not members of it, upon a question what was a reasonable time for the completion of a sale of shares made at Liverpool through the agency of brokers.

Cases not falling within the head of mercantile contracts.

"1000 rabbits."

Usage for servants to have holidays.

To come to cases not falling under the head of mercantile contracts, evidence has been received to show that by the custom of a particular district the words "1000 rabbits" meant 1200 rabbits; *Smith* v. *Wilson*, 3 B. & Ad. 728; see *Clayton* v. *Gregson*, 5 A. & E. 302. So in *R.* v. *Stoke-upon-Trent*, 5 Q. B. 303, an agreement in writing "to serve from 11 Nov., 1815, to 11 Nov., 1817," "to lose no time on our own account, to do our work well, and behave ourselves in every respect as good servants," was considered capable of explanation by a usage in the particular trade for servants, under similar contracts, to have certain holidays and Sundays to themselves; see *Phillips* v. *Innes*, 4 Cl. & F. 234. In *Grant* v. *Maddox*, 15 M. & W. 737, an agreement by the manager of a theatre to engage an actress for "three years, at a salary of 5*l.*, 6*l.*, and 7*l.* per week in those years respectively," was explained by the usage of the theatrical profession to mean that the actress was to be paid only whilst the theatre was open for performance.

Actress to be paid only when theatre open.

Month's notice to clerk.

In *Parker* v. *Ibbetson*, 4 C. B. N. S. 346, a custom that the yearly hiring of a clerk is determinable by a month's notice at any time was held not inconsistent with a provision in the agreement that at the end of the year the employer, if satisfied with the amount of business done, would make an addition of 30*l.* to the stipulated salary. So, again, in *Evans* v. *Pratt*, 3 M. & Gr. 759, in a memorandum as to a race, the run described was "four miles across a country," and evidence was admitted to show that in sporting parlance the meaning of those words is straight across over all obstructions without liberty to go through open gates. So in case of an agreement for a lease, it is implied from custom that the lessor should prepare and the lessee pay for it; *Grissell* v. *Robinson*, 3 B. N. C. 11; see *Smith* v. *Clegg*, 27 L. J. Ex. 300; although in general, upon a sale of property, the vendee who is to bear the expense of the conveyance ought to prepare it; *Price* v. *Williams*, 1 M. & W. 6; *Poole* v. *Hill*, 6 *Id.* 835; *Stephens* v. *De Medina*, 4 Q. B. 422; see, however, *Doe* v. *Stilwell*, 8 A. & E. 645. As to the liability by usage of a man about to marry to pay his wife's solicitor for preparing her marriage settlement, see *Helps* v. *Clayton*, 17 C. B. N. S. 553.

"Four miles across a country."

Lessor to prepare, lessee to pay for lease

Usage to pay costs of settlement.

In *N. Staffordshire R. Co.* v. *Peck*, E. B. & E. 986, the majority of the court held that the terms in a letter to carriers from their customer, "Please send the marbles *not insured*," were to be read "according to the understanding of language between carriers and their customers," and construed as a request to carry the marbles at the customer's risk. But this decision turned upon the construction of a statute, and was reversed, 10 H. L. C. 473.

"Not insured."

As to a usage of trade to allow goods to remain with hotel-keepers on hire preventing such goods from being affected by the order and disposition clause of the Bankruptcy Act; see *Re Blanshard*, 8 Ch. D. 601; *Crawcour* v. *Salter*, 18 *Id.* 53; *Ex p. Brooks*, 23 *Id.* 261; *Ex p. Turquand*, 14 Q. B. D. 636; *Re Chapman*, 1 Manson, 415; see notes to *Horn* v. *Baker*, *post*, vol. ii.

Usage preventing reputed ownership as to furniture.

Whilst, however, as we have seen, evidence of custom has been very largely admitted, there are numerous cases in which such evidence is inadmissible, and these will now be dealt with.

Cases in which evidence of custom inadmissible.

Thus the admissibility of evidence of custom, to explain the meaning of a word used in any contract whatever, is subject to this qualification, viz., that, if a statute has given a definite meaning to any particular word denoting weight,

Where words have statutory meaning custom cannot alter it.

Usages held inadmissible.

measure, or number, it must be understood to be used with that meaning, and no evidence of custom is admissible to attribute any other to it; *per curiam*, *Smith* v. *Wilson*, 3 B. & Ad. 728; see *Wing* v. *Erle*, Cro. Eliz. 267; *Noble* v. *Durrell*, 3 T. R. 271; *Hockin* v. *Cooke*, 4 *Id.* 314; *St. Cross* v. *De Walden*, 6 *Id.* 338.

Distinction in this respect as to meaning of feast days in leases *by deed*.

In *Doe* v. *Lea*, 11 East, 312, it was held that a lease *by deed* of lands since the new style, to hold from the feast of St. Michael, must mean *New* Michaelmas, and could not be shown by parol evidence to refer to Old Michaelmas. In *Furley* v. *Wood*, 1 Esp. 198, Lord Kenyon had admitted parol evidence of the custom of the country to explain the meaning of the word Michaelmas: and the court, in *Doe* v. *Lea*, on hearing that case cited, asked whether the holding there was *by deed*, which it does not appear to have been; and it may be added, that possibly it was not even in writing.

In *Doe* v. *Benson*, 4 B. & Ald. 588, evidence of the custom of the country was held admissible to show that a letting *by parol* from Lady Day meant from *Old* Lady Day. The court referred to *Furley* v. *Wood*, and distinguished it from *Doe* v. *Lea*, on the ground that the letting there was *by deed*, "which," said Holroyd, J., "is a solemn instrument; and *therefore* parol evidence was inadmissible to explain the expression Lady Day there used, even supposing that it was equivocal."

Quære as to distinction between deeds and contracts not under seal.

It is perhaps not easy to conceive a distinction, founded on principle, between the admissibility of evidence to explain terms used in a *deed*, and terms used in a written contract not under seal: for though, when the terms of a deed are ascertained and understood, the doctrine of estoppel gives them a more conclusive effect than those of an unsealed instrument; yet the rule, that parol evidence shall not be admitted to vary the written terms of a contract, seems to apply as strongly to an unsealed contract as to a sealed one; while, on the other hand, it appears from *Wigglesworth* v. *Dallison*, without going further, that, in cases where parol evidence is in other respects admissible, the fact that the instrument is under seal forms no insuperable obstacle to its reception. See also *Abbott* v. *Bates*, 43 L. J. C. P. 150.

Suggestion that evidence only admissible as to verbal contracts.

Nor does it seem necessary, in order to prevent contradiction between *Doe* v. *Lea* and *Doe* v. *Benson*, and *Furley* v. *Wood*, to establish any such distinction between deeds and other written instruments; for in *Doe* v. *Benson*, the

letting seems not to have been in writing, so that the objection to the admission of parol evidence, founded upon the nature of a written instrument, did not arise. In *Furley* v. *Wood* the letting was perhaps also by mere parol; and though the evidence was, it is true, offered to explain the notice to quit, still it may be urged, that when the holding was once settled to commence from Old Michaelmas, the notice to quit, which probably contained the words "at the expiration of your term," or something *ejusdem generis*, must be held to have had express reference to, and to be explained by it. We must not therefore, it is submitted, too hastily infer that parol evidence of custom would be receivable to explain a word of time used in a lease in writing, but not under seal. See, however, *Rogers* v. *Hull Dock Co.*, 34 L. J. Ch. 165, where the evidence was admitted to explain such an agreement.

Usages held inadmissible.

Doe v. *Lea* was acted upon in *Smith* v. *Walton*, 8 Bing. 238, where the defendant avowed for rent payable "at *Martinmas, viz.*, Nov. 23rd;" the plaintiff pleaded *non tenuit*; and a holding from *Old* Martinmas having been proved, the court thought that the words after the *videlicet* must be rejected, as inconsistent with the term Martinmas, which they thought themselves bound by statute to interpret Nov. 11th; that no evidence was admissible to explain the record; and that there was, therefore, a fatal variance between it and the evidence; see *Hockin* v. *Cooke*, 4 T. R. 314; *St. Cross* v. *De Walden*, 6 *Id.* 338; *Kearney* v. *King*, 2 B. & Ald. 301; *Sprowle* v. *Legge*, 1 B. & C. 16; *Hogg* v. *Berrington*, 2 F. & F. 246.

Custom cannot alter or control the law. In *Meyer* v. *Dresser*, 16 C. B. N. S. 646, which was an action for freight, the defendant sought by evidence of usage, alleged to be universal in the mercantile world, to establish a right to deduct from the amount of freight due for goods delivered the value of certain other goods which ought to have been but were not delivered by the plaintiff, but the court held that "a universal usage which is not according to law cannot be set up to control the law;" see also *Goodwin* v. *Robarts*, L. R. 10 Ex. 337, 357; and the judgment of Blackburn, J., in *Crouch* v. *Crédit Foncier*, L. R. 8 Q. B. 386, though the latter is to some extent qualified by that of the Exch. Cham. in *Goodwin* v. *Robarts*, *supra*. In *Crouch* v. *Crédit Foncier*, *supra*, the court pointed out that "where the incident" (sought to be introduced by usage

Custom cannot control the law.

Usages held inadmissible.

into a contract) "is of such a nature that the parties are not themselves competent to introduce it by express stipulation," (*e.g.*, to make a modern instrument negotiable), "no such incident can be annexed by the tacit stipulation arising from usage." See further, *Neilson* v. *James*, 9 Q. B. D. 546 and *Perry* v. *Barnett*, 15 *Id.* 388, which show that a custom of the Stock Exchange to disregard Leeman's Act, 30 & 31 Vict. c. 29, s. 1, is not binding on an outsider; unless, indeed, he has contracted with knowledge of it; *Seymour* v. *Bridge*, 14 Q. B. D. 460; *Perry* v. *Barnett*, *supra*.

Custom to disregard Leeman's Act.

Evidence of usage not admissible to vary or contradict written instrument.

Again, evidence of usage, though sometimes admissible to add to, or explain, is never so to vary, or contradict, either expressly or by implication, the terms of a written instrument; *Magee* v. *Atkinson*, 2 M. & W. 442; *Adams* v. *Wordley*, 1 *Id.* 374; *Trueman* v. *Loder*, 11 A. & E. 589; see *Humfrey* v. *Dale*, E. B. & E. 1004; *Hutchinson* v. *Tatham*, L. R. 8 C. P. 482; *Norden Co.* v. *Dempsey*, 1 C. P. D. 654; *The Alhambra*, 6 P. D. 68. In *Scrutton* v. *Childs*, 36 L. T. 212, where a custom was admitted to exist, and in a charter-party the words "as customary" were *written*, it was held that the custom must prevail, even though it contradicted a *printed* term in the charter-party; but this rule certainly does not apply where there is no contradiction between the written and printed terms; see *The Nifa*, (1892) P. 412, where A. L. Smith, J., thought that *Scrutton* v. *Childs* had been practically overruled; and see *Glynn* v. *Margetson*, (1893) A. C. 346.

In *Yates* v. *Pym*, 6 Taunt. 445, an action on a warranty of *prime singed bacon*, evidence was offered of a usage in the bacon trade, that a certain latitude of deterioration called "average taint" was allowed to subsist before the bacon ceased to answer the description of *prime bacon*. This evidence was held inadmissible, first at *nisi prius*, by Heath, J., and afterwards in the Common Pleas.

Blackett v. *Royal Exchange*.

In *Blackett* v. *Royal Exchange Ins. Co.*, 2 Tyr. 266, which was an action on a policy upon "*ship, &c., boat, and other furniture*," evidence was offered that it was not the usage of underwriters to pay for boats slung on the davits on the larboard quarter; but was rejected at *nisi prius*, and the rejection confirmed by the Court of Exch. "The objection," said Lord Lyndhurst, "to the parol evidence is, that it was not to explain any ambiguous words in the policy, any words which might admit of doubt, nor to introduce matter upon which the policy was silent, but was at

direct variance with the words of the policy, and in plain opposition to the language it used. That, whereas the policy imported to be upon the ship, furniture, and apparel generally, the usage is to say that it is not upon all the furniture and apparel, but upon part only, excluding the boat. Usage may be admissible to explain what is doubtful, it is never admissible to contradict what is plain. This case, however, is mentioned with disapproval in *Myers* v. *Sarl*, 30 L. J. Q. B. 9; and *Humfrey* v. *Dale*, *supra*. Usages held inadmissible.

Hall v. *Janson*, 4 E. & B. 500, was an action upon a policy of marine insurance in the ordinary form, in which the interest was declared to be "on money advanced on account of freight," and the count alleged the interest to be in the shipowner, and that it became subject to a general average contribution: a plea to that count stating a custom of London, where the policy was made, that insurance upon "money advanced on account of freight" should not be liable for a general average, was held bad, the custom alleged being inconsistent with the terms of the policy; see, however, *Miller* v. *Titherington*, 6 H. & N. 278. *Hall* v. *Janson*.

Where, under an alleged usage of trade, the underwriters on a marine policy covering loss by jettison sought to be relieved from payment of anything beyond the assured's own proportion of a loss of his goods which had been jettisoned under circumstances constituting a general average, leaving him to recover the residue from the other contributories, the court held the custom bad as contrary to the express agreement of the parties; *Dickenson* v. *Jardine*, L. R. 3 C. P. 639. See also *Menzies* v. *Lightfoot*, 11 Eq. 459. *Dickenson* v. *Jardine*.

In *Hathesing* v. *Laing*, 17 Eq. 92, a custom at Bombay, making it obligatory on ship captains to require the production of the mate's receipt before signing the bill of lading, was held bad by Bacon, V.-C.; but see *Schuster* v. *M'Kellar*, 7 E. & B. 704. *Hathesing* v. *Laing*, as to mate's receipts.

In several cases alleged customs of ports to take delivery on terms inconsistent with charter-parties have been held inadmissible; *The Alhambra*, 6 P. D. 68; *Hayton* v. *Irwin*, 5 C. P. D. 130; *The Nifa*, (1892) P. 411. Custom of port inconsistent with charter-party.

In *Suse* v. *Pompe*, 8 C. B. N. S. 538, evidence was given of a usage in London that on non-payment by the acceptor of a bill of exchange drawn and indorsed in England, and payable abroad at a certain rate of exchange, the holder is entitled at his election to recover from the drawer either *Suse* v. *Pompe*.

Usages held inadmissible.

Willans v. *Ayers.*

the re-exchange or the amount which he paid for the bill. This evidence was held inadmissible, as contradicting the terms of the bill. In *Willans* v. *Ayers*, 3 App. Cas. 133, doubts were expressed as to the validity of an alleged custom to allow a fixed percentage of 20 per cent. for exchange, re-exchange, and interest, in cases of certain dishonoured bills, but the point was not decided.

Roberts v. *Barker.*

In *Roberts* v. *Barker*, 1 C. & M. 808, the question was whether a covenant by the tenant not to sell or take away the manure, on quitting the land, but to leave it to be expended by the succeeding tenant, excluded the custom of the country, by which the outgoing tenant was bound to leave the manure, and was entitled to be paid for it. The court held that it did. "It was contended," said Lord Lyndhurst, delivering judgment, "that the stipulation to leave the manure was not inconsistent with the tenant's being paid for what was so left, and that the custom to pay for the manure might be engrafted on the engagement to leave it. But if the parties meant to be governed by the custom in this respect, there was no necessity for any stipulation, as, by the custom, the tenant would be bound to leave the manure, and would be entitled to be paid for it. It was altogether idle, therefore, to provide for one part of that which was sufficiently provided for by the custom, unless it was intended to exclude the other part." *Accord. Clarke* v. *Roystone*, 13 M. & W. 752. See further, *Reading* v. *Menham*, 1 M. & Rob. 236; *Clarke* v. *Westrope*, 18 C. B. 765; *Foster* v. *Mentor Life Ass.*, 4 E. & B. 48.

Judicial observations as to what is a contradiction.

As to the meaning of the rule prohibiting a "contradiction" of the instrument, see some valuable remarks in the judgment of the Q. B. in *Humfrey* v. *Dale*, 7 E. & B. 266, cited *ante*, p. 544, and *per* Lord Blackburn, in *Tucker* v. *Linger*, 8 App. Cas. 511. In *Fleet* v. *Murton*, L. R. 7 Q. B. 132, Blackburn, J., admitted his "difficulty in making out how the custom could make the broker, who was, in fact, not contracting as purchaser, liable in the terms of the count in *Humfrey* v. *Dale*, which charged the defendant as a purchaser," and suggested that the true view of the broker's liability under the custom is as a *del credere* agent, who guarantees a purchaser. See *Humfrey* v. *Dale*, discussed in *Myers* v. *Sarl*, 30 L. J. Q. B. 9, and by Jessel, M.R., in *Southwell* v. *Bowditch*, 1 C. P. D. 374.

In *Hutchinson* v. *Tatham*, L. R. 8 C. P. 482, in which evidence of usage was admitted to charge the defendant as

principal on a charter-party, which he had signed only "as agent for the merchants," Brett, J., said: "The cases have lately gone very far as to the admissibility of evidence of custom. It is clear, however, that no such evidence can be admitted to contradict the plain terms of a document. If evidence were tendered to prove a custom that the defendants should be liable as principals under all circumstances, that would contradict the document; but it has been decided that, though you cannot contradict a written document by evidence of custom, you may add a term not inconsistent with any term of the contract. What, I apprehend, it is here attempted to add, is, not that the defendants would be liable as principals in the first instance, or under all circumstances, but that, though *primâ facie*, and in most cases, the brokers are mere agents, yet, if they fail to disclose the names of the principals within a reasonable time, they, the agents, may on the happening of this contingency be principals. This is not, I think, on the whole, inconsistent with the contract, and, therefore, with some doubt, I think the evidence was admissible." See this case further considered in *Pike* v. *Ongley*, 18 Q. B. D. 708.

Usages held inadmissible.

In *Robinson* v. *Mollett*, L. R. 5 C. P. 646, 7 *Id.* 84, 7 H. L. 802, the plaintiff sought to be indemnified by the defendant against loss upon a contract for the purchase of tallow. The defendant had instructed the plaintiff to buy 50 tons of tallow, as broker, for him. The plaintiff, acting for other buyers as well as the defendant, bought 150 tons. He forwarded a bought note to the defendant for 50 tons, and to the vendors a sold note for the 150 tons, but made no contract for the purchase of 50 tons on behalf of the defendant, on which the latter could come forward as principal, his intention being to appropriate 50 of the 150 tons to the defendant. The defendant refused to take delivery of 50 tons, and the market having fallen the plaintiff was obliged, according to the usage of the trade, to pay the vendor the difference of price: and this loss he sought to recover from the defendant. It was conceded that, apart from usage, there was no fulfilment of the defendant's order for 50 tons, and he was not bound to take the tallow or indemnify the plaintiff; but it was contended that the plaintiff was justified by the usage of the London tallow market, though unknown to the defendant, in fulfilling the order in this way. In the Common Pleas, Bovill, C.J., and Montague Smith, J., were in favour of the usage;

Custom as between principal and broker.

Robinson v. *Mollett.*

but Willes and Keating, JJ., were against it, on the ground that "the authority of the brokers was to buy as brokers for their principal, not to sell to him. If the sale had been consummated in the course insisted upon by the brokers, the principal would have bought them of his own brokers and no one else. A custom of trade may control the mode of performance of a contract, but cannot control its intrinsic character. No usage unknown to the principal can justify a broker in converting himself into a principal seller." On appeal, the Exch. Cham. was equally divided, but the H. L. was unanimous in holding the custom to be invalid. See also *Hamilton* v. *Young*, 7 L. R. Ir. 289, where a custom of the Stock Exchange, authorizing brokers entitled to sell their customers' securities, to take them for themselves at the price of the day, was held unreasonable, and not binding on a customer; and *McDevitt* v. *Connolly*, 13 *Id.* 207; also *Barrow* v. *Dyster*, 13 Q. B. D. 635, where a custom in the hide trade to make the selling broker liable on a contract if he did not disclose his principal's name within a reasonable time, was held inconsistent with a term in that contract by which disputes were to be referred to the arbitration of the selling broker.

Terms not incidental to those in written contract cannot be introduced by custom.

Terms not incidental to those expressed in the written contract cannot be annexed to it by oral evidence of a particular usage of trade. Thus a charterer of a vessel for a voyage from here to China, the ship to be consigned to his agents there free of commission, sought in vain upon the strength of a particular custom to add to the charter a term that the agents in China should be entitled to procure charters for the return voyage from China and be paid commission on the amount of freight mentioned in such charters; *Phillipps* v. *Briard*, 1 H. & N. 21. And see *Gibson* v. *Crick*, 1 H. & C. 142; *Allan* v. *Sundius*, *Id.* 123.

In *Hutcheson* v. *Eaton*, 13 Q. B. D. 861, the plaintiffs had bought goods of the defendants, who were brokers, but on the face of the contract sold as principals. The contract contained a clause providing that "any dispute arising on it was to be settled by arbitration." The plaintiffs alleged that the goods were of inferior quality, and the matter having been referred to arbitration, the arbitrators decided in favour of the defendants, on the ground of the existence of a custom relieving them from liability, if, as was the fact, they disclosed the names of their principals. It was held by Brett, M.R., and Bowen, L.J., *diss.* Fry, L.J., that

in finding the existence of this custom the arbitrators had exceeded their jurisdiction, whether the evidence of the custom was admissible or not. In this case a jury negatived the existence of the custom.

Custom must be reasonable.

A custom or usage, to be binding, at any rate on those not acquainted with it, must be reasonable, and the question of reasonableness is for the court; see Co. Litt. 56 b., *Leuckhart* v. *Cooper*, 3 B. N. C. 99; *Bottomley* v. *Forbes*, 5 Id. 128; *Tyson* v. *Smith*, 9 A. & E. 421; *Gibson* v. *Crick*, 1 H. & C. 142; *Duncan* v. *Hill*, L. R. 8 Ex. 242; *Merry* v. *Nickalls*, 7 Ch. 733, 7 H. L. 530; *Dann* v. *City Brewery*, 8 Eq. 155; *Bradburn* v. *Foley*, 3 C. P. D. 129; *Pierson* v. *Scott*, 9 Ch. D. 198; *Perry* v. *Barnett*, 15 Q. B. D. 388. Where, however, in a bill of lading for goods shipped for London, it was provided that "average, if any, should be adjusted according to British custom," and a fire having broken out in the ship, water was poured in to extinguish it, and injured the goods mentioned in the bill of lading; it was held that, though by British law such loss was a general average loss, still, as the practice of British average adjusters was not to allow it as such, the parties must be bound by that practice, "though it might be according to the best opinion vicious and unreasonable;" *Stewart* v. *West India Co.*, L. R. 8 Q. B. 88, 362. When evidence of usage is admitted, evidence may be given in reply, tending to show such usage to be unreasonable; *Botiomley* v. *Forbes*, 5 B. N. C. 121, 128.

Previous usage between the parties.

As to the admissibility and effect of previous usage between the parties to a contract, see *Bourne* v. *Gatliffe*, 11 Cl. & F. 45; *Ford* v. *Yates*, 2 M. & Gr. 549; *Cumming* v. *Shand*, 5 H. & N. 95. And as to the evidence of usage between other parties in the same trade to show the reasonableness of a contract, see *Rowcliffe* v. *Leigh*, 6 Ch. D. 256.

Parol evidence inadmissible to exclude custom.

Parol evidence is inadmissible to show that the parties to a written contract intended to exclude the incorporation into it of a customary incident; *Fawkes* v. *Lamb*, 31 L. J. Q. B. 98.

What is evidence to establish a usage.

As to what is sufficient evidence to establish a usage in a trade, see *Mackenzie* v. *Dunlop*, 3 Macq. 22; *Dent* v. *Nickalls*, 22 W. R. 218; *Abbott* v. *Bates*, 43 L. J. C. P. 150; *Ex p. Powell*, 1 Ch. D. 501; *Re Witt*, 2 Id. 489; *Willans* v. *Ayers*, 3 App. Cas. 133; *Nelson* v. *Dahl*, 12 Ch. D. 576; *Wildy* v. *Stephenson*, C. & E. 3; *Knight* v.

Cotesworth, Id. 51, *per* Mathew, J.; *Re Catford*, 71 L. T. 584. In *Fleet* v. *Murton*, L. R. 7 Q. B. 126, evidence of custom in the London colonial market was held admissible in proof of a similar custom in the London fruit trade.

Tendency of the courts.

Lord Eldon, in *Anderson* v. *Pitcher*, 2 B. & P. 168, expressed an opinion that the practice of admitting usage to explain contracts ought not to be extended; see also the expression of the court in *Trueman* v. *Loder*, 11 A. & E. 589; and *Johnston* v. *Usborne*, Id. 549. But the tendency of the courts appears now to be the other way; see *Humfrey* v. *Dale*, 7 E. & B. 266, E. B. & E. 1004; *Hutchinson* v. *Tatham*, L. R. 8 C. P. 482.

How far words "of general import" may be explained by usage.

In *Cross* v. *Eglin*, 2 B. & Ad. 106, evidence was offered, to show that the plaintiffs, who had contracted for "300 *quarters (more or less) of foreign rye*," could not, consistently with the usage of trade, be required to receive so large an excess as 45 quarters over the 300. The question as to the admissibility of the evidence ultimately proved immaterial; but Littledale, J., said that, where words were of such *general import*, he should feel much difficulty in saying that evidence ought to be received to ascertain their meaning; see *Lewis* v. *Marshall*, 7 M. & Gr. 729; *Moore* v. *Campbell*, 10 Exch. 323; *Bourne* v. *Seymour*, 16 C. B. 337; *Carter* v. *Crick*, 4 H. & N. 412. It is not, however, necessary that the phrase should be itself "ambiguous;" *per* Blackburn, J., *Myers* v. *Sarl*, 30 L. J. Q. B. 9; and see *Alcock* v. *Leeuw*, C. & E. 98.

It is right to observe that, though in certain cases above pointed out evidence of usage is received to explain the terms used in a contract, yet, when the jury have decided on the meaning of those terms, it is not for them but for the court to put a construction upon the entire contract or document; *Hutchinson* v. *Bowker*, 5 M. & W. 535; *Neilson* v. *Harford*, 8 Id. 806; *Bowes* v. *Shand*, 2 App. Cas. 455, 462.

WHITCOMB *v.* WHITING.

EASTER.—21 *GEORGE* 3.

[REPORTED, 2 DOUGL. 652.]

The acknowledgment of one out of several drawers of a joint and several promissory note takes it out of the Statute of Limitations as against the others, and may be given in evidence in a separate action against any of the others. (*Secus*, since the statutes mentioned in the notes.)

DECLARATION, in the common form, on a promissory note executed by the defendant. Pleas: the general issue, and *non assumpsit infra sex annos*. Replication: *assumpsit infra sex annos*. The cause was tried before Hotham, B., at the last assizes for Hampshire. The plaintiff produced a joint and several note executed by the defendant and three others; and, having proved payment, by one of the others, of interest on the note, and part of the principal, within six years, and the Judge thinking that was sufficient to take the case out of the statute, as against the defendant, a verdict was found for the plaintiff.

On Friday, the 4th of May, a rule was granted to show cause why there should not be a new trial, on a motion of *Lawrence*, who cited *Bland* v. *Haslerig* (*a*); and this day, in support of the application, he contended, that the plaintiff, by suing the defendant separately, had treated this note exactly as if it had been signed only by the defendant; and, therefore, whatever might have been the case in a joint action, in this case the acts of the other parties were clearly not evidence against him. The acknowledgment of a party himself does not amount to a new promise, but is only evidence of a promise. This was determined in the case of *Heylin* v. *Hastings* (*b*), reported in Salkeld (*c*), and 12 Modern (*d*); and in *Hemings* v.

(*a*) C. B., H. 1 & 2 W. & M.: 2 Ventr. 151.
(*b*) B. R., H. 10 Will. 3.
(*c*) 1 Salk. 29.
(*d*) 223.

Robinson (*e*), it was decided, that the confession of nobody but a defendant himself is evidence against him. That last case was an action by an indorsee of a note, against the drawer, and the plaintiff proved the acknowledgment of a mesne indorser that the indorsement on the back of the note was in his handwriting; but the court was of opinion that this was not evidence against the drawer, but that the indorsement must be proved. It would certainly open a door to fraud and collusion, if this sort of evidence were, in any case, to be admitted. A plaintiff might get a joint drawer to make an acknowledgment, or to pay part, in order to recover the whole, although it had been already paid.

Lord Mansfield.—The question here is only whether the action is barred by the Statute of Limitations. When cases of fraud appear, they will be determined on their own circumstances. *Payment by one is payment for all*, the one acting, virtually, as agent for the rest; and in the same manner, *an admission by one is an admission by all*; and the law raises the promise to pay, when the debt is admitted to be due.

Willes, J.—The defendant has had the advantage of the partial payment, and, therefore, must be bound by it.

Ashurst and Buller, JJ., of the same opinion.

The rule discharged (*f*).

(*e*) C. B., M. 6 Geo. 2: Barnes, 4to ed., 436.

(*f*) The case of *Bland* v. *Haslerig*, cited in the preceding page, was a joint action against four; the plea, the Statute of Limitations; and a verdict, that one of the defendants did assume within six years, and that the others did not; and it was held by Pollexfen, C. J., Powel, and Rokeby (against Ventris), that the plaintiff could not have judgment against the defendant, who was found to have promised within the six years. That case may be explained on the manner of the finding; for as the plea was joint, and the replication must have alleged a joint undertaking, the verdict did not find what the plaintiff had bound himself to prove. But, according to the principle in the case of *Whitcomb* v. *Whiting*, the jury ought to have considered the promise of one as the promise of all, and therefore should have found a general verdict against all.

Changes in the law by statute.

The law, as laid down in the principal case, as to the effect of acknowledgment or payment *by a joint contractor* with regard to the Statute of Limitations, has been reversed by Lord Tenterden's Act, and the Mercantile Law Amendment Act, 1856. The former Act provides that where there

9 Geo. 4, c. 14, ss. 1, 2.

are two or more joint-contractors, or executors or administrators of a contractor, no such joint-contractor, executor, or administrator, shall lose the benefit of the Statute of Limitations (21 Jac. 1, c. 16), so as to be chargeable in respect or by reason only of any *acknowledgment or promise* by another of them; and the latter Act provides that where there are two or more co-contractors, whether liable jointly or jointly and severally, or executors or administrators of a contractor, no such co-contractor, executor, or administrator, shall lose the benefit of the Statutes of Limitations, so as to be chargeable in respect or by reason only of any *payment* by another of them. 19 & 20 Vict. c. 97, s. 14.

Lord Tenterden's Act also enacts that "in actions of debt, or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of" the Statute of Limitations (21 Jac. 1, c. 16), "or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby;" provided that nothing therein contained "shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever." 9 Geo. 4, c. 14, s. 1.

The present notes to this case relate chiefly to the question, what proof of payment suffices, as against *the person actually paying*, to save the Statute of Limitations (21 Jac. 1, c. 16), and also to the question what is a sufficient written acknowledgment for that purpose. Scope of these notes.

In order that a part-payment may have that effect there are two requisites besides proof of the mere fact of payment:— (1) it must appear that the payment was made on account of a larger debt; (2) that that debt is the one sued for. Payments. What must be proved.

The principle upon which a part-payment, made within six years before action brought, takes a case out of the operation of the statute is that the payment affords evidence of an acknowledgment of the whole debt, and of a new promise to pay the remainder of it, creating a new cause of action; see *per* Blackburn, J., *Morgan* v. *Rowlands*, L. R. 7 Q. B. 493, 497; *per* Lord Tenterden, *Tanner* v. *Smart*, 6 B. & C. 603, 606. "In order to take a case out of the statute by a part-payment, it must appear, in the first place, that the payment was made on account of a debt. . . Secondly, it must appear that the payment was made on account of Principle on which payment saves the statute. *Per* Parke, B., *Tippets* v. *Heane*.

the debt for which the action was brought. . . It is necessary, in the third place, to show that the payment was made as part-payment of a greater debt, because the principle upon which a part-payment takes a case out of the statute is that it admits a greater debt to be due at the time of the part-payment. Unless it amounts to an admission that more is due, it cannot operate as an admission of any still existing debt;" *per* Parke, B., *Tippets* v. *Heane*, 1 C. M. & R. 252.

Davies v. *Edwards.*

"A part-payment, in order to take a case out of the statute, must be made on account of a larger sum thereby admitted to be due, and must include a promise to pay the remainder;" *per* Parke, B., *Davies* v. *Edwards*, 7 Exch. 22.

Circumstances must not rebut inference of promise to pay balance.

It follows therefore that the payment, in order to save the statute, must be made under circumstances which do not rebut an implication of a promise to pay the balance, because it is only as giving rise to such an implication, and not by any specific effect of its own, that the payment operates. Accordingly, a part-payment accompanied by a denial of the debt or a refusal to pay the balance is not sufficient; *Wainman* v. *Kynman*, 1 Exch. 118; *Linsell* v. *Bonsor*, 2 B. N. C. 241; nor is a payment made with the intention of thereby discharging the whole of the creditor's claim; *Foster* v. *Dawber*, 6 Exch. 839, 853; *Waugh* v. *Cope*, 6 M. & W. 824, 829; nor is a payment into court; *Long* v. *Grenville*, 3 B. & C. 10; *Reid* v. *Dickons*, 5 B. & Ad. 499; nor a payment of interest on the debt under compulsion of a judgment recovered for such interest; *Morgan* v. *Rowlands*, L. R. 7 Q. B. 493. As the cause of action is the new promise inferred from the payment, the payment, to support the action, must have been made before action brought; *Bateman* v. *Pindar*, 3 Q. B. 574, overruling *Yea* v. *Fouraker*, 2 Burr. 1099. It is immaterial, however, whether the payment on account of the debt was made before or after the debt had already become statute-barred; see *Heylin* v. *Hastings*, 1 Ld. Raym. 389, 421, cited in *Tanner* v. *Smart*, 6 B. & C. 303, 306; for the statute does not extinguish the debt, but only takes away the remedy by action.

Payment must be before action brought.

May be after debt has become statute barred.

Effect of unappropriated payment where more than one debt.

The second requisite referred to by Parke, B., in *Tippets* v. *Heane*, *supra*, (*viz.*, that "it must appear that the payment was made on account of the debt for which the action was brought"), has led to a discussion whether, when there are two clear and undisputed debts, either can be taken out

of the statute by proof of a payment not specifically appropriated by the debtor; upon which question Tindal, C. J., incidentally expressed an opinion in the negative in *Burn* v. *Boulton*, 2 C. B. 476. It has, however, been since held that it is a question of fact whether the payment was made on account of both debts, and that, if it was so paid, it will save both debts; *Walker* v. *Butler*, 6 E. & B. 506. "In general, even where the debts are quite separate, if a payment is shewn, it will be a question for the jury whether it was not applicable to all the debts;" *per* Crompton, J., Id.

Walker v. *Butler.*

In *Mills* v. *Fowkes*, 5 B. N. C. 458, it was held that though where there are several debts, some barred by the statute, and some not, the creditor can appropriate to the barred debts a payment not appropriated by the debtor, yet such payment is no evidence to revive the barred debts. In *Nash* v. *Hodgson*, 6 De G. M. & G. 474, the defendant, being indebted to the plaintiff on three promissory notes, paid the plaintiff 5*l.* on his application for payment of interest. At the time of the payment only one note was not barred by the statute, and the plaintiff appropriated the 5*l.* to payment of interest on that note. Subsequently, the question arose whether the payment took that note out of the statute. The C. A. agreed that it did. Knight-Bruce, L. J., held that the plaintiff in making the appropriation was the defendant's agent. Turner, L. J., expressly dissented from this view, but supported that taken by Lord Cranworth, who, on a review of the cases, said:—"The cases shew that a simple payment of money does not take a debt out of the statute, and that the payment must be of a smaller sum on account of a larger. What I deduce from them is, that, where a payment is made as principal, the effect of it will be to take out of the statute any debt which is not barred at the time of payment, but that it will not revive a debt which is then barred; and that, where there are several debts, the inference will be that the payment is to be attributed to those not barred. What may be the effect where there is a single debt consisting of several items, some of which are barred, and some not, may be doubtful. Exactly the same principle applies if the payment is made in respect of interest. It appears to me that in this case, there being three promissory notes, two barred and one not barred, and a payment made on account of interest generally, this payment must be attributed to the note which was not barred; and, if this were not so, the only effect would be to treat it as a

Where some of the debts statute-barred.

Mills v. *Fowkes.*

Nash v. *Hodgson.*

Per Lord Cranworth.

payment on account of all, so that in either case the 200*l.* note would be kept alive."

Payment of dividend.

A payment of a dividend in respect of a debt, made by the debtor's assignee under the Insolvent Debtors' Act, was held insufficient in *Davies* v. *Edwards*, 7 Exch. 22; and so, in *Ex parte Topping*, 34 L. J. Bank. 44, was a payment by the debtor's inspector under an inspectorship deed. Whether a payment, which upon the subsequent bankruptcy of the debtor is held to be fraudulent, saves the statute, *quære*; see

Other cases.

Re Lane, 23 Q. B. D. 74. Besides the cases already referred to, it was held in *Evans* v. *Davies*, 4 A. & E. 840, *Collinson* v. *Margesson*, 27 L. J. Ex. 305, *Worthington* v. *Grimsditch*, 7 Q. B. 479, *Dowling* v. *Ford*, 11 M. & W. 329, and *Burn* v. *Boulton*, 2 C. B. 476, that the evidence that the payment was on account of a larger debt, being the debt sued for, was sufficient; in *Holme* v. *Green*, 1 Stark. 488, and *Brandram* v. *Wharton*, 1 B. & Ald. 463, that it was insufficient.

Goods taken in part payment save the statute.

The payment relied on need not necessarily have been made in cash. Thus it has been held that, if goods be given and accepted in part payment within six years, that saves the statute; *Hooper* v. *Stephens*, 4 A. & E. 71; *Hart* v. *Nash*, 2 C. M. & R. 337; *Collinson* v. *Margesson*, 27 L. J. Ex. 305. "When anything is received, upon agreement, in reduction of a debt, that is a payment sufficient to take the debt out of the statute;" *per* Lord Denman, *Hooper* v. *Stephens*, *supra*. But "no delivery of goods is sufficient to take a case out of the statute except under circumstances which render the delivery equivalent to payment;" *per* Cresswell, J., *Cottam* v. *Partridge*, 4 M. & Gr. 271, 293.

But not an open account between tradesmen.

Consequently, an open account between two tradesmen, each charging the other with goods, though containing items within six years, has not the effect of saving the statute, in the absence of any agreement to appropriate the charges on one side in liquidation of those on the other; *Cottam* v. *Partridge*, *supra*; *Clark* v. *Alexander*, 8 Scott, N. R. 147. Where, however, such an appropriation is made, by going through the account and striking a balance, with an agreement, express or implied, that the balance only shall be payable, such a transaction is equivalent to a payment of the lesser debt, followed by a repayment of the amount in liquidation of so much of the larger debt; and so it operates to save the balance of the larger debt from the effect of the statute; *Ashby* v. *James*, 11 M. & W. 542, *per* Alderson, B.;

Scholey v. *Watton*, 12 Id. 510, *per* Parke, B.; see *Roberts* v. *Shaw*, 4 B. & S. 44, *per* Blackburn, J.

Payment by bill, note or cheque.

The delivery of a bill, note, or cheque, as a part payment of the debt, is a sufficient payment to oust the statute; and its subsequent dishonour is immaterial; for "where a bill of exchange has once been so delivered, in payment on account of the debt, as to raise an implication of a promise to pay the balance, the statute is answered as *from the time of such delivery*, whatever afterwards takes place on the bill;" *Turney* v. *Dodwell*, 3 E. & B. 136; see *Irving* v. *Veitch*, 3 M. & W. 90.

To whom payment must be made.

A payment to the creditor's agent is a sufficient payment; *Evans* v. *Davies*, 4 A. & E. 840; *Hart* v. *Stephens*, 6 Q. B. 937; and a payment to a third party seems to be sufficient, if made at the creditor's request and under an agreement that it shall go in part liquidation of the debt; *Worthington* v. *Grimsditch*, 7 Q. B. 479, where Lord Denman said that "by agreement between the parties the payment by the debtor of money owing by the creditor to a third person may be a mode of payment either of interest, or, in part, of the principal to the creditor; and such agreement, like any other, may be proved by implication, or course of dealing, or ratification, as well as by express and previous direction." But a payment to a person having no authority to receive payment is not sufficient, because it is no payment to the creditor, and no promise to the creditor to pay the balance can be inferred from it; *Stamford Bank* v. *Smith*, (1892) 1 Q. B. 765.

What is a payment.

In *Bodger* v. *Arch*, 10 Exch. 333, the maintenance of a child, under an agreement that such maintenance should be taken in satisfaction of interest, was held (*dubitante* Parke, B.) to be a sufficient payment to the creditor. In that case, Martin, B., said that "any facts which would support a plea of payment of interest in the event of an action being brought to recover it, would be a payment sufficient to bar the statute;" and this test was adopted in *Maber* v. *Maber*, L. R. 2 Ex. 153, a case in which the money did not actually pass, because the creditor made a gift of the money to the debtor, as he was in the act of paying it; see also *Amos* v. *Smith*, 1 H. & C. 238.

Payment to a person acting as administrator without title.

It seems that a payment may be sufficient if made to a person who is in fact acting as the creditor's administrator, though his title to act is defective, such payment enuring for the benefit of the estate; *Clark* v. *Hooper*, 10 Bing.

480; *Bodger* v. *Arch*, 10 Exch. 333; see *Stamford Bank* v. *Smith*, (1892) 1 Q. B. 765, where *Clark* v. *Hooper* was considered. As to a payment made to a prior holder of a bill or note, while still holder, *quære*; see *Cripps* v. *Davis*, 12 M. & W. 159; *Gale* v. *Capern*, 1 A. & E. 104, *per* Patteson, J.

Payment must be made by debtor's authority.

A payment made by a person who is not the debtor's agent to make it cannot save the statute, because such payment can raise no promise by the debtor to pay the balance; see *Neve* v. *Hollands*, 18 Q. B. 262, where the wife's payments, made without her husband's authority, were held not to keep the debt alive as against him; *Linsell* v. *Bonsor*, 2 B. N. C. 241, where the debtor's agent paid, as a part payment, a sum given to him for the purpose of discharging the whole claim. See also *Newbould* v. *Smith*, 29 Ch. D. 882, 33 Id. 127, 14 App. Cas. 423; *Davies* v. *Edwards*, 7 Exch. 22; *Thorne* v. *Heard*, (1893) 3 Ch. 530, (1894) 1 Ch. 599, W. N. 1895, p. 109. Payment by the devisee for life of interest upon a simple contract debt of the testator keeps alive the creditor's right to obtain payment out of the real estate of the testator as against the remainderman; *Re Hollingshead*, 37 Ch. D. 651.

Evidence of authority.

Where parish officers borrowed money, and gave a promissory note to secure it, signed A. B. &c., churchwardens, C. D. &c., overseers, "or others for the time being," it was held that this form of signature was evidence of an authority to their successors to pay on account, so as to keep the note alive; *Jones* v. *Hughes*, 5 Exch. 104.

Partners.

During the partnership a partner has, *primâ facie*, authority to make payments on account of the firm's debts on the firm's behalf, so as to keep them alive as against his co-partners; *Goodwin* v. *Parton*, 41 L. T. 91; but after the dissolution of the partnership he has, *primâ facie*, no such authority; *Watson* v. *Woodman*, 20 Eq. 721. Such authority, however, may be given to him by an express or implied agreement between the partners at the dissolution; *Tucker* v. *Tucker*, (1894) 1 Ch. 724.

Willis v. *Newham*. Verbal acknowledgment of part payment held insufficient.

In *Willis* v. *Newham*, 3 Y. & J. 518, the Court of Exch. held that a verbal acknowledgment of part payment of a debt was not sufficient proof thereof by reason of Lord Tenterden's Act, s. 1; the import whereof they construed to be that in no case should a mere verbal acknowledgment take a case out of the Statute of Limitations, whether that acknowledgment were of the existence of the debt or of the fact of payment. The authority of *Willis* v. *Newham* was,

however, repeatedly questioned, although it was acted upon in *Bayley* v. *Ashton*, 12 A. & E. 493, *Maghee* v. *O'Neil*, 7 M. & W. 531, *Eastwood* v. *Savile*, 9 Id. 615, and *Clark* v. *Alexander*, 8 Scott, N. R. 147; and the case was at length overruled in *Cleave* v. *Jones*, 6 Exch. 573, where the demand was upon a promissory note for 350*l.* and interest, and it was held that an unsigned entry, made by the debtor in her account book, stating a payment by her of interest on the note within six years, was evidence to take the case out of the Statute of Limitations; see also *Edwards* v. *Janes*, 1 K. & J. 534.

Willis v. *Newham* now overruled.

It was held, even before *Cleave* v. *Jones*, that evidence of a payment on account of the debt might be *corroborated* by evidence of subsequent oral admissions by the debtor that he had made the payment on that account; *Bevan* v. *Gething*, 3 Q. B. 740; and that, evidence of a payment by the debtor having been given, the fact that the debtor appropriated the payment to the debt sought to be taken out of the Statute of Limitations might be proved by evidence of oral declarations made by the debtor, whether made at the time of the payment, or at some other previous or subsequent time; *Waters* v. *Tompkins*, 2 C. M. & R. 726; see *Trentham* v. *Deverill*, 3 B. N. C. 397. As to entries against interest made by a deceased person, see notes to *Higham* v. *Ridgway*, *post*, vol. ii.

How appropriation may be proved.

Lord Tenterden's Act, s. 3, enacts that no memorandum of any payment made, by or on behalf of the payee, on any bill, note, or other writing (*i.e.* "writing constituting the contract;" *Bradley* v. *James*, 22 L. J. C. P. 193, *per* Cresswell, J.; 13 C. B. 822, *per* Maule, J.), "shall be deemed *sufficient* proof of payment to take the case" out of the Statute of Limitations. This section renders such a memorandum insufficient by itself to prove a payment, but does not render it wholly inadmissible; *Bradley* v. *James*, *supra*.

Indorsements on bills, notes or contracts. 9 Geo. 4, c. 14, s. 3.

It is perhaps convenient to refer shortly in this place to the question, what is a sufficient written acknowledgment to save the statute, under section 1 of Lord Tenterden's Act. The principles are thus summed up by Mellish, L. J., *Re River Steamer Co., Mitchell's Claim*, 6 Ch. 822, 828:—"There must be one of these three things to take the case out of the statute. Either there must be an acknowledgment of the debt from which a promise to pay is to be implied, or secondly, there must be an unconditional promise

What is a sufficient written acknowledgment.

to pay the debt, or thirdly, there must be a conditional promise to pay the debt and evidence that the condition has been performed."

A long train of authorities, commencing with *Tanner* v. *Smart*, 6 B. & C. 603, have conclusively settled that an absolute acknowledgment of the debt by itself is sufficient, because an unconditional promise to pay the debt may be inferred from it; *Skeet* v. *Lindsay*, 2 Ex. D. 314; *Green* v. *Humphreys*, 26 Ch. D. 474.

These are the recognised principles. But the question, whether particular written expressions amounted to an absolute acknowledgment or an unconditional promise, has naturally produced much litigation, and has sometimes caused a remarkable diversity of judicial opinion; see the cases collected in *Chasemore* v. *Turner*, L. R. 10 Q. B. 500; *Quincey* v. *Sharpe*, 1 Ex. D. 72; *Meyerhoff* v. *Froehlich*, 4 C. P. D. 63; *Re Bethell*, 34 Ch. D. 561; *Firth* v. *Slingsby*, 58 L. T. 481; *Curwen* v. *Milburn*, 42 Ch. D. 424. In the first of these cases, the creditor relied on a letter from the debtor, in which he wrote: "The old account between us which has been standing over so long has not escaped our memory, and as soon as we can get our affairs arranged, we will see you are paid. Perhaps in the meantime you will let your clerk send me an account of how it stands." At the trial, Martin, B., held that the letter was sufficient to take the case out of the statute. In the Q. B. it was held to be insufficient by Blackburn and Archibald, JJ., Mellor, J., dissenting; but in the Exch. Cham. this decision was reversed (Lord Coleridge *diss.*) by Cleasby, Pollock, and Amphlett, BB., and Grove and Denman, JJ. It has long been settled that the writing relied on need not specify the amount of the debt; that may be proved by parol; see *Bird* v. *Gammon*, 3 B. N. C. 888; *Waller* v. *Lacy*, 1 M. & Gr. 54; *Dickenson* v. *Hatfield*, 1 M. & Rob. 141; *Cheslyn* v. *Dalby*, 4 Y. & C. 238; *Sidwell* v. *Mason*, 2 H. & N. 306.

If there be an express promise, there can be none by implication, and if the express promise be a conditional one, the condition must be fulfilled; *Meyerhoff* v. *Froehlich*, 4 C. P. D. 63. An unqualified admission that there is a pending account between two parties which has to be settled, "is an admission from which you may infer a promise that when the account is settled the balance shall be paid;" *per* Kay, J., *Banner* v. *Berridge*, 18 Ch. D. 274; see *Nichols* v. *Regent's Canal Co.*, 71 L. T. 249, 836.

Letter written without prejudice.

In *Re River Steamer Co.*, 6 Ch. 822, 831, Mellish, L.J., said that he was strongly of opinion that "a letter which is stated to be without prejudice cannot be relied upon to take a case out of the Statute of Limitations, for it cannot do so unless it can be relied upon as a new contract. Now if a man says his letter is without prejudice, that is tantamount to saying, 'I make you an offer which you may accept or not; but if you do not accept it, the having made it is to have no effect at all.' It appears to me, not on the ground of bad faith, but on the construction of the document, that, when a man says in his letter it is to be without prejudice, he cannot be held to have entered into any contract by it, if the offer contained in it is not accepted."

To whom acknowledgment must be made.

An acknowledgment of a simple contract debt is insufficient to save the statute, unless made to the creditor or his agent; *Fuller* v. *Redman*, 26 Beav. 614. "It must be to the creditor or his agent; to some one who was entitled to receive payment of the debt, and to whom you could presume a promise to pay it;" *per* Lord Herschell, *Stamford Bank* v. *Smith*, (1892) 1 Q. B. 765. But an acknowledgment of a specialty debt suffices, under 3 & 4 W. 4, c. 42, s. 5, though made to a stranger; *Moodie* v. *Bannister*, 4 Drew. 432.

Acknowledgment by agent.

By the Mercantile Law Amendment Act, 1856, s. 13, a written acknowledgment, signed *by an agent* of the debtor, "duly authorized to make such acknowledgment," is sufficient.

How far stamp necessary to memorandum under 9 G. 4, c. 14.

There is in Lord Tenterden's Act, s. 3, a proviso, "that no memorandum or other writing *made necessary* by this Act shall be deemed to be an agreement within any Stamp Act." The effect of this appears to be to render a stamp unnecessary where the agreement is put in merely for the purpose of avoiding the Statute of Limitations, the debt having been proved *aliunde*. But, if it were put in as the only evidence of a debt though more than six years old, *semble* that it would require a stamp; *Morris* v. *Dixon*, 4 A. & E. 845. The proviso has been held to be inapplicable to the case of an unstamped promissory note; *Jones* v. *Ryder*, 4 M. & W. 32; but, where a promissory note made in 1846 was indorsed by the maker and the date altered to 1866, a new stamp was held not to be necessary; *Bourdin* v. *Greenwood*, 13 Eq. 281.

MOSTYN *v.* FABRIGAS.

MICHAELMAS.—15 *GEO.* 3, *B. R.*

[REPORTED, 1 COWP. 161.]

Trespass and false imprisonment lies in England by a native Minorquin, against a governor of Minorca, for such injury committed by him in Minorca.

If the imprisonment was justifiable, the governor must plead his authority specially.

On the 8th of June, in last term, Mr. Justice Gould came personally into court to acknowledge his seal affixed to a bill of exceptions in this case; and errors having been assigned thereupon, they were now argued.

This was an action of trespass, brought in the Court of Common Pleas, by Anthony Fabrigas against John Mostyn, for an assault and false imprisonment: in which the plaintiff declared that the defendant on the 1st Sept., 1771, with force and arms, &c., made an assault upon the said Anthony at Minorca, to wit, at London aforesaid, in the parish of St. Mary-le-Bow, in the ward of Cheap, and beat, wounded, and ill-treated him, and then and there imprisoned him, and kept and detained him in prison there for a long time, to wit, for the space of ten months, without any reasonable or probable cause, contrary to the laws and customs of this realm, and against the will of the said Anthony, and compelled him to depart from Minorca aforesaid, where he was then dwelling and resident, and carried, and caused to be carried, the said Anthony from Minorca, aforesaid, to Carthagena, in the dominions of the King of Spain, &c., to the plaintiff's damage of 10,000*l.*

The defendant pleaded, 1st, Not Guilty; upon which issue was joined. 2ndly. A special justification, that the defendant at that time, &c., and long before, was governor of the said Island of Minorca, and during all that time was invested with and did exercise all the powers, privileges, and authorities, civil and

military, belonging to the government of the said Island of Minorca, in parts beyond the seas; and the said Anthony, before the said time when, &c., to wit, on the said 1st of September, in the year aforesaid, at the island of Minorca aforesaid, was guilty of a riot, and was endeavouring to raise a mutiny among the inhabitants of the said island, in breach of the peace; whereupon the said John, so being governor of the said island of Minorca as aforesaid, at the same time, when, &c., in order to preserve the peace and government of the said island, was obliged to and did then and there order the said Anthony to be banished from the said island of Minorca; and, in order to banish the said Anthony, did then and there gently lay hands upon the said Anthony, and did then and there seize and arrest him, and did keep and detain the said Anthony, before he could be banished from the said island, for a short space of time, to wit, for the space of six days then next following; and afterwards, to wit, on the 7th of September, in the year aforesaid, at Minorca, aforesaid, did carry and cause to be carried the said Anthony on board a certain vessel from the island of Minorca aforesaid to Carthagena aforesaid, as it was lawful for him to do, for the cause aforesaid; which are the same making the said assault upon the said Anthony in the first count of the said declaration mentioned, and beating and ill-treating him, and imprisoning him, and keeping and detaining him in prison for the said space or time, in the said first count of the said declaration mentioned, and compelling the said Anthony to depart from Minorca aforesaid, and carrying and causing to be carried the said Anthony from Minorca to Carthagena, in the dominions of the King of Spain, whereof the said Anthony has above complained against him, and this he is ready to verify; wherefore he prays judgment, &c., without this, that the said John was guilty of the said trespass, assault and imprisonment, at the parish of St. Mary-le-Bow, in the ward of Cheap, or elsewhere, out of the said island of Minorca aforesaid. Replication, *de injuriâ suâ propriâ absque tali causâ*. At the trial the jury gave a verdict for the plaintiff, upon both issues, with 3,000*l.* damages, and 90*l.* costs.

The substance of the evidence, as stated by the bill of exceptions, was as follows: on behalf of the plaintiff, that the defendant at the island of Minorca on the 17th Sept., 1771, seized the

(Evidence.)

plaintiff, and, without any trial, imprisoned him for the space of six days against his will, and banished him for the space of twelve months from the said island of Minorca to Carthagena in Spain. On behalf of the defendant, that the plaintiff was a native of Minorca and at the time of seizing, imprisoning, and banishing him as aforesaid, was an inhabitant of and residing in the Arraval of St. Phillip's, in the said island; that Minorca was ceded to the crown of Great Britain, by the treaty of Utrecht, in the year 1713. That the Minorquins are in general governed by the Spanish laws, but when it serves their purpose plead the English laws: that there are certain magistrates, called the Chief Justice Criminal, and the Chief Justice Civil, in the said island: that the said island is divided into four districts, exclusive of the Arraval of St. Phillip's; which the witness always understood to be separate and distinct from the others, and under the immediate order of the governor; so that no magistrate of Mahon could go there to exercise any function, without leave first had from the governor: that the Arraval of St. Phillip's is surrounded by a line wall on one side, and on the other by the sea, and is called the Royalty, where the governor has greater power than anywhere else in the island; and where the judges cannot interfere but by the governor's consent: that nothing can be executed in the Arraval but by the governor's leave, and the judges have applied to him, the witness, for the governor's leave to execute process there. That for the trial of murder, and other great offences committed within the said Arraval, upon application to the governor, he generally appoints the *assesseur criminel* of Mahon, and for lesser offences, the *mustastaph*; and that the said John Mostyn, at the time of the seizing, imprisoning, and banishing the said Anthony, was the governor of the said island of Minorca, by virtue of certain letters patent of his present Majesty. Being so governor of the said island, he caused the said Anthony to be seized, imprisoned, and banished, as aforesaid, without any reasonable or probable cause, or any other matter alleged in his plea, or any act tending thereto.

This case was argued this term by Mr. *Buller*, for the plaintiff in error, and Mr. *Peckham*, for the defendant. Afterwards in

Hilary Term, 1775, by Mr. Serjeant *Walker*, for the plaintiff, and Mr. Serjeant *Glynn*, for the defendant.

For the plaintiff in error. There are two questions, 1st, Whether in any case an action can be maintained in this country for an imprisonment committed at Minorca, upon a native of that place?

2ndly. Supposing an action will lie against any other person, whether it can be maintained against the governor acting as such in the peculiar district of the Arraval of St. Phillip's?

In the discussion of both these questions, the constitution of the island of Minorca, and of the Arraval of St. Phillip's, are material. Upon the record it appears that, by the treaty of Utrecht, the inhabitants had their own property and laws preserved to them. The record further states that the Arraval of St. Phillip's, where the present cause of action arose, is subject to the immediate control and order of the governor only, and that no judge of the island can execute any function there, without the particular leave of the governor for that purpose. 1st. If that be so, and the *lex loci* differs from the law of this country, the *lex loci* must decide, and not the law of this country. The case of *Robinson* v. *Bland*, 2 Burr. 1078, does not interfere with this position; for the doctrine laid down in that case is, that, where a transaction is entered into between British subjects with a view to the law of England, the law of the place can never be the rule which is to govern. But where an act is done, as in this case, which by the law of England would be a crime, but in the country where it is committed is no crime at all, the *lex loci* cannot but be the rule. It was so held by Lord Chief Justice Pratt, in *Pons* v. *Johnson*, and in a like case of *Ballister* v. *Johnson*, sittings after Trinity Term, 1765.

2nd. In criminal cases, an offence committed in foreign parts cannot, except by particular statutes, be tried in this country; *East India Co.* v. *Campbell*, 1 Vesey, sen. 246 (*a*). If crimes com-

(*a*) It is a "well-recognised principle that crimes, including in that term all breaches of public law punishable, by pecuniary mulct or otherwise, at the instance of the state government, or of some one representing the public, are local in this sense, that they are only cognizable and punishable in the country where they were committed;" see *Huntington* v. *Attrill*, (1893) A. C. 150, 156.

(Argument.)

mitted abroad cannot be tried here, much less ought civil injuries, because the latter depend upon the police and constitution of the country where they occur, and the same conduct may be actionable in one country which is justifiable in another. But in crimes, as murder, perjury, and many other offences, the laws of most countries take for their basis the law of God, and the law of nature; and, therefore, though the trial be in a different country from that in which the offence was committed, there is a greater probability of distributing equal justice in such cases than in civil actions. In Keilwey, 202, it was held that the Court of Chancery cannot entertain a suit for dower in the Isle of Man, though it is part of the territorial dominions of the crown of England. 3rd. The cases where the courts of Westminster have taken cognizance of transactions arising abroad seem to be wholly on contracts, where the laws of the foreign country have agreed with the laws of England, and between English subjects; and even there it is done by a legal fiction; namely, by supposing under a *videlicet*, that the cause of action did arise within this country, and that the place abroad lay either in London or in Islington. But where it appears upon the face of the record, that the cause of action did arise in foreign parts, there it has been held that the court has no jurisdiction. *Davis* v. *Yale*, 2 Lutw. 946:—Assault and false imprisonment of the plaintiff, at Fort St. George, in the East Indies, in parts beyond the seas, *viz.*, at London, in the parish of St. Mary-le-Bow, in the ward of Cheap. "It was resolved, by the whole court, that the declaration was ill, because the trespass is supposed to be at Fort St. George, in parts beyond the seas, *viz.*, in London; which is repugnant and absurd: and it was said, by the Chief Justice, and Powel, J., that if a bond bore date at Paris, in the kingdom of France, it is not triable here." In the present case, it does appear upon the record, that the offence complained of was committed in parts beyond the seas, and the defendant has concluded his plea with a traverse, that he was not guilty in London, in the parish of St. Mary-le-Bow, or elsewhere out of the island of Minorca. Besides, it stands admitted by the plaintiff; because if he had thought fit to have denied it, he should have made a new assignment, or have taken issue on the

place. Therefore, as Justice Dodderidge says, in Latch, 4 (*b*), the court must take notice that the cause of action arose out of their jurisdiction.

Before the statute of Jeofails, even in cases the most transitory, if the cause of action was laid in London, and there was a local justification, as at Oxford, the cause must have been tried at Oxford, and not in London. But the statute of Jeofails does not extend to Minorca: therefore, this case stands entirely upon the common law; by which the trial is bad, and the verdict void.

The inconveniences of entertaining such an action in this country are many, but none can attend the rejecting it. For it must be determined by the law of this country, or by the law of the place where the act was done. If by our law, it would be the highest injustice, by making a man, who has regulated his conduct by one law, amenable to another totally opposite. If by the law of Minorca, how is it to be proved? There is no legal mode of certifying it, no process to compel the attendance of witnesses, or means to make them answer. The consequence would be to encourage every disaffected or mutinous soldier to bring actions against his officer, and to put him upon his defence without the power of proving either the law or the facts of his case.

Second point. If an action would lie against any other person, yet it cannot be maintained against the Governor of Minorca, acting as such, within the Arraval of St. Phillip's.

The Governor of Minorca, at least within the district of St. Phillip's, is absolute: both the civil and criminal jurisdiction vest in him as the supreme power, and as such he is accountable to none but God. But supposing he were not absolute: in this case, the act complained of was done by him in a judicial capacity as criminal judge; for which no man is answerable. *Groenvelt* v. *Burwell*, 1 Salk. 396; *Hamond* v. *Howell*, 2 Mod. 218; *Dutton* v. *Howell*, Show. Parl. Cases, 24, are in point to this position; but

(*b*) *Ward's Case*, Latch, 4, 77, 84, W. Jones, 69: action on a bill, declared on as bearing date in the parish of St. Mary-le-Bow, in London, but actually dated "at Hamburgh," without showing that Hamburg in Germany was intended. What Dodderidge, J., actually said, seems to have been: "If in verity we know the date to be at Hamburgh beyond the sea, yet, as judges, we do *not* take notice that it is beyond the sea." And this view prevailed.

(Argument.)

more particularly the last case, where in trespass, assault, and false imprisonment, the defendant justified as Governor of Barbadoes, under an order from the council of state in Barbadoes, made by himself and the council, against the plaintiff (who was the deputy-governor), for maladministration in his office; and the House of Lords determined, that the action would not lie here. All the grounds and reasons urged in that case, and all the inconveniences pointed out against that action, hold strongly in the present. This is an action brought against the defendant for what he did as judge: all the records and evidence, which relate to the transaction, are in Minorca, and cannot be brought here: the laws there are different from what they are in this country: and, as it is said in the conclusion of that argument, government must be very weak indeed, and the persons entrusted with it very uneasy, if they are subject to be charged with actions here for what they do in that character in those countries. Therefore, unless that case can be materially distinguished from the present, it will be an authority, and the highest authority that can be adduced, to show that this action cannot be maintained; and that the plaintiff in error is entitled to the judgment of the court.

Mr. *Peckham*, for the defendant in error. 1st, the objection to the jurisdiction is now too late; for wherever a party has once submitted to the jurisdiction of the court, he is for ever after precluded from making any objection to it. Year Book, 22 H. 6, fol. 7; Co. Litt. 127 b.; T. Raym. 34; 1 Mod. 81; 2 Mod. 273; 2 Ld. Raym. 884; 2 Vern. 483.

Secondly. An action of trespass can be brought in England for any injury done abroad. It is a transitory action, and may be brought anywhere. Co. Litt. 282; 12 Co. 114; Co. Litt. 261 b., where Lord Coke says, that an obligation made beyond seas, at Bordeaux, in France, may be sued here in England, in what place the plaintiff will. Captain Parker brought an action of trespass and false imprisonment against Lord Clive, for injuries received in India, and it was never doubted but that the action did lie. And at this time there is an action depending between Gregory Cojimaul, an Armenian merchant, and Governor Verelst, in which the cause of action arose in Bengal. A bill

was filed by the Governor in the Exchequer for an injunction, which was granted; but, on appeal to the House of Lords, the injunction was dissolved; therefore, the Supreme Court of Judicature, by dissolving the injunction, acknowledged that an action of trespass could be maintained in England, though the cause of action arose in India.

Thirdly. There is no disability in the plaintiff which incapacitates him from bringing this action. Every person born within the ligeance of the King, though without the realm, is a natural-born subject, and as such, is entitled to sue in the King's courts; Co. Litt. 129. The plaintiff, though born in a conquered country, is a subject, and within the ligeance of the King; 2 Burr. 858.

In 1 Salk. 404, upon a bill to foreclose a mortgage in the island of Sarke, the defendants pleaded to the jurisdiction, *viz.*, that the island was governed by the laws of Normandy, and that the party ought to sue in the courts of the island, and appeal. But Lord Keeper Wright overruled the plea; "otherwise there might be a failure of justice, if the Chancery could not hold plea in such case, the party being here." In this case both the parties are upon the spot. In *Ramkissenseat* v. *Barker* (*c*), upon a bill filed against the representatives of the Governor of Patna, for money due to him as his Banyan; the defendant pleaded, that the plaintiff was an alien born, and an alien infidel, and therefore could have no suit here. But Lord Hardwicke said, "as the plaintiff's was a mere personal demand, it was extremely clear that he might bring a bill in this court." And he overruled the defendant's plea without hearing one counsel on either side.

The case of the *Countess of Derby*, Keilwey, 202, does not affect the present question; for that was a claim of dower; which is a local action, and cannot, as a transitory action, be tried anywhere. The other cases from Latch and Lutwyche were either local actions or questions upon demurrer; therefore, not applicable to the case before the court; for a party may avail himself of many things upon a demurrer, which he cannot by a writ of error. The true distinction is between transitory and local actions; the former of which may be tried anywhere; the latter cannot; and this is a transitory action. But there is

(*c*) 1 Atk. 51.

(Argument.)

one case which more particularly points out the distinction, which is the case of Mr. Skinner, referred to the twelve Judges from the council board. In the year 1657, when trade was open to the East Indies, he possessed himself of a house and warehouse, which he filled with goods, at Jamby, and he purchased of the King at Great Jamby the islands of Baretha. The agents of the East India Company assaulted his person, seized his warehouse, carried away his goods, and took and possessed themselves of the islands of Baretha. Upon this case it was propounded to the Judges, by an order from the King in council, dated the 12th April, 1665, "Whether Mr. Skinner could have a full relief in any ordinary court of law?" Their opinion was, "That his Majesty's ordinary courts of justice at Westminster can give relief for taking away and spoiling his ship, goods, and papers, and assaulting and wounding his person, notwithstanding the same was done beyond the seas. But that as to the detaining and possessing of the house and islands in the case mentioned, he is not relievable in any ordinary court of justice" (*d*). It is manifest from this case that the twelve Judges held, that an action might be maintained here for spoiling his goods, and seizing his person, because an action of trespass is a transitory action; but an action could not be maintained for possessing the house and land, because it is a local action.

Fourth point. It is contended that General Mostyn governs as all absolute sovereigns do, and that *stet pro ratione voluntas* is the only rule of his conduct. From whom does the governor derive this despotism? Not from the King, for the King has no such power, and therefore cannot delegate it to another. Many cases have been cited, and much argument has been adduced, to prove that a man is not responsible in an action for what he has done as a judge; and the case of *Dutton* v. *Howell* has been much dwelt upon; but that case has not the least resemblance to the present. The ground of that decision was, that Sir John Dutton was acting with his council in a judicial capacity, in a matter of public accusation, and agreeable to the laws of Barbadoes, and only let the law take its course against a criminal. But Governor Mostyn neither sat as a military nor a

(*d*) 6 Howell, St. Tr. 710 719

civil judge; he heard no accusation, he entered into no proof; he did not even see the prisoner; but in direct opposition to all laws, and in violation of the first principles of justice, followed no rule but his own arbitrary will, and went out of his way to prosecute the innocent. If that be so, he is responsible for the injury he has done; and so was the opinion of the court of C. B., as delivered by Lord Chief Justice De Grey, on the motion for a new trial. If the governor had secured him, said his Lordship, nay, if he had barely committed him, that he might have been amenable to justice, and if he had immediately ordered a prosecution upon any part of his conduct, it would have been another question; but the governor knew he could no more imprison him for a twelvemonth (and the banishment for a year is a continuation of the original imprisonment), than that he could inflict the torture. *Lord Bellamont's Case*, 2 Salk. 625, Pasc. 12 W. 3, is a case in point to show that a governor abroad is responsible here; and the stat. 12 W. 3, passed the same year (*e*), for making governors abroad amenable here in criminal cases, affords a strong inference that they were already answerable for civil injuries, or the legislature would at the same time have provided against that mischief. But there is a late decision not distinguishable from the case in question: *Comyn* v. *Sabine*, Governor of Gibraltar, Mich. 11 Geo. 2. The declaration stated, that the plaintiff was a master carpenter of the office of ordnance at Gibraltar; that Governor Sabine tried him by a court-martial, to which he was not subject; that he underwent a sentence of 500 lashes; and that he was compelled to depart from Gibraltar, which he laid to his damage of 10,000*l*. The defendant pleaded not guilty, and justified under the sentence of the court-martial. There was a verdict for the plaintiff, with 700*l*. damages. A writ of error was brought, but the judgment affirmed.

With respect to the Arraval of St. Phillip's being a peculiar district, under the immediate authority of the governor alone, the opinion of Lord Chief Justice De Grey, upon the motion for a new trial, is a complete answer: "One of the witnesses in the cause," said his Lordship, "represented to the jury, that in some particular cases, especially in criminal matters, the governor resident upon the island does exercise a legislative

(*e*) 11 & 12 W. 3, c. 12.

(Argument.)

power. It was gross ignorance in that person to imagine such a thing: I may say it was impossible that a man, who lived upon the island in the station he had done, should not know better than to think that the governor had a civil and criminal power in him. The governor is the King's servant; his commission is from him, and he is to execute the power he is invested with under that commission; which is to execute the laws of Minorca, under such regulations as the King shall make in council. It was a vain imagination in the witnesses to say that there were five terminos in the island of Minorca; I have at various times seen a multitude of authentic documents and papers relative to that island; and I do not believe that, in any one of them, the idea of the Arraval of St. Phillip's being a distinct jurisdiction was ever started. Mahon is one of the four terminos, and St. Phillip's, and all the district about it, is comprehended within that termino; but to suppose that there is a distinct jurisdiction, separate from the government of the island, is ridiculous and absurd." Therefore, as the defendant, by pleading in chief, and submitting his cause to the decision of an English jury, is too late in his objection to the jurisdiction of the court; as no disability incapacitates the plaintiff from seeking redress here; and as the action, which is a transitory one, is clearly maintainable in this country, though the cause of action arose abroad, the judgment ought to be affirmed. Should it be reversed, I fear the public, with too much truth, will apply the lines of the Roman satirist, on the drunken Marius, to the present occasion; and they will say of Governor Mostyn, as was formerly said of him,

Hic est damnatus inani judicio;

and to the Minorquins, if Mr. Fabrigas should be deprived of that satisfaction in damages, which the jury gave him,

At tu victrix provincia ploras.

Lord Mansfield.—Let it stand for another argument. It has been extremely well argued on both sides.

On Friday, 27th January, 1775, it was very ably argued by

Mr. Serjeant *Glynn* for the plaintiff, and by Mr. Serjeant *Walker* for the defendant.

Lord MANSFIELD.—This is an action brought by the plaintiff against the defendant, for an assault and false imprisonment; and, part of the complaint made being for banishing him from the island of Minorca to Carthagena in Spain, it was necessary for the plaintiff, in his declaration, to take notice of the real place where the cause of action arose: therefore, he has stated it to be in Minorca; with a *videlicet* at London, in the parish of St. Mary-le-Bow, in the ward of Cheap. Had it not been for that particular requisite, he might have stated it to have been in the county of Middlesex. To this declaration the defendant put in two pleas. First, "not guilty"; secondly, that he was Governor of Minorca, by letters patent from the crown; that the plaintiff was raising a sedition and mutiny; and that, in consequence of such sedition and mutiny, he did imprison him and send him out of the island; which, as governor, being invested with all the privileges, rights, &c. of governor, he alleges he had a right to do. To this plea the plaintiff does not demur, nor does he deny that it would be a justification in case it were true: but he denies the truth of the fact: and puts in issue whether the fact of the plea is true. The plea avers that the assault for which the action was brought arose in the island of Minorca, out of the realm of England, and nowhere else. To this the plaintiff has made no new assignment, and therefore by his replication he admits the locality of the cause of action.

Thus it stood on the pleadings. At the trial the plaintiff went into the evidence of his case, and the defendant into evidence of his; but, on behalf of the defendant, evidence different from the facts alleged in his plea of justification was given, to show that the Arraval of St. Phillip's, where the injury complained of was done, was not within either of the four precincts, but is a district of itself, more immediately under the power of the governor; and that no judge of the island can exercise jurisdiction there, without a special appointment from him. Upon the facts of the case, the judge left it to the jury, who found a verdict for the plaintiff, with 3,000*l.* damages. The defendant has tendered a bill of exceptions, upon which bill of exceptions the cause comes before us: and the great difficulty

(JUDGMENT.)

I have had upon both the arguments has been to be able clearly to comprehend what the question is, which is meant seriously to be brought before the court.

If I understand the counsel for Governor Mostyn right, what they say is this: The plea of not guilty is totally immaterial; and so is the plea of justification: because upon the plaintiff's own showing it appears, 1st, that the cause of action arose in Minorca, out of the realm; 2ndly, that the defendant was Governor of Minorca, and by virtue of such his authority imprisoned the plaintiff. From thence it is argued that the judge who tried the cause ought to have refused any evidence whatsoever, and have directed the jury to find for the defendant: and three reasons have been assigned. One, insisted upon in the former argument, was that the plaintiff, being a Minorquin, is incapacitated from bringing an action in the King's courts in England. To dispose of that objection at once, I shall only say it is wisely abandoned to-day; for it is impossible there ever could exist a doubt, but that a subject born in Minorca has as good a right to appeal to the King's courts of justice as one who is born within the sound of Bow bell; and the objection made in this case, of its not being stated on the record that the plaintiff was born since the treaty of Utrecht, makes no difference. The two other grounds are, 1st, That the defendant, being Governor of Minorca, is answerable for no injury whatsoever done by him in that capacity: 2ndly, That the injury being done at Minorca, out of the realm, is not cognisable by the King's courts in England. As to the first, nothing is so clear as that, to an action of this kind, the defendant, if he has any justification, must plead it: and there is nothing more clear than that, if the court has not a general jurisdiction of the subject-matter, he must plead to the jurisdiction, and cannot take advantage of it upon the general issue. Therefore, by the law of England, if an action be brought against a judge of record for an act done by him in his judicial capacity, he may plead that he did it as judge of record, and that will be a complete justification. So in this case, if the injury complained of had been done by the defendant as a judge, though it arose in a foreign country, where the technical distinction of a

court of record does not exist, yet sitting as a judge in a court of justice, subject to a superior review, he would be within the reason of the rule which the law of England says shall be a justification; but then it must be pleaded (*f*). Here no such matter is pleaded, nor is it even in evidence that he sat as judge of a court of justice. Therefore I lay out of the case everything relative to the Arraval of St. Phillip's.

The first point, then, upon this ground, is the sacredness of the defendant's person as governor. If it were true that the law makes him that sacred character, he must plead it, and set forth his commission as special matter of justification; because *primâ facie* the court has jurisdiction. But I will not rest the answer upon that only. It has been insisted by way of distinction, that, supposing an action will lie for an injury of this kind committed by one individual against another, in a country beyond the seas, but within the dominion of the crown of England, yet it shall not emphatically lie against the governor. In answer to which I say, that for many reasons, if it did not lie against any other man, it shall most emphatically lie against the governor.

In every plea to the jurisdiction, you must state another jurisdiction; therefore, if an action is brought here for a matter arising in Wales, to bar the remedy sought in this court, you must show the jurisdiction of the court of Wales; and in every case, to repel the jurisdiction of the King's court, you must show a more proper and more sufficient jurisdiction: for if there is no other mode of trial, that alone will give the King's courts a jurisdiction. Now, in this case no other jurisdiction is shown, even so much as in argument. And if the King's courts of justice cannot hold plea in such case, no other court can do it. For it is truly said that a governor is in the nature of a viceroy; and therefore locally, during his government, no civil or criminal action will lie against him: the reason is, because upon process he would be subject to imprisonment (*g*). But here the injury is

(*f*) See 1 Salk. 306; Vaugh. 138; 12 C. 24; Lord Raym. 466; 6 T. R. 449; 3 M. & S. 411. See too 1 T. R. 493, 513, 514, 535, 550, 784; 4 Taunt. 67; 2 C. & P. 146; 1 B. & C. 163; 4 B. & C. 292.

(*g*) This *dictum* as to the position of a governor was dissented from in *Hull* v. *Bigge*, 3 Moo. P. C. 465; see also *Musgrave* v. *Pulido*, 5 App. Cas. 102, 107; and *post*, p. 623.

(JUDGMENT.)

said to have happened in the Arraval of St. Phillip's, where, without his leave, no jurisdiction can exist. If that be so, there can be no remedy whatsoever, if it is not in the King's courts: because, when he is out of the government, and is returned with his property into this country, there are not even his effects left in the island to be attached.

Another very strong reason, which was alluded to by Mr. Serjeant Glynn, would alone be decisive; and it is this: that though the charge brought against him is for a civil injury, yet it is likewise of a criminal nature; because it is in abuse of the authority delegated to him by the King's letters patent, under the great seal. Now, if everything committed within a dominion is triable by the courts within that dominion, yet the effect or the extent of the King's letters patent, which gave the authority, can only be tried in the King's courts; for no question concerning the seignory can be tried within the seignory itself. Therefore, where a question respecting the seignory arises in the proprietary governments, or between two provinces of America, or in the Isle of Man, it is cognizable by the King's courts in England only. In the case of the Isle of Man, it was so decided in the time of Queen Elizabeth, by the chief justice and many of the judges. So that emphatically the governor must be tried in England, to see whether he has exercised the authority delegated to him by the letters patent legally and properly, or whether he has abused it, in violation of the laws of England, and the trust so reposed in him.

It does not follow from hence, that, let the cause of action arise where it may, a man is not entitled to make use of every justification his case will admit of, which ought to be a defence to him. If he has acted right according to the authority with which he is invested, he must lay it before the court by way of plea, and the court will exercise their judgment whether it is a sufficient justification or not. In this case, if the justification had been proved, the court might have considered it as a sufficient answer: and if the nature of the case would have allowed of it, might have adjudged that the raising a mutiny was a good ground for such a summary proceeding. I can conceive cases in time of war in which a governor would be justified, though he

acted very arbitrarily, in which he could not be justified in time of peace. Suppose, during a siege or upon an invasion of Minorca, the governor should judge it proper to send a hundred of the inhabitants out of the island, from motives of real and general expediency; or suppose, upon a general suspicion, he should take people up as spies; upon proper circumstances laid before the court, it would be very fit to see whether he had acted as the governor of a garrison ought, according to the circumstances of the case. But it is objected, supposing the defendant to have acted as the Spanish governor was empowered to do before, how is it to be known here that by the laws and constitution of Spain he was authorised so to act? The way of knowing foreign laws is, by admitting them to be proved as facts, and the court must assist the jury in ascertaining what the law is. For instance, if there is a French settlement, the construction of which, depends upon the custom of Paris, witnesses must be received to explain what the custom is; as evidence is received of customs in respect of trade. There is a case of the kind I have just stated. So in the supreme resort before the King in council, the privy council determines all cases that arise in the plantations, in Gibraltar or Minorca, in Jersey or Guernsey; and they inform themselves, by having the law stated to them. As to suggestions with regard to the difficulty of bringing witnesses, the court must take care that the defendant is not surprised, and that he has a fair opportunity of bringing his evidence, if it is a case proper in other respects for the jurisdiction of the court. There may be some cases arising abroad, which may not be fit to be tried here; but that cannot be the case of a governor injuring a man contrary to the duty of his office, and in violation of the trust reposed in him by the King's commission.

If he wants the testimony of witnesses whom he cannot compel to attend, the court may do what this court did in the case of a criminal prosecution of a woman who had received a pension as an officer's widow: and it was charged in the indictment that she never was married to him. She alleged a marriage in Scotland, but that she could not compel her witness to come up to give evidence. The court obliged the prosecutor to consent that the witnesses might be examined before any of the judges of the court of session, or any of the barons of the court

(JUDGMENT.)

of exchequer in Scotland, and that the depositions so taken should be read at the trial. And they declared that they would have put off the trial of the indictment from time to time for ever, unless the prosecutor had so consented. The witnesses were so examined before the lord president of the court of session.

It is a matter of course in aid of a trial at law to apply to a court of equity for a commission and injunction in the meantime: and where a real ground is laid, the court will take care that justice is done to the defendant as well as to the plaintiff (*h*). Therefore, in every light in which I see the subject, I am of opinion that the action holds emphatically against the governor, if it did not hold in the case of any other person. If so, he is accountable in this court or he is accountable nowhere, for the King in council has no jurisdiction. Complaints made to the King in council tend to remove the governor, or to take from him any commission which he holds during the pleasure of the crown. But if he is in England, and holds nothing at the pleasure of the crown, they have no jurisdiction to make reparation, by giving damages, or to punish him in any shape for the injury committed. Therefore to lay down in an English court of justice such a monstrous proposition, as that a governor acting by virtue of letters patent under the great seal is accountable only to God and his own conscience, that he is absolutely despotic, and can spoil, plunder, and affect his Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained.

In *Lord Bellamont's Case*, 2 Salk. 625, cited by Mr. Peckham, a motion was made for a trial at bar, and granted because the Attorney-General was to defend it on the part of the King; which shows plainly that such an action existed. And in *Wey* v. *Vally*, 6 Mod. 195, Justice Powell says, that an action of false imprisonment has been brought here against a governor of Jamaica, for an imprisonment there, and the laws of the country were given in evidence. The governor of Jamaica in that case never thought that he was not amenable. He defended

(*h*) The 1 Will. 4, c. 22, enabled the courts of law to order the examination of witnesses who could not attend the trial to be taken in writing, whether they resided in a foreign country, or in a colony, or in England. See, now, R. S. C. 1883, O. 37, r. 5, *et seq.*

himself, and possibly showed, by the laws of the country, an Act of the Assembly which justified that imprisonment, and the court received it as they ought to do. For whatever is a justification in the place where the thing is done, ought to be a justification where the case is tried. I remember, early in my time, being counsel in an action brought by a carpenter in the train of artillery against Governor Sabine, who was governor of Gibraltar, and who had barely confirmed the sentence of a court-martial, by which the plaintiff had been tried, and sentenced to be whipped. The governor was very ably defended, but nobody ever thought that the action would not lie; and it being proved at the trial, that the tradesmen who follow the train are not liable to martial law, the court were of that opinion, and the jury accordingly found the defendant guilty of the trespass, as having had a share in the sentence, and gave 500*l.* damages.

The next objection which has been made is a general objection, with regard to the matter arising abroad; namely, that as the cause of action arose abroad, it cannot be tried here in England.

There is a formal and a substantial distinction as to the locality of trials. I state them as different things: the substantial distinction is, where the proceeding is *in rem*, and where the effect of the judgment cannot be had, if it is laid in a wrong place. That is the case of all ejectments where possession is to be delivered by the sheriff of the county; and as trials in England are in particular counties, the officers are county officers; therefore the judgment could not have effect, if the action was not laid in the proper county.

With regard to matters that arise out of the realm, there is a substantial distinction of locality too; for there are some cases that arise out of the realm which ought not to be tried anywhere but in the country where they arise; as in the case alluded to by Serjeant Walker: if two persons fight in France, and both happening casually to be here, one should bring an action of assault against the other, it might be a doubt whether such an action could be maintained here; because, though it is not a criminal prosecution, it must be laid to be against the peace of the king (*i*); but the breach of the peace is merely

(*i*) It seems that the words *contra pacem* were not necessary in a declaration of trespass even before the C. L. P. Act, 1852, for the fine to the king had

(JUDGMENT.)

local, though the trespass against the person is transitory. Therefore, without giving any opinion, it might perhaps be triable only where both parties at the time were subjects. So, if an action were brought relative to an estate in a foreign country, where the question was a matter of title only and not of damages, there might be a solid distinction of locality.

But there is likewise a formal distinction, which arises from the mode of trial; for trials in England being by jury, and the kingdom being divided into counties, and each county considered as a separate district or principality, it is absolutely necessary that there should be some county where the action is brought in particular, that there may be a process to the sheriff of that county, to bring a jury from thence to try it. This matter of form goes to all cases that arise abroad: but the law makes a distinction between transitory actions and local actions. If the matter which is the cause of a transitory action arises within the realm, it may be laid in any county—the place is not material; and if an imprisonment in Middlesex, it may be laid in Surrey, and though proved to be done in Middlesex, the place not being material, it does not at all prevent the plaintiff recovering damages: the place of transitory actions is never material, except where by particular Acts of Parliament it is made so; as in the case of churchwardens and constables, and other cases which require the action to be brought in the county. The parties, upon sufficient ground, have an opportunity of applying to the court in time to change the *venue*; but if they go to trial without it, that is no objection. So all actions of a transitory nature that arise abroad may be laid as happening in an English county. But there are occasions which make it absolutely necessary to state in the declaration, that the cause of action really happened abroad; as in the case of specialties, where the date must be set forth. If the declaration states a specialty to have been made at Westminster in Middlesex, and upon producing the deed, it bears date at Bengal, the action is

been abolished. In *Day* v. *Muskett*, L. Raym. 985, Lord Holt said that it was not the *contra pacem*, but the *vi et armis*, that might be omitted, yet, *quære*, whether they stood on a different footing, see Com. Dig., *Pleader*, 3 M. 8. As to whether the doubt expressed by Lord Mansfield be well founded, see *post*, p. 605.

gone; because it is such a variance between the deed and the declaration as makes it appear to be a different instrument. There is some confusion in the books upon the stat. 6 Rich. 2. But I do not put the objection upon that statute. I rest it singly upon this ground: if the true date or description of the bond is not stated, it is a variance. But the law has in that case invented a fiction; and has said the party shall first set out the description truly, and then give a *venue* only for form, and for the sake of trial, by a *videlicet*, in the county of Middlesex, or any other county. But no judge ever thought that, when the declaration said in Fort St. George, viz., in Cheapside, the plaintiff meant it was in Cheapside. It is a fiction of form; every country has its forms, which are invented for the furtherance of justice; and it is a certain rule, *that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted* (*k*). Now the fiction invented in these cases is barely for the mode of trial; to every other purpose, therefore, it shall be contradicted, but not for the purpose of saying the case shall not be tried. So in the case that was long agitated and finally determined some years ago, upon a fiction of the *teste* of writs taken out in the vacation, which bear date as of the last day of the term, it was held, that the fiction shall not be contradicted so as to invalidate the writ, by averring that it issued on a day in the vacation: because the fiction was invented for the furtherance of justice and to make the writ appear right in form. But where the true time of suing out a *latitat* is material, as on a plea of *non assumpsit infra sex annos*, there it may be shown that the *latitat* was sued out after the six years, notwithstanding the *teste*. I am sorry to observe, that some sayings (*l*) have been alluded to, inaccurately taken down, and improperly printed, where the court has been made to say, that as men they have one way of thinking, and as judges they have another, which is an absurdity: whereas in fact they only meant to support the fiction. I will mention a case or two to show that this is the meaning of it.

In 6 Mod. 228, the case of *Robert* v. *Harnage* is thus stated: The plaintiff declared that the defendant became bound to him

(*k*) Cited by Bramwell, B., *A.-G.* v. *Kent*, 1 H. & C. 12, 28; see *Holmes* v. *The Queen*, 31 L. J. Ch. 58.

(*l*) See *ante*, p. 577, note (*b*).

(JUDGMENT.)

at Fort St. David's in the East Indies at London, in such bond; upon demurrer the objection was that the bond appeared to have been sealed and delivered at Fort St. David's in the East Indies, and therefore the date made it local, and, by consequence, the declaration ought to have been of a bond made at Fort St. David's in the East Indies, viz., at Islington in the county of Middlesex; or in such a ward or parish in London: and of that opinion was the whole court. This is an inaccurate statement of the case. But in 2 Lord Raym. 1042, it is more truly reported, and stated as follows: it appeared by the declaration that the bond was made at London in the ward of Cheap; upon oyer, the bond was set out, and it appeared upon the face of it to be dated at Fort St. George in the East Indies; the defendant pleaded the variance in abatement, and the plaintiff demurred, and it was held bad: but the court said that it would have been good if laid at Fort St. George in the East Indies, to wit, at London, in the ward of Cheap. The objection there was, that they had laid it falsely; for they had laid the bond as made at London; whereas, when the bond was produced, it appeared to be made at another place, which was a variance. A case was quoted from Latch, and a case from Lutwyche, on the former argument, but I will mention a case posterior in point of time, where both those cases were cited, and no regard at all paid to them; and that is the case of *Parker* v. *Crook*, 10 Mod. 255. It was an action of covenant upon a deed indented; it was objected to the declaration, that the defendant is said in the declaration to continue at Fort St. George, in the East Indies: and upon the oyer of the deed it bore date at Fort St. George, and therefore the court, as was pretended, had no jurisdiction: Latch, fol. 4, Lutwyche, 950. Lord Chief Justice Parker said that "an action will lie in England upon a deed dated in foreign parts; or else the party can have no remedy; but then in the declaration a place in England must be alleged *pro formâ*. Generally speaking, the deed, upon the oyer of it, must be consistent with the declaration: but in these cases, *propter necessitatem*, if the inconsistency be as little as possible, it is not to be regarded; and here the contract being of a voyage which was to be performed from Fort St. George to Great Britain, does import that Fort St. George is different from

Great Britain;" and after taking time to consider of it in Hilary term, the plaintiff had his judgment, notwithstanding the objection. Therefore, the whole amounts to this: that where the action is substantially such a one as the court can hold plea of, as the mode of trial is by jury, and as the jury must be called together by process directed to the sheriff of the county, matter of form is added to the fiction, to say it is in that county, and then the whole of the inquiry is, whether it is an action that ought to be maintained. But can it be doubted that actions may be maintained here, not only upon contracts which follow the persons, but for injuries done by subject to subject; especially for injuries, where the whole that is prayed is a reparation in damages, or satisfaction to be made by process against the person or his effects, within the jurisdiction of the court? We know it is within every day's experience. I was embarrassed a great while to find out whether the counsel for the plaintiff really meant to make a question of it. In sea batteries the plaintiff often lays the injury to have been done in Middlesex, and then proves it to be done a thousand leagues distant on the other side of the Atlantic. There are cases of offences on the high seas where it is of necessity to lay in the declaration that it was done upon the high seas; as the taking a ship. There is a case of that sort occurs to my memory; the reason I remember it is, because there was a question about the jurisdiction. There likewise was an action of that kind before Lord Chief Justice Lee, and another before me (*m*), in which I quoted that determination, to show that, when the lords commissioners of prizes have given judgment, that is conclusive in the action; and likewise, when they have given judgment, it is conclusive as to the costs, whether they have given costs or not. It is necessary in such actions to state in the declaration that the ship was taken or seized on the high seas, *videlicet*, in Cheapside. But it cannot be seriously contended that the judge and jury who try the cause fancy the ship is sailing in Cheapside; no, the plain sense of it is that, as an action lies in England for the ship which was taken on the high seas, Cheapside is named as a *venue*: which is saying no more than that the party prays the action may be tried in London. But, if a party were at liberty to offer reasons of fact contrary to

(*m*) For the cases referred to, see 2 Dougl. 602, 603.

(JUDGMENT.)

the truth of the case, there would be no end of the embarrassment. At the last sittings there were two actions brought by Armenian merchants, for assaults and trespasses in the East Indies, and they are very strong authorities. Serjeant Glynn said that the defendant, Mr. Verelst, was very ably assisted; so he was, and by men who would have taken the objection, if they had thought it maintainable, and the actions came on to be tried after this case had been argued once; yet the counsel did not think it could be supported. Mr. Verelst would have been glad to make the objection; he would not have left it to a jury, if he could have stopped them short, and said, You shall not try the actions at all. I have had some actions before me, rather going further than these transitory actions; that is, going to cases which in England would be local actions (*n*). I remember one, I think it was an action brought against Captain Gambier, who, by order of Admiral Boscawen, had pulled down the houses of some suttlers who supplied the navy and sailors with spirituous liquors; and, whether the act was right or wrong, it was certainly done with a good intention on the part of the admiral, for the health of the sailors was affected by frequenting them. They were pulled down: the captain was inattentive enough to bring the suttler over in his own ship, who would never have got to England otherwise; and as soon as he came here he was advised that he should bring an action against the captain. He brought his action, and one of the counts in the declaration was for pulling down the houses. The objection was taken to the count for pulling down the houses; and the case of *Skinner* v. *East India Company* (*o*) was cited in support of the objection. On the other side, they produced from a manuscript note a case before Lord Chief Justice Eyre, where he overruled the objection (*p*); and I overruled the objection upon this principle, namely, that

(*n*) Lord Mansfield's opinion as to *Gambier's Case* and *Palliser's Case*, *post*, was not followed in *Doulson* v. *Matthews*, 4 T. R. 503, where Buller, J., said, "We try actions here which are in their nature transitory, though arising out of a transaction abroad, but not such as are in their nature local." *Doulson* v. *Matthews* was approved in *British S. Africa Co.* v. *Companhia de Mocambique*, (1893) A. C. 602; see *post*, p. 602.

(*o*) The opinion of the judges in this case, 6 Howell, St. Tr. 710, 719, is cited *ante*, p. 580.

(*p*) "*Quære*, a misreport of *Shelling* v. *Farmer*," 1 Str. 646; *per* Wright, J., *Companhia de Mocambique* v. *British S. Africa Co.*, (1892) 2 Q. B. 358, 362; see also *per* Lord Halsbury, S. C., (1893) A. C. 602, 633.

the reparation here was personal, and for damages, and that otherwise there would be a failure of justice; for it was upon the coast of Nova Scotia, where there were no regular courts of judicature; but if there had been, Captain Gambier might never go there again; and therefore the reason of locality in such an action in England did not hold. I quoted a case of an injury of that sort in the East Indies, where even in a court of equity Lord Hardwicke had directed satisfaction to be made in damages (*q*); that case before Lord Hardwicke was not much contested, but this case before me was fully and seriously argued, and a thousand pounds damages given against Captain Gambier. I do not quote this for the authority of my opinion, because that opinion is very likely to be erroneous; but I quote it for this reason—a thousand pounds damages and the costs were a considerable sum. As the captain had acted by the orders of Admiral Boscawen, the representatives of the admiral defended the cause, and paid the damages and costs recovered. The case was favourable; for what the admiral did was certainly well intended; and yet there was no motion for a new trial.

I recollect another cause that came on before me; which was the case of Admiral Palliser. There the very gist of the action was local; it was for destroying fishing-huts upon the Labrador coast. After the treaty of Paris, the Canadians early in the season erected huts for fishing; and by that means got an advantage, by beginning earlier, of the fisherman who came from England. It was a nice question upon the right of the Canadians. However, the admiral, from general principles of policy, ordered these huts to be destroyed. The cause went on a great way. The defendant would have stopped it short at once, if he could have made such an objection, but it was not made. There are no local courts among the Esquimaux Indians upon that part of the Labrador coast; and therefore whatever injury had been done there by any of the king's officers would have been altogether without redress, if the objection of locality would have held. The consequence of that circumstance shows, that where the reason fails, even in actions which in England would be local actions, yet it does not hold to places beyond the seas within

(*q*) "In this exercise of jurisdiction he has not been followed by any judge of the Court of Chancery;" *per* Lord Herschell, (1893) A. C. 626.

(JUDGMENT.)

the king's dominions. Admiral Palliser's case went off upon a proposal of a reference, and ended by an award. But as to transitory actions there is not a colour of doubt, that every action that is transitory may be laid in any county in England, though the matter arises beyond the seas; and when it is absolutely necessary to lay the truth of the case in the declaration, there is a fiction of law to assist you, and you shall not make use of the truth of the case against that fiction, but you may make use of it to every other purpose. I am clearly of opinion, not only against the objections made, but that there does not appear a question upon which the objections could arise.

The three other judges concurred.

Per Curiam: Judgment affirmed.

History of English law as to locality of actions.

It is very curious and instructive to trace the progress of the English law, respecting the locality of actions, though the Judicature Act, 1873, renders the subject of small practical importance so far as regards the question of *venue*.

Juries originally summoned from neighbourhood on account of their personal knowledge.

During the earliest ages of our judicial history, juries were selected for the very reason which would now argue their unfitness, *viz.*, for their personal acquaintance with the parties and the merits of the cause; and few rules of law were enforced with greater strictness than those which required that the *venue*, *visne*, or *vicinetum*, in other words the neighbourhood whence the jury were to be summoned, should be also that in which the cause of action had arisen; in order that the jury, who were to determine it principally from their own private knowledge, and who were liable to be *attainted* if they delivered a wrong verdict, might be persons likely to be acquainted with the nature of the transaction which they were called upon to try. *Peregrina judicia*, says a law of Henry the First, *modis omnibus submovemus*.

In order to effect this end, the parties litigant were required to state in their pleadings with the utmost certainty, not merely the county, but the very *venue*, *i.e.*, the very district, *hundred*, or *rill*, within that county, where the facts that they alleged had taken place, in order that the sheriff might be directed to summon the jury from the proper neighbourhood, in case issue should be taken on any of such

History of English law as to locality of actions.

allegations. It followed, of course, that a new *venue* was designated as often as the allegations of the parties litigant shifted the scene of the transaction from one part of the country to another.

Distinction taken between transitory and local matters.

This was, however, soon found to produce great inconveniences; for in mixed transactions, which may happen partly in one place, and partly in another, it was extremely difficult to ascertain the right *venue*; and as the number of these transactions increased with increasing civilisation, these difficulties about determining the place of trial became of constant occurrence, and soon induced the courts, in order to relieve themselves, to take a distinction between *transitory* matters, such as a contract which might happen anywhere, and *local* ones, such as a trespass to the realty, which could only happen in one particular place; and they established as a rule, that in *transitory* matters the plaintiff should have a right to lay the *venue* where he pleased, and the defendant should be bound to follow it, unless indeed his defence consisted of some matter in its nature *local*, which must therefore, *ex necessitate rei*, be alleged to have taken place where it really happened.

Ancient strictness as to venue revived.

However, this distinction was soon abused by litigious plaintiffs, who, by laying the *venue* in a county distant from the defendant's residence, obliged him to come thither with his witnesses; Gilb. C. P. 89; and this occasioned a return to the ancient strictness with regard to *venues* expressed in the above law of Henry the First. Accordingly by stat. 6 Rich. 2, c. 2, it was enacted, "to the intent that writs of debt, and account, and all other such actions be from henceforth taken in their counties, and directed to the sheriffs of the counties where the contracts of the same actions did arise, that if, from henceforth, in pleas upon the same writs it shall be declared that the contract thereof was in another county than is contained in the original writ, that then the said writ shall be utterly abated:" and, as the words of this statute were found not quite sufficient to effect the object, statute 4 Hen. 4, c. 18, directed that attorneys should be sworn "that they would make no suit in a foreign county."

After these statutes the judges adopted various means of enforcing their provisions. At first they examined the plaintiff on oath, as to the truth of the *venue*; afterwards they allowed the defendant to traverse it and try it in an issue; Rastell, *Debt*, 184 b, Fitz. Abr., *Brief*, 8; and still later they made a rule of court, rendering it highly penal on

History of English law as to locality of actions.

attorneys to transgress the act of Hen. 4; R. M. 1654, pl. 5, K. B.; M. 1654, pl. 8, C. P.; but finding that the mode of traversing the *venue* produced great delay, they at last adopted the mode of changing it on motion, which continued in use until the Judicature Act, 1873, which will be referred to below, came into force.

Where local matters alleged in any pleading venue strictly local.

But all these alterations in the law applied, it must be borne in mind, only to *transitory matters*, for where a matter alleged in pleading was of a *local* description, whether the allegation happened in a declaration or in any subsequent pleading, the *venue* for the trial of such matter could be nowhere but at the very place where it was alleged in pleading to have happened, and therefore, as is observed in the text, p. 577, "even in cases the most transitory, if the cause of action was laid in London, and there was a *local* justification as at Oxford, the cause must have been tried in Oxford, not in London." Acc. *Ford* v. *Brooke*, Cro. Eliz. 261; *Bowyer's Case*, Moore, 410.

Hence defendant confined to one plea.

And it was probably this strictness of the law with regard to *venue* which rendered it necessary to confine the defendant so long to a single plea, since had he pleaded several pleas on which issues had been taken triable by different *venues*, there could have been no single trial of the action; and accordingly we find that it was not till after the effect of the statute of Charles the Second on *venues* had become well settled, that the very same year which put an end to the last remnant of the old severity, by abolishing the necessity of summoning hundreders, also endowed the defendant with a right which he ought in justice always to have possessed, of stating everything in his defence which can by law be made available to exonerate him; the right corresponding to which, that, namely, of replying to the defence everything which has a direct tendency to rebut it, was, even in more advanced times, denied the plaintiff, until the passing of the C. L. P. Act, 1852, s. 81.

Since 16 & 17 Car. 2, c. 8, no arrest of verdict, if case tried by jury from place where the action laid in the declaration.

But to return to the progress of the law of *venue*, stat. 16 & 17 Car. 2, c. 8 (one of the statutes of Jeofails), enacted that "after judgment no verdict shall be arrested or reversed, for that there is no right *venue*, so as the cause of action were tried by a jury of the proper county or place *where the action was laid*."

Considerable difficulty arose on the construction of this statute, many lawyers contending that the words "the proper county or place where the action is laid" must be

History of English law as to locality of actions.

understood to mean the proper county or place where the issue arises, so that if the issue arose at *Dale* in Oxfordshire, and the *venue* was *Sale* in the same county, here they said was a case within the statute, there being a right county but a wrong *venue*. However, it was at length decided in *Craft* v. *Boite*, 1 Saund. 246 b, contrary to the opinion of Twysden, J., and settled by many subsequent cases, that the words "*where the action was laid*" meant, where it was laid *in the declaration*, not in any subsequent pleading. And accordingly it was ever afterwards held sufficient if the jury were summoned from the *venue* laid in the declaration.

Venue originally the *hundred*.

This *venue* indeed was at that time the *vill* or *hundred* where the cause of action was stated in the declaration to have arisen; and anciently the jury, in order that they might be persons well acquainted with the controversy, were summoned out of the very *hundred* designated for the *venue*.

Rule relaxed.

Afterwards the rule was relaxed, and in the reign of Edward the Third it was sufficient if the jury contained *six* hundreders; Gilb. C. P. c. 8. This number was in Henry the Sixth's reign reduced to *four*; Fortescue de Laud. c. 25; it was afterwards, by stat. 35 Hen. 8, c. 6, restored to *six*; stat. 27 Eliz. c. 6, reduced it to *two*; and so the law remained till long after the stat. 16 & 17 Car. 2, c. 8, after which Act it was still necessary that *two* at least of the jurors should be summoned from the *hundred* laid in the declaration; and if there were not so many, it was cause of challenge. But this last remnant of the ancient strictness was abolished by 4 & 5 Anne, c. 6, except so far as concerned actions founded upon penal statutes, to which the abolition was extended by 24 G. 2, c. 18. So that thenceforth it was in all cases sufficient if the jury were summoned *de corpore comitatus*, *i.e.*, from the body of the *county* in which the *venue* was laid by the declaration.

Sufficient if jury summoned from *county*.

Practice introduced of changing the venue on the common affidavit in transitory actions.

It has been already mentioned that in transitory actions the judges adopted various modes of enforcing the policy of the statute of Richard the Second, and obliging the plaintiff to lay his *venue* where the transaction in dispute had really occurred. At last they had recourse to a practice, which seems to have been first introduced in the reign of James the First, (*per* Holt, C.J., 2 Salk. 670; the first case in the books is *Gerrard* v. *Floyd*, 1 Sid. 185, E. 16 Car. 2), founded upon the equity of that enactment, by which they held themselves authorised, upon affidavit made that the

History of English law as to locality of actions.

cause of action, if any, arose in the county of A., and not in the county of B., in which the *venue* was laid, or elsewhere out of the county of A., to change the *venue* to the county of A., and the motion for so doing was of course, only requiring counsel's signature; R. H. 2 W. 4, pl. 103. But as it would be hard to conclude the plaintiff on the single affidavit of the defendant, it was further held that the *venue* must be brought back, if the plaintiff undertook to give material evidence in the county in which the action was brought, failing which he must have been non-suited, which was equivalent to an abatement of the writ, according to the statute; Gilb. C. P. 90; *Santler* v. *Heard*, 2 W. Bl. 1032, 1033; *Bruckshaw* v. *Hopkins*, 1 Cowp. 409; *Watkins* v. *Towers*, 2 T. R. 275.

Cases in which defendant could not make the common affidavit.

There were many cases of transitory actions in which the defendant could not by possibility make the above common affidavit, but could procure a change of *venue* on a special affidavit in the interests of justice; see Tidd's Pract. 605.

By the rules of Hilary Term, 1853, all former written rules of practice were abolished, and the only rule substituted relating to *venue* was the 18th, which was that "no *venue* can be changed without a special order of the court or judge unless by consent of the parties."

Power to change venue in local actions.

By 3 & 4 W. 4, c. 42, s. 23, power was given to the court or a judge to alter the *venue* in certain cases, even in local, as distinguished from transitory actions, and this power was further enlarged by the C. L. P. Act, 1852, ss. 41, 182.

Privilege of Crown to retain the venue where it pleases.

As to the right of the Crown, in transitory but not in local actions, to lay and retain the *venue* where it pleases; see *A.-G.* v. *Churchill*, 8 M. & W. 171; and as to similar rights in the Attorney-General for the Prince of Wales, see *A.-G. to the Prince of Wales* v. *Crossman*, L. R. 1 Ex. 381, and the cases therein cited. As to the right of the Crown, under 28 & 29 Vict. c. 104, s. 46, to change the *venue* in certain cases as of right, see *Dixon* v. *Farrer*, 18 Q. B. D. 43.

Privilege of attorney.

An attorney suing in person had, before the Judicature Act, 1873, the privilege to lay and retain the *venue* in Middlesex, and the court had no power to change it; *Grace* v. *Wilmer*, 26 L. J. Q. B. 1.

Local venues abolished since the Judicature Acts.

The law on this subject is now contained in the Judicature Acts, 1873 (36 & 37 Vict. c. 66), and 1875 (38 & 39 Vict. c. 77), and the rules made in pursuance of those Acts. By R. S. C., 1883, O. 36, r. 1, it is provided that "there

shall be no local *venue* for the trial of any action, except where otherwise provided by statute. Every action in every division shall, unless the court or a judge otherwise orders, be tried in the county or place named on the statement of claim, or (where no statement of claim has been delivered or required) by a notice in writing to be served on the defendant, or his solicitor, within six days after appearance. Where no place of trial is named, the place of trial shall, unless the court or a judge shall otherwise order, be the county of Middlesex." The effect of this rule is to abolish all local *venues* existing at the time of the passing of the Judicature Acts, and the qualification, "except where otherwise provided by statute," applies only to statutes passed since 1875; *Buckley* v. *Hull Docks Co.*, (1893) 2 Q. B. 93.

By rule 1A. of the same order, it is provided that the provisions of rule 1 "shall apply to every action, notwithstanding that it may have been assigned to any judge."

In deciding upon applications to change the place of trial, the courts are governed to a great extent by the same principles as governed the practice, prior to the Judicature Acts, on motions to change the *venue*. In *Church* v. *Barnett*, L. R. 6 C. P. 116, Willes, J., stated the true rule to be that a plaintiff had the right to lay his *venue* where he thought proper. If he did so capriciously, a judge would change the *venue* to the place where the cause of action arose. But, where he had not exercised a capricious choice, the defendant who sought to deprive him of an undoubted right must show that there would be a practical preponderance of convenience in trying the cause in the place where the cause of action arose. The same doctrine as to the preponderance of convenience was laid down in *Helliwell* v. *Hobson*, 3 C. B. N. S. 761, and *Durie* v. *Hopwood*, 7 Id. 835; the places where the contract was made and where the breach took place being also elements for consideration; *Levy* v. *Rice*, L. R. 5 C. P. 119. In *Schroder* v. *Myers*, 34 W. R. 261, the C. A. affirmed the plaintiff's *primâ facie* right to lay the *venue* where he pleases. The court will not in general interfere with an order to change the *venue* made by a judge at chambers, unless he acted on a misconception of the facts; *Schuster* v. *Wheelright*, 8 C. B. N. S. 383; see *Jackson* v. *Kidd*, 29 L. J. C. P. 221; and *Church* v. *Barnett*, *Levy* v. *Rice*, and *Schroder* v. *Myers*, *supra*.

In *Green* v. *Bennett*, 54 L. J. Ch. 85, and *Powell* v. *Cobb*,

29 Ch. D. 486, which were actions in the Chancery Division since the Judicature Acts, the question was treated as one for the discretion of the judge to whom the actions were assigned as to the preponderance of convenience. But where Bacon, V.-C., made an order changing the place of trial to London, on the ground merely that the action was brought in the Chancery Division, the C. A. set aside the order; *Philips* v. *Beale*, 26 Ch. D. 621.

To turn now from the technical rules respecting the *venue* or place of trial to more substantial doctrines with regard to causes of action arising abroad.

Local causes of action arising abroad excluded from our courts.

"Our courts are said to be more open to admit actions founded upon foreign transactions than those of any other European country; but there are restrictions in respect of locality which exclude some foreign causes of action altogether, namely, those which would be local if they arose in England, such as trespass to land; and even with respect to those not falling within that description, our courts do not undertake universal jurisdiction;" *Phillips* v. *Eyre*, *per* Willes, J., L. R. 6 Q. B. 1, 28; see *Doulson* v. *Matthews*, 4 T. R. 503, which was approved in the H. L. in *British S. Africa Co.* v. *Companhia de Mocambique*, (1893) A. C. 603.

Jurisdiction not extended by abolition of local venues.

To some extent, no doubt, the difficulty as to local actions, such as trespass to lands abroad, being tried in our courts rested upon technical rules as to the necessity in such cases for a local *venue*, as distinguished from any inherent want of jurisdiction in our courts to try them. But there are broader grounds on which our courts decline jurisdiction, sometimes altogether, sometimes perhaps when the parties are aliens, and there is, therefore, no jurisdiction founded upon the *lex domicilii*. And the abolition, by the Judicature Acts, and Rules of the Supreme Court, of local *venues* has not affected the question, or extended the jurisdiction of the courts of this country in cases where, before those Acts, they would not have entertained jurisdiction; *British S. Africa Co.* v. *Companhia de Mocambique*, *supra*.

Our courts will not entertain actions where the subject-matter is land abroad.

Thus our courts refuse to try actions, such as actions of trespass, or, *a fortiori*, ejectment actions, founded on a disputed claim of title to foreign land, or "to adjudicate upon claims of title to foreign land in proceedings founded on the alleged invasion of the proprietary rights attached to it, and to award damages founded on that adjudication;" *British S. Africa Co.* v. *Companhia de Mocambique*, *supra*, at p. 625, where the question was elaborately discussed; and this is

so, whether the parties be aliens or domiciled in England. In *Carteret* v. *Petty*, 2 Swanst. 323 *n.*, a bill for partition of foreign lands was dismissed; and so, in *Graham* v. *Massey*, 23 Ch. D. 743, was a suit for an account of the purchase-money on a sale of foreign land, the title to which was in dispute between the parties.

Except in some cases through their jurisdiction *in personam*.

In some cases the Courts of Equity have entertained suits affecting lands beyond the jurisdiction, as by decreeing specific performance of articles concerning boundaries of provinces in America; *Penn* v. *Baltimore*, 1 Ves. sen. 444, Tudor's L. C. in Eq., vol. ii.; or by a foreclosure decree of a mortgage of land situate abroad; *Toller* v. *Carteret*, 2 Vern. 494; *Paget* v. *Ede*, 18 Eq. 118; but this exceptional jurisdiction has been exercised only by reason of the authority of the court *in personam*, and, as it seems, only where there was privity between the parties arising by reason of a contract made within the jurisdiction; *Norris* v. *Chambres*, 29 Beav. 246, 3 De G. F. & J. 583; *Cookney* v. *Anderson*, 31 Beav. 452, 1 De G. J. & S. 365; *Norton* v. *Florence Land Co.*, 7 Ch. D. 332; see also *Re Holmes*, 2 J. & H. 527; *Blake* v. *Blake*, 18 W. R. 944; *Reiner* v. *Salisbury*, 2 Ch. D. 378, where Malins, V.-C., refused to entertain a bill for discovery in aid of proposed proceedings to recover land in India; *Batthyany* v. *Walford*, 36 Ch. D. 269; and *per* Wright, J., *Companhia de Mocambique* v. *British S. Africa Co.*, (1892) 2 Q. B. 358, 364.

Otherwise, as a general rule, our courts entertain foreign causes of action, though parties aliens.

On the other hand, speaking generally, (and subject to the distinction before mentioned in respect of *local* actions), where the action is *in personam*, whether in respect of a contract or of a tort, our courts will, it is apprehended, entertain it, though the cause of action may have arisen abroad, and though the parties to it may be aliens, provided that service of process is effected according to their rules. See Story's Conflict of Laws, 542-543; Wharton's Conflict of Laws, 2nd ed., 743; Phillimore Priv. Int. Law, 701; *Buenos Ayres R. Co.* v. *N. R. Co. of Buenos Ayres*, 2 Q. B. D. 210. "Though every fact arose abroad, and the dispute was between foreigners, yet the courts, we apprehend, would clearly entertain and determine the cause, if in its nature transitory, and if the process of the court had been brought to bear against the defendant by service of a writ on him where present in England;" *per* Brett, J., *Jackson* v. *Spittall*, L. R. 5 C. P. 542, 549.

Possible exception.

As regards contractual obligations, however, a distinction

has been taken that, where the contract is made abroad, and its subject-matter is abroad, an English court will not entertain a cause of action in respect of it, if the parties be aliens, though it would do so if they were domiciled here; see *Matthaei* v. *Galitzin*, 18 Eq. 340, and the judgment of Romilly, M.R., in *Cookney* v. *Anderson*, 31 Beav. 466, which was affirmed, 1 De G. J. & S. 365. *Quære*, whether the *dicta* in the last cited cases are not too wide. In *Doss* v. *Sec. of State for India*, 19 Eq. 535, Malins, V.-C., approved of and followed *Matthaei* v. *Galitzin*.

Hart v. *Herwig.*

In *Hart* v. *Herwig*, 8 Ch. 860, the plaintiff, an Englishman, made at Hamburg an agreement with the defendant Herwig, domiciled at Hamburg, for the sale by Herwig, to the plaintiff, of a Hamburg ship then on voyage, to be delivered to the plaintiff at any place whither she might be ordered for discharge, the seller making allowance if she arrived in a damaged state. The ship was ordered to Sunderland to discharge, but, on arrival, delivery was refused except on payment of the full price. The Lords Justices affirmed an order of Malins, V.-C., restraining the removal of the ship by the defendant Herwig, or the master, who was also made a defendant. James, L.J., said, "The substantial question is, whether this court has power to prevent a specific chattel from being removed out of the jurisdiction until a question relating to that chattel is decided. I am of opinion that, according to the established law of nations, if this suit were a suit for damages only, or one which could result in damages only, then the plaintiff must, in order to enforce his claim for damages, go and seek the forum of the defendant. But where the contract, as in this case, though made abroad, is to deliver a thing in specie in this country, and the thing itself is brought here, then the court here, in the exercise of its discretion, will see that the thing to be delivered in this country does not leave this country, so as to defeat the right of the plaintiff to have it so delivered." It is presumed that James, L.J., in saying that, if the suit was a suit for damages only, then the plaintiff must seek the forum of the defendant, was speaking of a case in which there had been no service of process within the jurisdiction, and that the necessity would arise from this, and not from any inherent lack of jurisdiction in our courts to try such a case, if service of process had been effected. See the judgment of Mellish, L.J. As to service of process, see *post*, p. 607.

Contracts must not violate English law.

But just as, in the case of torts, the acts complained of must be actionable both by English law and by the law of the country where they were committed, so also, in the case of contracts, our courts will not enforce contracts which are illegal according to English law, though they be legal according to the law of the place where they are made; *Santos* v. *Illidge*, 6 C. B. N. S. 841, reversed in error, 8 *Id.* 861, but only on the ground that the contract sought to be enforced was not prohibited by English law. See also *Grell* v. *Levy*, 16 *Id.* 73; *Hope* v. *Hope*, 26 L. J. Ch. 417.

Injuries must be actionable both by foreign and by local law.

As regards torts, there seems to be no reason why aliens should not sue in England for personal injuries done them by other aliens abroad, when such injuries are actionable both by the law of England and also by that of the country where they are committed, and the impression which had prevailed to the contrary (see *ante*, p. 589), seems to be erroneous. See *The Halley*, L. R. 2 P. C. 193, 202, where this statement was cited with approval, and the point was treated as "long since established."

But to found a cause of action between aliens, or between aliens and British subjects, or between British subjects in an English court for a wrong committed abroad, both these conditions must be fulfilled. See the judgment in *Phillips* v. *Eyre*, L. R. 6 Q. B. 1; *The M. Moxham*, 1 P. D. 107; and *per* Lord Esher, *Chartered Bank of India* v. *Netherlands St. Nav. Co.*, 10 Q. B. D. 521, 536 (who, however, said that "for a tort committed on the *high seas* between two foreign ships an action can be maintained in this country although it is not a tort according to the laws of the courts in the foreign country to which the ships belong"). Thus, in *The Halley*, *supra*, the Judicial Committee, reversing the decision of the Court of Admiralty, pronounced against a suit in the Admiralty founded upon a liability by the law of Belgium for collision caused by the act of a pilot, whom the shipowner was compelled by that law to employ, and for the act of whom therefore, as not being his agent, he was not responsible by English law.

Phillips v. *Eyre.*

Conversely, in *Phillips* v. *Eyre*, *supra*, the Exch. Cham. upheld the decision of the Q. B. that no action could be maintained in an English court in respect of an assault and imprisonment which had been rendered lawful in Jamaica, where the alleged acts took place, by an Act of Indemnity. That historical case is a remarkable exemplification of the

doctrine of English law now under discussion, because it was thereby solemnly decided, in the words of Cockburn, C.J., that "the principle, that an act authorized by the law of the country in which it takes place cannot be the subject of a legal proceeding here, is equally applicable to an act originally wrongful but legalized by an *ex post facto* law" of the foreign country. It was an action brought by an inhabitant of Jamaica against the defendant, who had been governor of that island, for an assault and false imprisonment; and the acts complained of took place during the rebellion in that island in 1865. The defendant pleaded an Act of Indemnity passed by the Jamaica Legislature, to which plea the plaintiff demurred. On the argument a number of objections were urged against the plea, and, *inter alia*, that such an Act could not take away the plaintiff's right of action in this country. The Q. B. and the Exch. Cham., on appeal, unanimously decided in favour of the defendant. In delivering the judgment of the latter Court, Willes, J., said: "A right of action, whether it arise from contract governed by the law of the place or wrong, is equally the creature of the law of the place, and subordinate thereto. The terms of the contract or the character of the subject-matter may show that the parties intended their bargain to be governed by some other law; but, *primâ facie*, it falls under the law of the place where it was made. And in like manner the civil liability arising out of a wrong derives its birth from the law of the plac , and its character is determined by that law. Therefore an act committed abroad, if valid and unquestionable by the law of the place, cannot, so far as civil liability is concerned, be drawn in question elsewhere, unless by force of some distinct exceptional legislation, superadding a liability other than and besides that incident to the act itself. In this respect no sound distinction can be suggested between the civil liability in respect of a contract governed by the law of the place and a wrong. . . . Where an obligation *ex delicto* to pay damages is discharged and avoided by the law of the country where it was made, the accessory right of action is in like manner discharged and avoided."

As to *ex post facto* legislation, see also *Rouquette* v. *Overmann*, L. R. 10 Q. B. 536.

The Maria Moxham.

Again, in *The M. Moxham*, 1 P. D. 107, which was a cause of damage instituted by an English company against

the owners of an English ship for injuries to a pier belonging to the company, but situate in a Spanish port, the C. A., overruling the decision of Sir R. Phillimore, upheld an alleged defence that, if the collision was caused by negligence, it was negligence of the master and mariners of the ship, and that by the law of Spain the owners were in such a case not liable. In this case any objection to the *jurisdiction* of the English court was waived. See also *Scott* v. *Seymour*, 1 H. & C. 219; *Submarine Telegraph Co.* v. *Dickson*, 15 C. B. N. S. 759; *Hart* v. *Gumpach*, L. R. 4 P. C. 439; *The Mali Ivo*, L. R. 2 A. & E. 356; *Batthyany* v. *Walford*, 36 Ch. D. 269.

There must be service of process.

The foregoing remarks as to the capacity of the English courts to take cognizance of actions against foreigners must be taken subject to the qualification that, to give an English court jurisdiction in personal actions, there must be service of its process within the jurisdiction, or in certain cases service or notice in lieu thereof without the jurisdiction. See *per* Bowen, L.J., *Re King & Co.'s Trade Mark*, (1892) 2 Ch. 462, 483; cp. *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, (1894) A. C. 670. Service without the jurisdiction is provided for under the Judicature Acts by the rules in Order XI. But this is of course a technical question, totally distinct from the broader one discussed in these notes, as to the capacity of English courts to take cognizance of foreign causes of action.

As to the jurisdiction of our Courts over a chattel when brought to this country, see *Hart* v. *Herwig*, 8 Ch. 860, cited *ante*, p. 604.

A special jurisdiction has sometimes been exercised by the Admiralty Division over foreign ships at the request of the representative of the State to whose subjects such ships belong; see *The Agincourt*, 2 P. D. 239; *The Evangelistria*, *Id.* 241.

As to the limits of the Crown's jurisdiction not extending beyond low water mark, see *R.* v. *Keyn*, 2 Ex. D. 63; 46 L. J. M. C. 17; *Harris* v. *Owners of "Franconia,"* 2 C. P. D. 173; and 41 & 42 Vict. c. 73.

Foreigner bankrupt.

As to when a foreigner can be made a bankrupt in England, see *Ex p. Crispin*, 8 Ch. 374; cp. *Re Artola Hermanos*, 24 Q. B. D. 640. As to when bankruptcy proceedings can be served on a foreigner, see *Ex p. Pascal*, 1 Ch. D. 509; *Ex p. Blain*, 12 *Id.* 522; *Re Pearson*, (1892) 2 Q. B. 263.

Locus regit actum.

Locus regit actum is a canon of general jurisprudence, and must be assumed in the absence of contrary evidence to hold good in every system of law; *Guepratte* v. *Young*, 4 De G. & S. 217; *Re Barnard*, 56 L. T. 9. See *Cammell* v. *Sewell*, 5 H. & N. 728, where a sale in Norway of goods there, abandoned to English underwriters, was upheld as valid by Norwegian though invalid by English law.

Foreign judgments.

An action will lie in the courts of this country on the judgment of a foreign court of competent jurisdiction, even when the cause in which the judgment was obtained would have been decided differently according to English law; *Munroe* v. *Pilkington*, 2 B. & S. 11; *Dent* v. *Smith*, L. R. 4 Q. B. 414; *Messina* v. *Petrococchino*, L. R. 4 P. C. 144; *Castrique* v. *Imrie*, L. R. 4 H. L. 414; *Godard* v. *Gray*, L. R. 6 Q. B. 139; *Re Trufort*, 36 Ch. D. 600. But the judgment must be one that finally and conclusively settled the existence of the debt; *Nouvion* v. *Freeman*, 15 App. Cas. 1. And, in the case of a defendant not subject to the laws of, nor resident in, the country where the judgment was obtained, the defendant must have appeared in the foreign courts; *Schibsby* v. *Westenholz*, L. R. 6 Q. B. 155; *Turnbull* v. *Walker*, 67 L. T. 767; *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, (1894) A. C. 670. If the defendant appeared, it is immaterial that he did so merely to protect property of his in that country; *Voinet* v. *Barrett*, 55 L. J. Q. B. 39. The courts of this country will not enforce a foreign judgment, if it was recovered in an action on behalf of the foreign State for the punishment of an offence against its municipal law; *Huntington* v. *Attrill*, (1893) A. C. 150. To an action on a foreign judgment it is a defence to show that the judgment was obtained by fraud; *Abouloff* v. *Oppenheimer*, 10 Q. B. D. 295; *Vadala* v. *Lawes*, 25 Q. B. D. 310. See further, as to the grounds on which a foreign judgment may be impeached, the notes to *The Duchess of Kingston's Case*, *post*, vol. ii. In *Simpson* v. *Fogo*, 1 H. & M. 195, Wood, V.-C., declined to enforce a decree of a court of Louisiana acting in defiance of British law and the comity of nations. Compare with this case *Liverpool Marine Credit Co.* v. *Hunter*, 3 Ch. 479.

Maritime contracts.

In a contract by charter-party the law of the flag as a general rule prevails; *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115; *The August*, (1891) P. 328; and the same law governs the right of a shipmaster to bottomry his cargo; *The Gaetano and Maria*, 7 P. D. 137; but this is only *primâ facie*, and

the whole circumstances must be looked at to see what was the intention of the parties; *Chartered Mercantile Bank of India* v. *Netherlands S. Nav. Co.*, 10 Q. B. D. 521; *The Industrie*, (1894) P. 58; *Re Missouri SS. Co.*, 42 Ch. D. 321; and see *Moore* v. *Harris*, 1 App. Cas. 331. On the question whether our courts recognize a "general maritime law," distinct from the law of this country, see *Lloyd* v. *Guibert*, *supra*; *The Patria*, L. R. 3 A. & E. 436; *The Gaetano and Maria*, *supra*; *The Leon*, 6 P. D. 148.

Cause of action governed by *lex loci*, procedure by *lex fori*.

With respect to transitory causes of action which have accrued abroad, like that in the principal case of *Mostyn* v. *Fabrigas*, it must be remarked that, although the courts of this country will entertain them, still they will, in adjudicating on them, be governed by the laws of the country in which they arose, or, in the case of contracts, by the law with reference to which the parties may be presumed to have contracted; *Hamlyn* v. *Talisker Distillery*, (1894) A. C. 202; *Lloyd* v. *Guibert*, 6 B. & S. 100; *Smith* v. *Weguelin*, 8 Eq. 198; *Ex p. Holthausen*, 9 Ch. 722, *per* Mellish, L.J.; *Cohen* v. *S. E. R. Co.*, 2 Ex. D. 253; *De Greuchy* v. *Wills*, 4 C. P. D. 362; *Adams* v. *Clutterbuck*, 10 Q. B. D. 403; *Chartered Merc. Bank* v. *Netherlands St. Nav. Co.*, *supra*. On the latter point "the broad rule is that the law of a country where a contract is made presumably governs the nature, the obligation, and the interpretation of it, unless the contrary appears to be the express intention of the parties;" *Jacobs* v. *Crédit Lyonnais*, 12 Q. B. D., 589, 600. See *The Missouri SS. Co.*, 42 Ch. D. 321, 338; *Hamlyn* v. *Talisker Distillery*, *supra*; *Ex p. Dever*, 18 Q. B. D. 660, 666; *Gibbs* v. *Société des Métaux*, 25 Q. B. D. 399, 405; *Re Barnard*, 56 L. T. 9; and *Chamberlain* v. *Napier*, 15 Ch. D. 614, where Hall, V.-C., held that such an intention did appear. The distinction laid down in all cases of this description is between the cause of action, which is to be judged of with reference to the law of the country where it originated, and the mode of procedure, which must be adopted as it happens to exist in the country where the action is brought.

Effect of conflict of laws as to bills of exchange.

This distinction is illustrated by the decisions which have been given in our courts as to the liabilities and rights of parties to, and holders of, bills of exchange drawn, accepted, and indorsed in different countries, and by the enactment in the Bills of Exchange Act, 1882, s. 72 (set forth *post*,

p. 614), which presumably was intended to embody the effect of those decisions.

Trimbey v. *Vignier.*

Thus in *Trimbey* v. *Vignier*, 1 B. N. C. 151, it was held, on the assumption that, by the law of *France*, an indorsement in blank does not transfer any property in a bill of exchange or promissory note, that the holder of a note made in *France* and *there* indorsed in blank could not recover upon it in this country against the maker.

And although in *Bradlaugh* v. *De Rin*, L. R. 5 C. P. 473 (better reported 39 L. J. C. P. 254), the Exch. Cham. declined to follow *Trimbey* v. *Vignier*, it was on the express ground that in the latter case the court had mistaken the French law, and that according to French law a blank indorsement acted as a procuration, that is to say, did convey a right to sue, though subject to the equities affecting the indorser in blank.

Lebel v. *Tucker.*

On the other hand, in *Lebel* v. *Tucker*, L. R. 3 Q. B. 77, it was held that, in the case of a bill of exchange drawn, accepted, and payable in *England*, the acceptor was liable to a holder after indorsement in France under similar circumstances to those in *Trimbey* v. *Vignier*; though the court assumed the French law to be as stated in *Trimbey* v. *Vignier*, distinguishing that case on the ground that the contract of the English acceptor of an English bill must be governed by English law. They at the same time declined to express any opinion as to what would be the effect of such an indorsement as between the indorser and any subsequent indorsee in an action against the indorser himself.

adlaugh v. *Rin.*

The case of *Bradlaugh* v. *De Rin*, *supra*, was intermediate between *Trimbey* v. *Vignier* and *Lebel* v. *Tucker*. In the report of the case in the C. P. it is stated, both in the report and in the judgment, that the bills sued upon were drawn in France; see L. R. 3 C. P. 538. In the report in the Exch. Cham. it is stated that they were drawn in Belgium; but in that court, as in the court below, it appears to have been assumed that the bills were in their inception French bills. They were accepted in England, but afterwards indorsed in France in blank, and it was assumed in the Court of C. P. that by French law such an indorsement was insufficient to give the holder—the plaintiff—a title to sue the acceptor—the defendant. The majority of the Court of C. P., consisting of Bovill, C.J., and Willes, J., held that under such circumstances, the bills being French bills in their inception, the obligations of the acceptor must

be determined by French law. Montague Smith, J., on the other hand, held that the acceptance having been in England the English law must prevail. The Exch. Cham., without impugning the correctness of the decision below in point of law, reversed the judgment on the ground that *as a matter of fact* by French law the indorsement was sufficient.

In re Marseilles Co.

In *Re Marseilles Co.*, 30 Ch. D. 598, (decided since the Bills of Exchange Act, 1882, but without reference to it, presumably because the bills were accepted before the passing of the Act), Pearson, J., held that the holders of a bill drawn in France but accepted by an English company in England, were entitled to recover against such acceptors, though the indorsement might have been invalid by the law of France where it was made. In this case the learned judge laid stress upon the form of the bill as constituting it an English instrument. Another case decided on the subject before the Bills of Exchange Act, 1882, is *Allen* v. *Kemble*, 6 Moo. P. C. 315, where Lord Kingsdown stated it as admitted that, in the case of a bill drawn in one country upon a drawee in another, "the drawer is liable according to the laws of the country where the bill was drawn, and not of the country upon which the bill was drawn." See the explanation, however, of this case by Cockburn, C.J., in *Rouquette* v. *Overmann*, L. R. 10 Q. B., p. 540, where it is pointed out that the above *dictum* was unnecessary to the decision of the case, which turned upon the question whether the defendant in a Demerara court could avail himself of the Demerara law as to set-off, a question upon which the *lex fori* must prevail, whatever might have been the law governing the *contract* of the drawer, the defendant in the action. See also *MacFarlane* v. *Norris*, 31 L. J. Q. B. 245.

Alcock v. *Smith.*

In the above cases the question that arose was as to the right to sue the acceptor or drawer. In *Alcock* v. *Smith*, (1892) 1 Ch. 238, the question arose as between two persons, each claiming to be entitled to a bill; and it was held that the title of an indorsee which was valid according to the law of the country where he acquired it was good, and that, although the bill was overdue at the time when such title was acquired, he acquired a title free from all equities, that being the effect of the law of the country where the title was acquired.

Gibbs v. *Fremont.*

In *Gibbs* v. *Fremont*, 9 Exch. 25, the holder of a dis-

honoured bill drawn at Ciudad de los Angeles in California upon Washington was held entitled as against the drawer to Californian interest.

Rouquette v. *Overmann.*

In *Rouquette* v. *Overmann*, L. R. 10 Q. B. (decided before the Act of 1882), at p. 536, the court discussed the supposed rule "that, although the obligations of the acceptor may be determined by the *lex loci* of the country in which the bill is payable, the contract as between the drawer and indorsee must be construed according to the law of the country where the bill was drawn." "It is unnecessary," says Cockburn, C.J., "to consider how far this position may hold good as to matter of form, or stamp objections, or illegality of consideration, or the like. We cannot concur in it as applicable to the substance of the contract, so far as presentment for payment is concerned; still less to a formality required on non-payment, in order to enable the holder to have recourse to an antecedent party to the bill." His lordship then points out that the party transferring a bill for value "engages as surety for the due performance by the acceptor of the obligation which the acceptor takes on himself by the acceptance. His liability therefore is to be measured by that of the acceptor whose surety he is, and as the obligations of the acceptor are to be determined by the *lex loci* of performance, so also must be those of the surety." The effect of the decision is that the court, following *Rothschild* v. *Currie*, 1 Q. B. 43 (though the reasoning of the court in that case has been disapproved, see *Horne* v. *Rouquette*, 3 Q. B. D. 514) and *Hirschfeld* v. *Smith*, L. R. 1 C. P. 340, held that notice of dishonour according to English law was not necessary, but that notice according to French law was sufficient to charge the defendants who were Manchester merchants, at the suit of the plaintiff, an English subject carrying on business in London, on a bill drawn and indorsed to the plaintiff by the defendants in England, but upon and accepted and dishonoured by a French firm at Paris. The state of facts was that the time for payment of the bill with all other French bills was, during its currency, from time to time extended by the French Government in consequence of national complications, and the Queen's Bench held that the drawer was equally with the acceptor entitled to the benefit of these extensions, so that the time for giving notice of dishonour only arose when the acceptor failed to fulfil the obligations imposed upon him.

Another qualification of the supposed rule (irrespective of the Bills of Exchange Act, 1882) that the liability created by an English indorsement is to be measured simply by English law, is to be found in *Horne* v. *Rouquette*, 3 Q. B. D. 514. In that case a bill was drawn in England by Bryant & Co., on Chasserot in Spain, in favour of the defendant, who indorsed it in England to the plaintiff. The plaintiff wrote his name on the back and forwarded it to one Monforte in Spain, who placed it to his credit under circumstances which the majority of the court held to constitute an indorsement to Monforte in Spain. Monforte indorsed it in Spain to Clavero, who indorsed it also in Spain to O'Connor & Sons. On presentment by them for acceptance the bill was dishonoured. Notice of dishonour was not given to the plaintiff until after such a time as would in England have discharged him; but it was proved that, according to Spanish law, no notice of dishonour for non-acceptance was required. The plaintiff when he did receive notice at once gave notice to the defendant, and paid Monforte: and was held by the C. A., affirming the judgment of Lord Coleridge, to be entitled to recover against the defendant. The court concurred in thinking that the fact of the bill being a foreign one was immaterial, that the liability of the defendant on his indorsement in England was governed by English law; but that the plaintiff, being liable to Monforte, because, according to Spanish law, no notice of dishonour was necessary to charge the indorser, was entitled in his turn to have recourse against the defendant. *Horne* v. *Rouquette*.

The *ratio decidendi* seems to be that a defendant, though indorsing in England, and whether the bill be foreign or English, must be deemed to anticipate the possibility of a subsequent foreign indorsement, and to undertake to indemnify his indorsee against any liability he may incur by reason of such later indorsement, though some of the links in the chain of indorsements subsequent to his own may not be such as would bind the defendant if the indorsement had been English.

The *ratio decidendi* which had been indicated above with reference to *Horne* v. *Rouquette*, or one founded on an analogous train of reasoning, is suggested by Wills, J., in *Lee* v. *Abdy*, 17 Q. B. D. 309, as applicable to the question of the liability of an English acceptor upon a bill indorsed abroad, and as explaining *Lebel* v. *Tucker* and *Bradlaugh* v. *De Rin*, *supra*. *Quære*, whether the learned judge, in sug- *Lee* v. *Abdy*.

gesting that the liability of *the acceptor* is to be measured by reference to what he must have contemplated would be the probable place of indorsement, gave sufficient weight to the fact that in *Bradlaugh* v. *De Rin* the bill was treated by the majority of the court below as a *foreign bill*, and the Exchequer Chamber, though they did not decide the point, dealt with the case on the same assumption. The bill being treated *as a foreign bill*, the court below held (and the Exchequer Chamber did not impugn that position) that the acceptor would be liable only upon an indorsement effectual against the drawer by the law of the place of issue. On the other hand, in *Lebel* v. *Tucker*, the bill being an English bill, the acceptor's liability was determined only by English law, not because he was taken to have contemplated negotiation in England only, but because that was the law of the place of his contract. In *Lee* v. *Abdy*, *supra*, Day and Wills, JJ., held that to an action on a life policy effected in England by the assignee of the policy, it was a defence that the assignment, though valid by English law, was invalid and void by the law of Cape Colony where the assignment was made, and where the assignor and assignee were domiciled. They considered that the decision in *Lebel* v. *Tucker* was distinguishable as being on the liability of an acceptor of a bill of exchange which was different from that of the defendants, who were being sued, not on a negotiable instrument, but as liable under a policy of insurance.

Bills of Exchange Act, 1882, s. 72.

The Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 72, provides as follows :—

"Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows :—

"(1.) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance supra protest, is determined by the law of the place where such contract was made.

"Provided that :—

"(a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue.

"(b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the

United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

"(2.) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill, is determined by the law of the place where such contract is made.

"Provided that where an inland bill is indorsed in a foreign country the indorsement shall, as regards the payer, be interpreted according to the law of the United Kingdom.

"(3.) The duties of the holder with respect to presentment for acceptance or payment, and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.

"(4.) Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.

"(5.) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable."

The wording of the Act, however, is not quite clear, and by s. 97, sub-s. 2, it is provided that "the rules of Common Law, including the Law Merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques." S. 97, sub-s. 2.

Lex loci and *lex fori.*

"The rule," said Tindal, C. J., delivering judgment in *Trimbey* v. *Vignier*, 1 B. N. C. 151, "which applies to the case of contracts made in one country, and put in suit in the courts of law of another country, appears to be this, that the interpretation of the contract must be governed by the law of the country where the contract was made: the mode of suing, and the time within which the action must be brought, must be governed by the law of the country where the action is brought."

Distinction between *lex fori* and *lex loci* as to the Statutes of Limitation.

This distinction was acted on in *British Linen Co.* v. *Drummond*, 10 B. & C. 903, where it was held that the English statute of limitations was a good plea to an action on a Scotch contract which might in *Scotland* have been put

in suit at any time within forty years; in *De la Vega* v. *Vianna*, 1 B. & Ad. 284, where the defendant was allowed to be arrested for a debt contracted in Portugal, for which he could not have been arrested there; in *Alivon* v. *Furnival*, 4 Tyr. 751, where the Court of Exch. acted on the French law of bankruptcy; and in *Huber* v. *Steiner*, 2 B. N. C. 202, where the whole difficulty was in ascertaining whether the rule of foreign law applied *ad valorem contractûs*, or *ad modum actionis instituendæ*.

Huber v. *Steiner.*

It was an action on a promissory note; and the question was, whether the French law of prescription formed a defence thereto, the action being brought within the English period of limitation. On behalf of the defendant it was contended that laws for the limitation of suits were of two kinds, those which bar the remedy, and those which extinguish the debt; and the following passage was cited from Story's Commentaries on the Conflict of Laws:—"Where the statutes of limitation of a particular country not only extinguish the right of action, but the claim or title itself *ipso facto*, and declare it a nullity after the lapse of the prescribed period, in such a case the statute may be set up, in any other country to which the parties remove, by way of extinguishment." "This distinction," said Tindal, C. J., delivering judgment, "when taken with the qualification annexed to it by the author himself, appears to be well founded. That qualification is, 'that the parties are resident within the jurisdiction during all that period, so that it has actually operated upon the case;' and with such restriction, it does indeed appear but reasonable, that the part of the *lex loci contractûs*, which declares the contract to be absolutely void at a certain limited time, without any intervening suit, should be equally regarded in the foreign country, as the part of the *lex loci contractûs*, which gives life to and regulates the construction of the contract; both parts go equally *ad valorem contractûs*, both *ad decisionem litis*." However, the court, upon examination of the French law of prescription, thought that its effect was not to extinguish the right, but, as in England, only to bar the remedy, and therefore that the defence was in that case unavailable. See also *MacFarlane* v. *Norris*, 2 B. & S. 783; *Harris* v. *Quine*, L. R. 4 Q. B. 653; *Pardo* v. *Bingham*, 4 Ch. 735; *Alliance Bank of Simla* v. *Carey*, 5 C. P. D. 429.

Story's rule that, when claim *extinguished*, statutes available in any country.

Quære, how far Story's qualification

Supposing the law of a foreign country to be, that a contract is, after a certain time, to be deemed absolutely

extinguished, it seems not quite reasonable to say that the removal of the parties out of the jurisdiction, while that time is running, should authorise the courts of this country to consider it *in esse* after the period prefixed. The authorities establish, that the law of the country where the contract is made must govern it, and must be looked on as impliedly incorporated with it. Now, if the contract had contained a *proviso* that it should be absolutely void if not enforced within a certain time, no doubt the English courts would hold it void after the expiration of that time. But what difference can it make that such *proviso* is implied from the law of the country where the contract was made instead of being expressed in terms? Is it not in both cases equally part of the contract? If, indeed, the rule of the foreign law be, that the contract shall, after the lapse of a certain time, become void, provided that the parties to it continue to reside all that time in the same country, the arrival of the period prefixed or its avoidance will depend on the contingency of their abstaining from absenting themselves; and if they leave the country, never will arrive at all; and this is, perhaps, what Judge Story intends by the words "that the parties are resident within the jurisdiction during all that period, *so that it has actually operated upon the case*." For if the law be so framed as *to operate upon the case* without such residence, the qualification appears to be inapplicable. But see *per* Lord Brougham, *Don* v. *Lippmann*, 5 Cl. & F. 1, 16.

of this rule is correct.

The English statute of limitations does not apply to charges on real estate situate abroad, as to which the *lex loci rei sitæ* is the law applicable; *Pitt* v. *Dacre*, 3 Ch. D. 295.

Charges on foreign real estate.

In *Lopez* v. *Burslem*, 4 Moo. P. C. 300, the same law was acted upon with reference to the limitation of time prescribed for bringing an appeal after condemnation by a vice-admiralty court under the Slave Trade Abolition Act, 5 G. 4, c. 113. It was contended in that case that the owners of the cargo were not bound by the enactment, being foreigners; but the court, admitting that the British parliament certainly has no general power to legislate for foreigners out of the dominions and beyond the jurisdiction of the British Crown, held that a British statute may fix a time within which application must be made for redress to the tribunals of the empire: "on matter of procedure," they said, "all mankind, whether aliens or liege subjects, plaintiffs or defendants, appellants or respondents, are bound by the

Statutes of Limitation further considered.

law of the *forum*," and "*if a law were made upon this subject working oppression and injustice to the subjects of a foreign state*, that state might make representations and remonstrances against this law to our government; but while it remains in force, judges have no choice but to give it effect." See further *Heriz* v. *Riera*, 11 Sim. 318; *Cooper* v. *Waldegrave*, 2 Beav. 282; *Beaucé* v. *Muter*, 5 Moo. P. C. 69; *Fergusson* v. *Fyffe*, 8 Cl. & F. 121; *Leslie* v. *Baillie*, 2 Y. & C. 91; *Cope* v. *Doherty*, 4 K. & J. 367, affirmed 2 De G. & J. 614; *Jago* v. *Graham*, 32 L. J. Adm. 49; *The Wild Ranger*, 32 L. J. Adm. 49.

What amounts to discharge of foreign cause of action.

In *Ellis* v. *M'Henry*, L. R. 6 C. P. 228, the decisions as to what amounts to a discharge of a foreign cause of action were elaborately reviewed. In that case it was held that a discharge by an English composition deed was binding in Canada, and also was clearly binding and effectual as an answer to proceedings commenced in this country on a Canadian cause of action; but further, that no advantage could be taken of such a discharge as an answer to an action on a judgment obtained in a Canadian Court, where such discharge might have but had not been pleaded. In delivering the judgment of the court, Bovill, C.J., laid down three important propositions:—"In the first place, there is no doubt that a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the courts of that country, but in every other country. Secondly, as a general proposition, it is also true that the discharge of a debt or liability by the law of a country other than that in which the debt arises does not relieve the debtor in any other country. Thirdly, where the discharge is created by the legislature or laws of a country which has a paramount jurisdiction over another country in which the debt or liability arose, or by the legislature or laws which govern the tribunal in which the question is to be decided, such a discharge may be effectual in both countries in the one case, or the proceedings before the tribunal in the other case." See also *Phillips* v. *Eyre*, L. R. 6 Q. B. 1, and *Ex p. Pascal*, 1 Ch. D. 509.

Foreign bankruptcy.

A discharge in bankruptcy under the law of a foreign country where the bankrupt is domiciled is not a discharge of a contract made and to be performed by him in this

country; *Gibbs* v. *Société des Métaux*, 25 Q. B. D. 399. As to the effect of proving or receiving dividends in the foreign bankruptcy, see *Phillips* v. *Allan*, 8 B. & C. 477; *Banco de Portugal* v. *Waddell*, 5 App. Cas. 161.

General Steam Navigation Company v. *Guillou*, an instance of the rule as to *lex fori*.

Another application of the rule, that procedure is to be governed by the law of the country in which the action is brought, may be found in the judgment of the Court of Exch. in *Gen. St. Nav. Co.* v. *Guillou*, 11 M. & W. 877. The action was on the case for running down a ship at sea; one of the defendant's pleas stated that he was a Frenchman, and that the injury complained of was committed on the high seas, out of the jurisdiction of the Queen of England, not by the defendant personally, but by the master of a French vessel in the employ of a French company, of which the defendant was a shareholder and acting director; that the defendant never was possessed of, or interested in, the vessel which did the injury, otherwise than as such shareholder, and that by the law of France he was not responsible or liable to be sued or impleaded individually, or in his own name or person, in any manner whatsoever, but that by that law the company alone, by their style or title, or the master or person in command for the time being of the vessel, was responsible and liable to be sued or impleaded, and that the defendant was not the master or person in command. Upon the grammatical construction of that plea, the Court of Exch. were divided in opinion, but they agreed that, if the plea were taken (according to the construction put upon it by Parke, B., and Gurney, B.) to aver that by the law of France the defendant was "not liable for the acts of the master, but that a body established by the French law, and analogous to an English corporation, were the proprietors of the vessel, and alone liable for the acts of the master, who was their servant, and not the servant of the individuals composing that body," then there was (as they were all strongly inclined to think) a good defence to the action; but that if, on the other hand, the plea were taken (according to the view of Lord Abinger and Alderson, B.) to mean "that in the French courts the mode of proceeding would be to sue the defendant jointly with the other shareholders under the name of the association," then it was bad on the ground that "the forms of remedies and modes of proceeding are regulated solely by the law of the place where the action is instituted, the *lex fori*; and it is no objection to a

suit instituted in proper form here, that it would have been instituted in a different form in the court of the country where the cause of action arose, or to which the defendant belongs."

Other instances of the rule as to *lex fori*.

So, where a colonial Act gave a mode of proceeding against a banking company by suing their chairman to judgment, and provided a particular mode of proceeding upon that judgment against members for the time being, it was considered that the members might, even in respect of a cause of action which arose in the colony, be sued in England either for the original debt or upon the judgment; *Bank of Australasia* v. *Harding*, 9 C. B. 661; *Bank of Australasia* v. *Nias*, 16 Q. B. 717; *Kelsall* v. *Marshall*, 1 C. B. N. S. 241; *Vanguelin* v. *Bouard*, 33 L. J. C. P. 79.

Cases as to *lex fori*.

And in *Bullock* v. *Caird*, L. R. 10 Q. B. 276, which was an action on a contract, a plea was held bad which alleged that the contract was made by the plaintiff, in Scotland, with a Scotch firm, and was to be performed wholly in Scotland, and that by Scotch law it was a condition precedent to the individual liability of the defendant as a member of the firm, that the firm, or the whole of the partners jointly, should first have been sued. The Queen's Bench held that, in an English court, non-joinder of the other partners was merely ground for a plea in abatement, not for one in bar, that the matters alleged in the plea were mere matter of procedure, and that the plea was bad.

In *Copin* v. *Adamson*, 1 Ex. D. 17, the defendant was a shareholder in a French company, the statutes and provisions of which provided that, in case of litigation between a shareholder and the rest of the company, the shareholder's domicile should be in Paris, and that in default thereof service at a public office should be good. In the action, which was on a French judgment, the above facts, together with the allegation that by French law the defendant was bound by the company's statutes, were held a good answer to a plea that the defendant was not domiciled within the jurisdiction of France, nor a native of France, nor served with process within the French jurisdiction during the original French suit.

A plea to an action for an assault that it was committed in a foreign country, where damages are not recoverable in respect of it until certain penal proceedings have been commenced and determined there, goes only to procedure; *Scott* v. *Seymour*, 1 H. & C. 219.

On the same principle Lord Romilly refused to give priority in an administration suit in this country to the claim of a foreign creditor, although the debt, which had been contracted in Venezuela, had been registered, so as to acquire, according to the law of that country, a priority in the distribution of the assets; *Pardo* v. *Bingham*, 6 Eq. 485. And so in *Ex p. Melbourn*, 6 Ch. 64, a wife was allowed to prove against the estate of her husband, under an English bankruptcy, as a creditor in respect of a marriage contract, *pari passu* with the other creditors; although, by the law of Batavia, where the contract was made, it would have had, for want of registration, no effect with regard to third parties: the court holding that the effect of this law was only to give the other creditors priority over the wife, and that all questions of priority must be determined by the *lex fori*.

Evidence governed by *lex fori*.

In *Brown* v. *Thornton*, 6 A. & E. 185, a charter-party was entered into at Batavia. According to the law prevailing there, such instruments are entered in a public book, which is the only evidence of their contents in that colony; a public notary makes two copies from the book, and delivers one to each party, and these are evidence of the original in all Dutch courts except Batavia. It was held that such copies are not evidence of the original in this country. The courts here will not adopt rules of evidence from foreign courts; *Appleton* v. *Braybrook*, 2 Stark. 6, 6 M. & S. 34; *Black* v. *Braybrook*, 2 Stark. 7, 6 M. & S. 39; see *Abbott* v. *Abbott*, 29 L. J. Mat. 57; *Bain* v. *Whitehaven R. Co.*, 3 H. L. C. 1.

In *Tulloch* v. *Hartley*, 1 Y. & C. 114, Knight-Bruce, V.-C., is supposed to have departed from this rule, on the ground that the property in litigation was *real* property; but he does not appear to have intended to lay down any exception to the rule so wide as the alleged ground of his decision might suggest. See *Yates* v. *Thomson*, 3 Cl. & F. 544.

Indian registration law not mere law of evidence.

In *Hicks* v. *Powell*, 4 Ch. 741, the court declined to enforce an unregistered charge on real estate in India, an Indian statute having enacted that no such charge on real estate in that country should, unless duly registered, "be received in evidence in any civil proceeding in any court, or be acted on by any public officer;" Lord Hatherley holding that "it would be a narrow construction, regard being had to the whole Act, to say that the above provision related simply to the question of evidence."

Where to an action on a bottomry bond it was pleaded that the bond was bad because the master had omitted to communicate with the cargo owner before hypothecating the cargo, the C. A. held that the necessity imposed by English law for doing so was not merely evidence so as to be matter of procedure. "The manner of proving facts," said Brett, L.J., "is matter of evidence and to my mind is matter of procedure, but the facts to be proved are not matters of procedure; they are the matters with which the procedure has to deal;" *The Gaetano and Maria*, 7 P. D. 137, 144.

Fourth section of Statute of Frauds held to affect procedure only.

The provisions of section 4 of the Statute of Frauds have been held only to affect the procedure in actions on contracts; therefore a contract made between a British and a French subject in France, and to be performed there, was held to be unenforceable here, because it was not to be performed within a year from the making of it, and was not in writing; *Leroux* v. *Brown*, 12 C. B. 801. In *Williams* v. *Wheeler*, 8 C. B. N. S. 316, and *Gibson* v. *Holland*, L. R. 1 C. P. 8, Willes, J., expressed dissatisfaction with this decision; see also *per* Field, J., *Rawley* v. *Rawley*, 1 Q. B. D. 461; but it was recognized by Brett, L.J., in *Britain* v. *Rossiter*, 11 Q. B. D. 128, and by Lord Selborne in *Maddison* v. *Alderson*, 8 App. Cas. 474; and in the latter case, Lord Blackburn said, "I think that it is now finally settled that the true construction of the Statute of Frauds, both the 4th and 17th sections, is . . . to render the kind of *evidence* required indispensable, when it is sought to enforce the contract."

In *Adams* v. *Clutterbuck*, 10 Q. B. D. 403, an action was brought for the breach of a stipulation in a *parol* lease, made in England, but good according to Scotch law, of the exclusive right of shooting over a Scotch moor. Cave, J., held that it was no defence that the lease was not under seal, according to the requirements of English law, and considered such requirements to be part of the *lex loci*, and not of the *lex fori*.

Mode of ascertaining foreign law.

In the judgment in the principal case it is stated (*ante*, p. 587), that "the way of knowing foreign laws is by admitting them to be proved as facts." See, on this point, *Bradlaugh* v. *De Rin*, L. R. 5 C. P. 473; *Orr-Ewing* v. *Orr-Ewing*, 22 Ch. D. 456, 465, *per* Jessel, M.R.; *Concha* v. *Murrieta*, 40 Ch. D. 543; *Chatenay* v. *Brazilian Submarine Telegraph Co.*, (1891) 1 Q. B. 79. The cases are

not altogether consistent as to how far it is necessary that the evidence should be that of experts, with actual experience of practice in the foreign courts. See *The Sussex Peerage Case*, 11 C. & F. 85, where the evidence of Cardinal Wiseman was admitted as to the matrimonial law of Rome, and *Van der Donckt* v. *Thellusson*, 8 C. B. 812; but, *contra*, see *Bristow* v. *Sequeville*, 5 Exch. 275, a decision which was followed in *The Goods of Bonelli*, 1 P. D. 69, where the evidence as to Italian law of a Mr. Reeve, who described himself as a certified special pleader, and as familiar with Italian law, was rejected: and again in *Cartwright* v. *Cartwright*, 26 W. R. 684, where the evidence of an English counsel as to Canadian law was similarly rejected. If an expert witness refers to a foreign code, the court may look at the code to ascertain its meaning; *Concha* v. *Murrieta*, *supra*.

By the 24 Vict. c. 11, superior courts of law may, for the purpose of ascertaining the law of a foreign State, send a case to a court of that State.

In the absence of proof to the contrary, foreign law is presumed to be the same as our own. See L. R. 1 Q. B. 129.

When pendency of action abroad held a ground for stay of proceedings.

As to when it may be a ground for a stay of proceedings in an action here that another action by the plaintiff against the defendant for the same cause is pending abroad, see *McHenry* v. *Lewis*, 22 Ch. D. 397; *Norton* v. *Florence Land Co.*, 7 *Id.* 332; *Peruvian Guano Co.* v. *Bockwoldt*, 23 *Id.* 225; *Hyman* v. *Helm*, 24 *Id.* 531; *The Christiansborg*, 10 P. D. 141.

Position of a governor of a colony.

The *dictum* attributed to Lord Mansfield, in *Mostyn* v. *Fabrigas*, *ante*, p. 585, *viz.*, "The governor is in the nature of a *viceroy*, and therefore locally, during his government, no civil or criminal action will lie against him; the reason is, because upon process he would be subject to imprisonment," was dissented from in *Hill* v. *Bigge*, 3 Moo. P. C. 465, where Lord Brougham, in delivering the judgment, suggested that Lord Mansfield's expressions may have been somewhat altered in the report. In *Hill* v. *Bigge*, to an action of debt brought in a colonial court against the governor of Trinidad, a plea that he was the governor was held to afford no defence; but Lord Brougham, adverting to the inconvenience suggested by Lord Mansfield, said: "It is not at all necessary that in holding a governor liable to be sued we should hold his person liable to arrest while on service; that is, while resident in his government. It

is not even necessary that we should meet the suggestion of his goods in all circumstances being liable to be taken in execution—though that is liable to a different consideration."

In *Musgrave* v. *Pulido*, 5 App. Cas. 102, 111, which was an action brought in a colonial court against the Governor of Jamaica, it was laid down in the judgment of the J.C. that "the governor of a colony (in ordinary cases) cannot be regarded as a viceroy; nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission, and limited to the powers thereby expressly or impliedly entrusted to him. Let it be granted that for acts of power done by a governor under and within the limits of his commission, he is protected, because in doing them he is the servant of the Crown, and is exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the governor may assume to do them as governor, cannot be considered as done on behalf of the Crown, nor be in any proper sense acts of state. When questions of this kind arise, it must necessarily be within the province of municipal courts to determine the true character of the acts done by a governor, though it may be that, when it is established that the particular act in question is really an act of state policy done under the authority of the Crown, the defence is complete, and the courts can take no further cognizance of it."

Position of Lord-Lieutenant of Ireland.

In *Luby* v. *Wodehouse*, 17 Ir. C. L. R. 618, it was held that the Lord Lieutenant of Ireland was not liable, while he continued in his office, to be sued in an Irish court of law for an alleged tortious act done by him in his official capacity: and, on the motion of the Attorney-General for Ireland, the court, upon affidavits, and relying on the authority of the principal case, and *Tandy* v. *Westmoreland*, 27 St. Tr. 1246, directed that a writ issued against the Lord Lieutenant in respect of such an alleged act should be summarily taken off the file. In this case "it *appeared* that the acts complained of were political acts done by the Lord Lieutenant in his official capacity, and they were *assumed* to be within the limits of the authority delegated to him by the Crown. The court appears to have thought that, *under the circumstances*, no action would lie against the Lord Lieutenant in Ireland, and upon the facts brought to their

notice it may well be that no action would have lain against him anywhere;" 5 App. Cas. 111, 112.

Rights and liabilities of sovereign princes.

With regard to the rights and liability of *sovereign princes* themselves to sue and be sued in the courts of this country, the general rule deducible from the cases is that in respect of acts of state they can neither sue nor be sued. Personally a foreign sovereign cannot be sued at all, unless, indeed, he has in fact submitted to the jurisdiction; *Mighell* v. *Sultan of Johore*, (1894) 1 Q. B. 149; and though it was said, in *The Charkieh*, L. R. 4 A. & E. 59, that in some cases proceedings *in rem* might be instituted against his property in this country, the *dicta* to this effect were overruled in the C. A., in *The Parlement Belge*, 5 P. D. 197. In certain cases a petition of right may be instituted by a British subject against the Crown; "but it seems clear to us," said Lord Coleridge, delivering the judgment of the C. A., in *Rustomjee* v. *The Queen*, 2 Q. B. D. 69, "that in all that relates to the making and performance of a treaty with another sovereign, the Crown is not, and cannot be, either a trustee or an agent for any subject whatever." The duty, his lordship added, of the English sovereign in such a case "was a duty to do justice to her subjects, according to the advice of her responsible ministers; not the duty of an agent to a principal, or of a trustee to a *cestui que trust*. If there has been a failure to perform that duty, which we only suggest for the sake of argument, it is one which parliament can and will correct; not one with which the courts of law can deal."

Immunity of sovereign princes from proceedings in foreign courts.

The liability of sovereign princes to be sued in the courts of foreign countries underwent a full discussion in *Duke of Brunswick* v. *King of Hanover*, 6 Beav. 1, where the defendant was at once a king of one country and a subject of that in which he was sued. Lord Langdale, in a judgment which exhausts the subject, stated his opinion: 1. That the King of Hanover was "exempt from all liability of being sued in the courts of this country for any acts done by him as King of Hanover, or in his character of sovereign prince;" but that, "being a subject of the Queen," he was "liable to be sued in the courts of this country in respect of any acts and transactions done by him, or in which he may have been engaged, as such subject." 2. That "in respect of any act done out of this realm, or any act as to which it may be doubtful whether it ought to be attributed to the character of sovereign or to the character of subject,

Brunswick v. *Hanover.*

it ought to be presumed to be attributable rather to the character of sovereign than to the character of subject." 3. That in a suit in the Court of Chancery against a sovereign prince who is also a subject, "the bill ought upon the face of it to show that the subject-matter of it constitutes a case in which a sovereign prince is liable to be sued as a subject." And the decree, allowing the demurrer in that case to a bill seeking an account against the King of Hanover as guardian of the plaintiff, to which office the king, upon his attaining the throne of Hanover, had been appointed under an arrangement springing out of the deposition of the duke pursuant to a decree of the Germanic Diet in 1830, was affirmed by the H. L. on appeal (2 H. L. C. 1), on the ground that a sovereign is not liable to be sued in respect of matters of state.

In *Nabob of Arcot* v. *East India Co.*, 3 Br. C. C. 291, 4 Id. 180, 2 Ves. 56, see Beames, El. Pl. 73, the Court of Chancery refused to entertain a suit arising out of transactions of state between sovereign powers, though the defendants were subjects of this country.

Munden v. *Brunswick.*

In *Munden* v. *Duke of Brunswick*, 10 Q. B. 656, it was held to be no plea to an action on an annuity deed that the defendant was a sovereign prince at the time it was made without showing either that it was an act of state or that the defendant retained his sovereign character at the time of action brought. "But the decision assumes that, if the plea had been drawn otherwise, and had contained all the material allegations, it would have been a good plea;" *per* Wills, J., *Mighell* v. *Sultan of Johore*, (1894) 1 Q. B. 149, 156.

Wadsworth v. *Spain.*

In *Wadsworth* v. *Queen of Spain*, 17 Q. B. 171, and *De Haber* v. *Queen of Portugal*, Id. 196, proceedings in foreign attachment instituted by holders of Spanish and Portuguese bonds against property belonging to those sovereigns in their public capacity were stayed by prohibition. In support of the general principle of the immunity of sovereign princes and of their property in respect of acts of state, see further *Gladstone* v. *Ottoman Bank*, 32 L. J. Ch. 228; *Gladstone* v. *Musurus Bey*, Id. 155; *Smith* v. *Weguelin*, 8 Eq. 198; *Doss* v. *Sec. of State for India*, 19 Eq. 509; *Twycross* v. *Dreyfus*, 5 Ch. D. 605; *Varasseur* v. *Krupp*, 9 Id. 351; *The Constitution*, 4 P. D. 39.

The Charkieh.

In *The Charkieh*, L. R. 4 A. & E. 59, Sir R. Phillimore elaborately discussed the subject of the immunities of foreign

princes in this respect, and laid down that the courts of this country have jurisdiction to entertain proceedings instituted *in rem*, though the property be that of a foreign sovereign, and in some cases, it would seem, even though such property may be "of a public character, as for instance a ship of war:" and further, that a sovereign may, by assuming the character of a trader, waive in respect of such trading the privilege which he enjoys generally as a sovereign, and render himself liable to the jurisdiction of an English court. The Queen's Bench refused to interfere in this case by prohibition to the Court of Admiralty; *The Charkieh*, L. R. 8 Q. B. 197.

The above *dicta*, however, were unnecessary to the decision, as the learned judge further held that the Khedive of Egypt, to whom the *Charkieh* belonged, was not a *foreign sovereign* so as to be entitled to the privilege claimed. And in *The Parlement Belge*, 5 P. D. 197, the C. A., after full consideration, overruled them, and held that foreign sovereigns enjoy the same immunity from proceedings *in rem* as from actions *in personam*, and that their property is equally privileged in this respect whether ships of war or trading vessels. The subject will be found very fully discussed in the interesting and exhaustive judgment delivered in this case by Brett, L.J.

The Parlement Belge.

In *Mighell* v. *Sultan of Johore*, (1894) 1 Q. B. 149, it was held that a foreign sovereign who, whilst he was residing in this country, had, as a private individual, under an assumed name, agreed to marry the plaintiff, could not be sued for a breach of such agreement. It was contended that, by assuming the character of a private individual, he had waived his rights as a sovereign and rendered himself subject to the jurisdiction. But it was held, in the words of Lopes, L.J., that "the only way in which a sovereign can submit to the jurisdiction is by a submission in the face of the court, as, for example, by appearance to a writ."

Mighell v. *Johore.*

In *Strousberg* v. *Republic of Costa Rica*, 29 W. R. 125, James, L.J., after stating that "it is a violation of the respect due to a foreign sovereign or state to issue the process of our courts against such sovereign or state," mentioned two exceptions, if they can be called exceptions, to this rule. First, that "where a foreign sovereign or state comes into the courts of this country for the purpose of obtaining some remedy, then by way of defence to that pro-

Exceptions to the rule prohibiting proceedings against sovereigns and states.

ceeding the person sued here may file a cross claim against that sovereign or state for enabling complete justice to be done between them." Secondly, he referred to "the case in which a foreign sovereign may be named as a defendant for the purpose of giving him notice of the claim which the plaintiff makes to funds in the hands of a third person or trustee over whom this court has jurisdiction, and who alleges that the foreign sovereign has also some claim upon the funds in question. These," added his lordship, "are the only exceptions."

Thus—to illustrate the first exception and the way in which it has been enforced in our courts—if a foreign sovereign sue here, and a cross action be brought, our courts will stay proceedings in the original action until the foreign sovereign name a proper person to be made a defendant for the purpose of discovery; see *Republic of Peru* v. *Weguelin*, 20 Eq. 140; *Republic of Costa Rica* v. *Erlanger*, 1 Ch. D. 171; and, in default of a sufficient affidavit of discovery being made, will dismiss the proceedings; *Republic of Liberia* v. *Roye*, 1 App. Cas. 139. Security for costs may be ordered; *Republic of Costa Rica* v. *Erlanger*, 3 Ch. D. 62.

Instances exemplifying the second exception will be found in *Gladstone* v. *Musurus Bey*, 32 L. J. Ch. 155, where a court of equity granted an injunction restraining the Bank of England from paying over, except under direction of the court, a sum of money deposited by the plaintiffs as caution-money for the fulfilment on their part of a concession granted to them by the Turkish government: and in *Larivière* v. *Morgan*, 7 Ch. 550, where Lord Hatherley affirmed a decree of Malins, V.-C., by which it was directed that a fund deposited with bankers in this country by the French government for the purpose of a contract made by them with the plaintiff should be applied in payment of his claims under the contract. In neither of these cases did the foreign government appear. The judgment in *Larivière* v. *Morgan* was reversed in the H. L. (L. R. 7 H. L. 423); but upon the ground that the facts showed only a personal undertaking by the bankers, not any trust or assignment of a trust-fund, so as to give the court jurisdiction. The same distinction was dwelt upon in *Twycross* v. *Dreyfus*, *supra*, and in *The Parlement Belge*, 5 P. D. p. 201. Both these cases are distinguished on the ground that in each of them there was a trustee who could be sued in our courts.

Foreign sovereign.

In the case of a suit by a foreign sovereign in amity with

us, although the foreign sovereign is entitled to *sue* in our courts for wrongs done to him by English subjects without authority from the English government in respect of property belonging to him either in his individual or his corporate capacity, yet he cannot maintain a suit here for invasions of his prerogative as reigning sovereign. See the judgments and the cases collected in *Emperor of Austria* v. *Day*, 30 L. J. Ch. 690; *King of Portugal* v. *Russell*, 31 L. J. Ch. 34; *Prioleau* v. *U. S. of America*, 2 Eq. 659; *U. S. of America* v. *Wagner*, 2 Ch. 582; *U. S. of America* v. *McRae*, 8 Eq. 69. Nor can the foreign sovereign sue in the name of his ambassador; *Penedo* v. *Johnson*, 22 W. R. 103.

reign may sue here for private wrongs, not for invasions of his prerogative.

The status of a foreign sovereign may be proved by a certificate of the Foreign or Colonial Office, and such certificate is conclusive on the subject; *Mighell* v. *Sultan of Johore*, (1894) 1 Q. B. 149.

Proof of status.

As to how far an English court will entertain an action by an English subject engaged in the service of a foreign government against another official in the same service for a libel contained in a report made by the defendant in his official capacity, both plaintiff and defendant being British subjects, see *Hart* v. *Gumpach*, L. R. 4 P. C. 439, 464.

Actions between foreign officials.

Upon the same principle which exempts sovereigns from liability to be sued in respect of acts of state, seems to rest the immunity of a soldier against actions by foreigners for acts done by him in a hostile manner in the name of the government which he serves, provided those acts be either authorised by an actual command, or ratified by a subsequent approval of the government: to such acts the maxim, *respondeat superior*, seems to apply in its widest sense; and if any injury be inflicted by them, (if redress be denied by the government), there is no remedy but an appeal to arms; see Vin. Abr., *Prerogative* (L. a): *Elphinstone* v. *Bedreechund*, 1 Knapp, P. C. 316; *Dobree* v. *Napier*, 2 B. N. C. 781; *Buron* v. *Denman*, 2 Exch. 167; *Paradine* v. *Jane*, Style, 48; *R.* v. *Lesley*, 29 L. J. M. C. 97; *Sec. of State for India* v. *Kamachee Boye Sahaba*, 13 Moo. P. C. 22.

Immunity of soldiers for acts authorised by their government.

On a question whether a government officer was liable to the plaintiffs (who were Indian subjects of her Majesty) for an act done by him in his official capacity, the Privy Council laid down, that "if the act which he did was in fact wrongful as against the plaintiffs, and produced damage to them, they must have the same remedy by action against the doer,

Government officer's liability for official acts.

whether the act was his own spontaneous act and unauthorised, or whether it was done by the order of the superior power. The civil irresponsibility of the supreme power for tortious acts could not be maintained with any show of justice, if its agents were not personally responsible for them; in such cases the government is morally bound to indemnify its agent, and it is hard on such agent if this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration;" *Rogers* v. *Rajendro Dutt*, 13 Moo. P. C. 209, 236; see *per curiam*, *Feather* v. *The Queen*, 35 L. J. Q. B. 200, 209; *Tobin* v. *The Queen*, 33 L. J. C. P. 199. See *O'Byrne* v. *Hartington*, I. R. 11 C. L. 445, 453, as to the non-liability of a superior officer for a legal order illegally carried out; and see *Grant* v. *Sec. of State for India*, 2 C. P. D. 445, as to the non-liability of a government official for the dismissal of a military officer, or for the publication of such dismissal in the *Gazette*.

As to the non-liability of a government official on a contract made by him for the public, see *O'Grady* v. *Cardwell*, 21 W. R. 340; *Palmer* v. *Hutchinson*, 6 App. Cas. 619.

Liability *inter se* of members of a hostile expedition.

As to the liability *inter se* of persons joining in a hostile expedition for acts done in obedience to the lawful orders of government officers sent out in command of the expedition, see *Hodgkinson* v. *Fernie*, 2 C. B. N. S. 415. As to an action for acts done abroad by a *commanding officer* in his official capacity, such as reducing a non-commissioned officer to the ranks, see *Barwis* v. *Keppel*, 2 Wils. 314.

Ambassador and members of embassy exempt from suit.

An ambassador is entitled to absolute exemption from suit in the courts of the country to which he is sent; *Magdalena St. Nav. Co.* v. *Martin*, 2 E. & E. 94; *Gladstone* v. *Musurus Bey*, 32 L. J. Ch. 155; *Sec. of State for India* v. *Kamachee Boye Sahaba*, 13 Moo. P. C. 22; *Parkinson* v. *Potter*, 16 Q. B. D. 152; see 7 Anne, c. 12; and no writ can be issued against him, either whilst he is actually accredited to the sovereign, or during a reasonable time, after his recall, for him to wind up his official business and depart; *Musurus Bey* v. *Gadban*, (1894) 2 Q. B. 352. The same principle applies to a secretary of legation; *Taylor* v. *Best*, 14 C. B. 487; and to a *bonâ fide* member of the embassy; *Macartney* v. *Garbutt*, 24 Q. B. D. 368; even though he be a British subject; Id.; but see *per* Lord Esher, *Re Cloete*, 65 L. T. 102; unless he has been received subject to an express condition that he shall be

subject to the jurisdiction of the courts of the country; Id. In *Re Cloete*, *supra*, the principle was held not to apply to the case of an honorary attaché who, through inadvertence on the part of the ambassador, had obtained his appointment for the purpose of taking advantage of the protection. The privilege whilst it applies prevents the Statute of Limitations from running; *Musurus Bey* v. *Gadban*, *supra*. It is waived by appearance; *Taylor* v. *Best*, *supra*. As to servants of the ambassador who engage in trade, see 7 Anne, c. 12, s. 5; and as to the registration of such servants, see s. 6 of the same Act.

Immunity of judges for judicial acts

With regard to judges, Lord Mansfield says, *ante*, p. 584, that "if an action be brought against a judge of record for an act done by him in his judicial capacity, he may plead that he did it as a judge of record, and that will be a complete justification." It is now settled that a judge is not liable for a judicial act which was within his jurisdiction, even though he did it maliciously; *Fray* v. *Blackburn*, 3 B. & S. 576; *Scott* v. *Stansfield*, L. R. 3 Ex. 220; *Anderson* v. *Gorrie*, (1895) 1 Q. B. 668; see also *Barnardiston* v. *Soame*, 6 Howell, St. Tr. 1063, 1096; *Gelen* v. *Hall*, 2 H. & N. 379; *Kemp* v. *Neville*, 10 C. B. N. S. 523, 549; and the other cases cited in the notes to *Ashby* v. *White*, *ante*, pp. 265, 283. Even if the act was outside his jurisdiction, the judge is not liable, unless he knew or had the means of knowing, from the facts before him, of his want of jurisdiction; *Calder* v. *Halket*, 3 Moo. P. C. 36, 76; *Houlden* v. *Smith*, 14 Q. B. 841; see *Lowther* v. *Radnor*, 8 East, 113, 119; *Gahan* v. *Lafitte*, 3 Moo. P. C. 382; *Willis* v. *Maclachlan*, 1 Ex. D. 376.

CREPPS *v.* DURDEN ET ALIOS.

TRINITY.—17 *GEO.* 3, *B. R.*

[REPORTED 2 COWP. 640.]

A person can commit but one offence on the same day, by "exercising his ordinary calling on a Sunday," contrary to the 29 Car. 2, c. 7.

And if a justice of peace proceed to convict him in more than one penalty for the same day, it is an excess of jurisdiction for which an action will lie, before the convictions are quashed (*a*).

THIS was an action of trespass brought by the plaintiff against the defendant, for breaking into his house and taking away his goods, and converting them to his own use; to this the general issue was pleaded, and the cause came on to be tried at Westminster before Lord Mansfield, at the sittings after Easter term, 1777; when a verdict was found for the plaintiff, for three several sums of five shillings each, and costs 40*s*., subject to the opinion of the court upon the following case: "That the plaintiff was convicted of selling small hot loaves of bread, the same not being any work of charity, on the same day (being Sunday) by four separate convictions, which were as follows: 'Westminster *to wit.* Be it remembered, that on the 10th of November, 1776, Peter Crepps, of, &c., baker and salter of bread, is lawfully convicted before me, Jonathan Durden, one of his Majesty's justices of the peace for the said city and liberty of Westminster, for unlawfully doing and exercising certain worldly labour, business, and work of his ordinary calling of a baker in the parish aforesaid, by selling of small hot loaves of bread, commonly called rolls, the same not being any work of necessity or charity, on the said 10th of November, being the Lord's day, commonly called Sunday, contrary to the statute in that case made and provided; for which offence I, the said Jonathan Durden, have

(*a*) *Secus*, as to this latter point, since the 11 & 12 Vict. c. 44; see *post*, *in notis*, p. 642.

adjudged, and do hereby adjudge, the said Peter Crepps to have forfeited the sum of five shillings.' "

The three other convictions were *verbatim* the same without any variation. The case then proceeded to state, that the defendant Durden issued the four warrants, afterwards stated, to the other defendants who by virtue of those warrants levied the four penalties of five shillings each, and the expenses. The first of these four warrants ran thus: —" Westminster *to wit.* To the constables of St. James's, in the city and liberty of Westminster. Whereas information has been made before me, Jonathan Durden, one of his Majesty's justices of the peace for the city and liberty of Westminster, that Peter Crepps, baker, of, &c., did on the 10th day of November, 1776, being the Lord's day, commonly called Sunday, exercise his trade and ordinary calling of a baker, by selling hot loaves of bread, contrary to the statute in that case made and provided: and whereas the said Peter Crepps has been duly summoned to appear before me, to answer to the said information, but has contemptuously refused to appear to answer the contents thereof; and whereas, upon full examination, and upon the oath of J. H., the said Peter Crepps was lawfully convicted before me of the offence aforesaid, whereby he has incurred the penalty of five shillings, pursuant to the statute in that case made and provided; therefore, &c., &c." The words of the other three warrants were *verbatim* the same.

The first question reserved was, whether in this action, and before the convictions were quashed, an objection could be made to their legality? If no objection could be made, then a nonsuit was to be entered. But in case an objection to their legality might be made, then the question was, whether the levy under the three last warrants could be justified? If not justifiable, a verdict was to be entered for the plaintiff, with 15*s.* damages and 40*s.* costs; if justifiable, then a verdict was to be entered for the defendants.

Mr. *Buller,* for the plaintiff, as to the first point, insisted that, wherever a conviction is in itself clearly bad, it is open to the party to take objection to it in an action against the justice; and it is no answer on his part to say that the conviction is not quashed, or in force; because it is incumbent upon him to show

(Argument.)

the regularity of his own proceedings. That there were several cases to this purpose; and though they were decisions at *nisi prius*, yet, as they were uniform in laying down the same doctrine, they ought to have considerable weight in this case. The first he should mention was *Hill* v. *Bateman*, 1 Str. 711; not for the principal matter adjudged, but because it was agreed on all hands, in that case, as a settled point, "that, in all actions against justices of peace, they must show the regularity of their proceedings." He added that he had a manuscript note of the same case to the same purport. In a case of *Moult* v. *Jennings*, *coram* Eyre, C. J., upon trespass and false imprisonment against the defendant, and the general issue pleaded, it appeared that the plaintiff had been convicted of swearing; and Eyre said, if the nature of the oaths had not been specified in the conviction, so that they might appear to the court, the conviction would have been void. In *Stanbury* v. *Bolt*, *coram* Fortescue, J., Trin. 11 G. 1, upon trespass for taking a brass pan, and false imprisonment, it did not appear that the plaintiff had been summoned; and the conviction was adjudged void for that reason only. In *Coles's Case*, Sir William Jones, 170, it was held by the whole court, "that, if a justice does not pursue the form prescribed by the statute, the party need not bring error, but all is void, and *coram non judice*." There are other authorities in which it has been held that an action will lie, even though the conviction is good in point of form, if it is not supported by the truth and justice of the case. There was one in Shropshire, before Gould, J., where the plaintiff had been convicted upon the game laws, and the conviction itself was good in point of form; but the party was not, in truth, an object of the game laws; whereupon Gould directed the jury to find for the plaintiff, which they accordingly did. There was another case in Lancashire, before Mr. Justice Gould, to the same effect. In criminal cases, it is clear that the conviction being good in point of form is no protection to the justice; and if not, why should it be so in a civil action? If he convict illegally, he ought not to be sheltered, and an action is the only mode of redress to the party injured. But, if the formality of the conviction is to be an answer to the action, the party injured would be without redress, where he

would be most entitled to it; because the caution of the justice, to be correct in form, would increase in proportion to his intention to act illegally. In *Bracklesbank* v. *Smith*, 2 Burr. 657, every act previous to the conviction is set out, as well as the conviction itself. If this case had happened before the stat. 7 Jac. 1, c. 5, which enables justices of peace to plead the general issue, and give the special matter in evidence, the defendant must have specially set forth every stage of the proceedings upon the record, and the omission of any one fact would have been fatal: or, if upon the face of the record it had appeared the conviction was illegal, it would have been a good cause of demurrer. Since the statute, his defence must be equally good in evidence: for the statute does not vary the law; it is only meant to ease the justice from the difficulty and risk of special pleading. Even in cases where the legislature gives a summary form of conviction, and where no summons is necessary, the justices must pursue the form prescribed, or it will be fatal. Secondly, upon the merits: the words of the stat. 29 Car. 2, c. 7, are, "that no tradesman or other person shall do or exercise any worldly labour, business, or work of their ordinary calling on the Lord's day, works of necessity and charity only excepted." In *Rex* v. *Cox*, 2 Burr. 786, the court held, "that baking puddings and pies was within the exception:" and, if so, why should not the baking rolls be so too? But what is decisive is, that the stat. 29 Car. 2, c. 7, gives no summary form of conviction; whereas the convictions produced barely state that the plaintiff was convicted, without any information, summons, appearance, or evidence being stated. In point of form, therefore, all four are bad. Lastly, supposing they were good in form, the three last are an excess of the justice's jurisdiction; for the offence created by the statute is, "exercising his calling on the Lord's day." If the plaintiff, therefore, had continued baking from morning till night, it would still be but one offence. Here there are four convictions for one and the same offence; consequently, as to three, there is an excess of jurisdiction; and if so, all is void, and *coram non judice*: and an action will lie, not only against the justice, but likewise against the officers. To this point he cited Hardres, 484, and concluded by praying judgment for the plaintiff.

(ARGUMENT.)

Mr. *T. Cowper, contra,* for the defendant, contended:

1. That by the bare production of the conviction at the trial the cause was at an end, and the court estopped from any further inquiry. That it was the general apprehension and prevailing opinion of the profession, founded in constant practice, that a conviction in a matter of which the justice had jurisdiction, must be removed by *certiorari* and quashed, before it can be questioned at *nisi prius.* If he has no jurisdiction, no doubt but all is *coram non judice* and void. But here the justice had jurisdiction; and if so, with deference to the opinion of Mr. Justice Gould in the case tried before him in Shropshire, the conviction, as to the matter of fact contained in it, is conclusive in favour of the justice in an action, though it is not so in an information. If it were not, instead of the mischief to be apprehended from the oppression of the justice, no one would act in the commission.

2. As to the objections which have been taken to the convictions in point of form, he said, it would be time enough to answer them when the convictions were removed and stood in the paper for argument. At present it was sufficient to observe that they continued as so many judgments on record, and, as such, conclusive, till reversed by appeal, or quashed by this court. He agreed the stat. 7 Jac. 1, c. 5, did not vary the law; but insisted that, before that statute, it would have been a good plea for the defendant to have stated that the plaintiff was convicted, &c., as in this case; and, if the plaintiff had traversed the conviction, the defendant might have demurred. The sole ground and object of taking away the *certiorari,* in the several acts of parliament for that purpose, was to prevent vexatious suits against justices for mere informalities in their proceedings. But they still remain liable to an information if they wilfully act wrong. This court has often lamented, when obliged to quash a conviction for want of form, because it opens a door to an action.

As to this being but one continued offence, it might be, that it was carried on at four different places; for there is evidence of four different acts, and the court will not presume the contrary against the justice. But, if the nature of the offence is such, that it could only be committed once in the same day, still the

plaintiff has no remedy, while the convictions are in force, but by removing them into this court to be quashed for illegality.

Lord MANSFIELD.—May there not be this point, that the justice had no jurisdiction, after convicting the plaintiff in the first penalty? The act of parliament gives authority to punish a man for exercising his ordinary calling on Sunday. The justice exercises his jurisdiction, by convicting him in the penalty for so doing. But then, he has proceeded to convict him for three other offences in the same day.

Mr. *Cowper*.—If he has done so, it is only a ground for quashing the convictions; but no priority appears to give legality to one in preference to the other.

Lord MANSFIELD.—This point you agree in: that, if the justice had no jurisdiction, it is open to inquiry in an action. Now, if there are four convictions for one and the same offence committed on one and the same day, three of them must necessarily be bad; and, if so, it does not signify as to the merits of the action which of the four is legal, or which illegal.

I do not remember that at the trial it was contended the plaintiff would be entitled to recover if the convictions were informal; or that any objection was taken to their formality there. The single question intended to be tried was, whether there could be more than one penalty incurred for exercising a man's ordinary calling on one and the same Sunday? As to that there can be no doubt: the only doubt was, whether that objection could be taken at the trial *before the convictions were quashed*. In the extent in which the argument upon that point has proceeded, it is a matter of considerable consequence; and, as a general question, I should be glad to think of it.

ASTON, J.—The court will never grant an information, unless the conviction is quashed. *Rex* v. *Heber*, 2 Str. 915. As to the general question before the court, suppose the justice were to convict for a single offence, where no offence at all had been committed, would not an action lie in that case? If it would, why not in this, where there are four convictions for one and the same offence? It seems to me that the baking every roll might as well have been charged as a separate offence.

Cur. adv. vult.

(JUDGMENT.)

Afterwards, on Wednesday, June 18th, in this term, Lord MANSFIELD, after stating the case at large, delivered the unanimous opinion of the Court as follows:—Upon the trial of this cause, no objection was made to the formality of the convictions: I doubt whether they were read, and for this reason: because, by the state I have of them, they appear different from the warrants; for the convictions take no notice of any summons (*b*), nor of any informations, nor of any evidence (*c*) upon oath given; though the warrants take notice of a summons, of the defendant's not appearing to that summons, of an information laid, and evidence given upon oath. This objection would have gone to all the four cases equally, but at the trial no objection whatever was made to the first conviction or warrant. But the objection made was this: that, allowing the first conviction and warrant to be good, the three others were an excess of the jurisdiction of the justice, and beyond it; for that, on the true construction of the stat. 29 Car. 2, c. 7, there can be but one offence, attended with one single penalty, on the same day.

In answer to this it was objected, on the part of the defendants, that no such objection could be taken to the convictions till after they had been quashed in this court; and that, if a case were to be made with regard to that, it must be taken upon the question, whether, according to the true construction and meaning of the act, the party could be guilty of repeated offences on one and the same day? Therefore, the questions stated for the opinion of the court on the present case are, first, "whether, in this action, and before the convictions were quashed, an objection could be made to their legality? If the court should be of opinion no objection could be made, then a nonsuit to be entered up; but in case the objection might be made, then, 2ndly, whether the levy made under the three last warrants could be justified?" The first question is, "whether any objection can be made to the legality of the convictions before they were quashed." In order to see whether it can, we will state the objection: it is this; that here are three convictions of a baker, for exercising

(*b*) Nor that the defendant made default; see *R.* v. *Allington*, 2 Str. 678; *R.* v. *Venables*, Id. 630; *R.* v. *Stone*, 1 East, 649.

(*c*) See *R.* v. *Lovet*, 7 T. R. 152; *R.* v. *Theed*, 2 Str. 919; *R.* v. *Smith*, 8 T. R. 588.

his trade on one and the same day; he having been before convicted for exercising his ordinary calling on that identical day. If the act of parliament gives authority to levy but one penalty, there is an end of the question, for there is no penalty at common law. On the construction of the act of parliament, the offence is, "exercising his ordinary trade upon the Lord's day;" and that, without any fractions of a day, hours, or minutes. It is but one entire offence, whether longer or shorter in point of duration; so, whether it consist of one or a number of particular acts. The penalty incurred by this offence is five shillings. There is no idea conveyed by the act itself, that, if a tailor sews on the Lord's day, every stitch he takes is a separate offence; or, if a shoemaker or carpenter work for different customers at different times on the same Sunday, that those are so many separate and distinct offences. There can be but one entire offence on one and the same day; and this is a much stronger case than that which has been alluded to, of killing more hares than one on the same day; killing a single hare is an offence; but the killing ten more in the same day will not multiply the offence, or the penalty imposed by the statute for killing one. Here, repeated offences are not the object which the legislature had in view in making the statute: but singly to punish a man for exercising his ordinary trade and calling on a Sunday. Upon this construction, the justice had *no jurisdiction whatever* in respect of the three last convictions. How then can there be a doubt but that the plaintiff might take this objection at the trial? 2ndly. With regard to the form of the defence, though the stat. 7 Jac. 1, c. 5, enables justices of peace to plead the general issue, and give the special matter in evidence; in doing so, it only allows them to give that in evidence, which they must before have pleaded; and, therefore, they must still justify. But what could the justification have been in this case, if any had been attempted to be set up? It could only have been this: that, because the plaintiff had been convicted of one offence on that day, therefore the justice had convicted him in three other offences for the same act. By law that is no justification: *it is illegal on the face of it*; and, therefore, as was very rightly admitted by the counsel for the defendant in the argument, if put upon the record by way of plea, would have been bad, and on demurrer must have been

(JUDGMENT.)

so adjudged. Most clearly, then, it was open to the plaintiff upon the general issue, to take advantage of it at the trial. The question does not turn upon niceties; upon a computation how many hours distant the several bakings happened; or upon the fact of which conviction was prior in point of time; or that, for uncertainty in that respect, they should all four be held bad: but it goes upon the ground that the offence itself can be committed only once in the same day. We are, therefore, all clearly of opinion, that, if there was no jurisdiction in the justice, the same might have appeared at the trial: of course, we are of opinion that this objection might have been made, and that the objection itself, in point of law, is well founded.

Per Curiam. *Postea* to be delivered to the plaintiff (*d*).

(*d*) For an analogous case see *Brooks* v. *Glencross*, 2 M. & Rob. 62; and see *R.* v. *E. Counties R. Co.*, 10 M. & W. 58. As to the effect of two orders or convictions for the same offence, see *Wilkins* v. *Hemsworth*, 7 A. & E. 807; *Wilkins* v. *Wright*, 3 Tyr. 830, 2 C. & M. 193. "The form which the legislature uniformly adopts when the intention is that for each and every violation of an Act of Parliament there shall be a distinct penalty, is to impose a penalty by express words 'for each and every offence';" *per* Pollock, C. B., *A.-G.* v. *McLean*, 1 H. & C. 750, 759. One conviction for several curses on the same day with a cumulative penalty at the rate of so much *per* curse was held good in *R.* v. *Scott*, 33 L. J. M. C. 15. Several convictions for selling pieces of bad meat at the same stall on the same day were held good in *Re Hartley*, 31 Id. 232. See also *Milnes* v. *Bale*, L. R. 10 C. P. 591; *Apothecaries Co.* v. *Jones*, (1893) 1 Q. B. 89.

Subject to 11 & 12 Vict. c. 44, conviction void if on the face of it the jurisdiction or facts defective,

SUBJECT to the Justices Protection Act, 1848, a summary of which will presently be given, the rule is the same—whether the conviction appear on the face of it to be for an offence not within the magistrate's jurisdiction—or to be for an offence within the magistrate's jurisdiction, but defective for want of the circumstances necessary to a conviction for that offence; *Griffith* v. *Harries*, 2 M. & W. 335; see *Lancaster* v. *Greaves*, 9 B. & C. 628; *Morgan* v. *Hughes*, 2 T. R. 225; *Fernley* v. *Worthington*, 1 M. & Gr. 491; *Hardy* v. *Ryle*, 9 B. & C. 603; *Groome* v. *Forrester*, 5 M. & S. 320; or of a sufficiently specific statement of them; *Newman* v. *Hardwicke*, 8 A. & E. 127; *R.* v. *Read*, 9 *Id.* 619; for, as was observed in *Lancaster* v. *Greaves*, though the conviction is conclusive upon matter of fact, and, if

or defectively stated.

the defendant mean to rely on matter of fact, he should make his defence at the time, the rule is not so as to matter of law.

So, if the conviction of two persons be joint, for offences *ex necessitate rei* several, it will be void, and (subject now to the above-mentioned Act) they may sue in trespass if it be acted upon; *Morgan* v. *Brown*, 4 A. & E. 515. And the rule is the same in the case of a single conviction of one person for two distinct offences; *Newman* v. *Bendyshe*, 10 A. & E. 11; see *Bettesworth* v. *Allingham*, 16 Q. B. D. 44.

But conviction conclusive evidence of facts stated in it.

But "a conviction by a magistrate who has jurisdiction over the subject-matter is, if no defects appear on the face of it, *conclusive evidence* of the *facts* stated in it;" *Brittain* v. *Kinnaird*, 1 B. & B. 432, *per* Dallas, C.J. In that case trespass was brought against justices for taking a boat; in their defence they relied on a conviction which warranted them in doing so. The plaintiff offered evidence to controvert the facts stated in the conviction, but it was held not to be admissible. *Accord. Basten* v. *Carew*, 3 B. & C. 649; *Fawcett* v. *Fowlis*, 7 Id. 394; *Gray* v. *Cookson*, 16 East, 13; *Lowther* v. *Radnor*, 8 Id. 113; *Ashcroft* v. *Bourne*, 3 B. & Ad. 684; *R.* v. *Bolton*, 1 Q. B. 66; *Colonial Bank of Australasia* v. *Willan*, L. R. 5 P. C. 417: and the same attribute, *viz.*, that of being conclusive evidence of the facts stated therein, and properly tending thereto, seems to have been thought to belong to every adjudication emanating from a competent tribunal; *Aldridge* v. *Haines*, 2 B. & Ad. 395, and the cases there cited by Coleridge *arguendo*; see also *Westbury-on-Severn Union Case*, 4 E. & B. 321; *De Cosse Brissac* v. *Rathbone*, 6 H. & N. 301; *Kemp* v. *Neville*, 10 C. B. N. S. 549; *Ex p. La Mert*, 33 L. J. Q. B. 69.

43 Geo. 3, c. 141 (now repealed).

Even when the conviction had been quashed, it was provided by the 43 G. 3, c. 141, that the party convicted, in an action against the justices, which was required to be on the case, should only obtain two pence damages, besides the amount of the penalty if levied, and no costs of suit, unless he expressly averred malice and want of probable cause; and that he should not recover the amount of the penalty if the defendants proved him to have been guilty of the offence of which he had been convicted, and that he had undergone no greater punishment than was by law assigned thereto. And it was held under this Act that he must at the trial prove not merely his own innocence of the offence

of which he was convicted, but also what took place before the justices at the time of conviction, in order that it might appear whether there was probable cause or no; *Burley* v. *Bethune*, 5 Taunt. 580. See *Baylis* v. *Strickland*, 1 M. & Gr. 591.

11 & 12 Vict. c. 44. S. 1.

But the 43 Geo. 3, c. 141, is now repealed by the Justices Protection Act, 1848, the first section of which provides that *every action* to be brought against any justice for any act done by him in the execution of his duty as such justice, as to any matter *within his jurisdiction* (see *Sommerville* v. *Mirehouse*, 1 B. & S. 652; *Lawrenson* v. *Hill*, 10 Ir. C. L. R. 177; *Gelen* v. *Hall*, 2 H. & N. 379), shall be *on the case*, and the declaration shall allege the act to have been done maliciously and without reasonable and probable cause, and, if such allegation be not proved upon the plea of the general issue, the plaintiff shall be nonsuit, or a verdict shall be given for the defendant. See *Kendall* v. *Wilkinson*, 4 E. & B. 680. *Semble*, in cases within this section, the action may be maintained without the conviction or order being quashed; *per* Lord Campbell, *R.* v. *Wood*, 5 E. & B. 58; and see *Lawrenson* v. *Hill*, *supra*. *Quære*, however, whether, notwithstanding this Act, the justice, for acts done in the execution of his office, might not claim the protection extended generally to judicial acts, even though the act was done maliciously. See the cases as to judges cited *ante*, at the end of the notes to *Mostyn* v. *Fabrigas*.

11 & 12 Vict. c. 44. S. 2.

But when the act is done by the justice in a matter, of which he has *no jurisdiction*, as in *Crepps* v. *Durden*, or where he *exceeds his jurisdiction*, he may, by s. 2, be sued as before the statute, except where the act complained of has been done under a conviction or order, in which case "the conviction" (*sic* in statute) must be first quashed—or, if done under a warrant for appearance followed by a conviction or order, the conviction or order must be first quashed—or, if such warrant be not followed by conviction or order or be upon information for an indictable offence, still no action can be maintained if a summons was previously served and disobeyed. See, as to the construction of this section, *Leary* v. *Patrick*, 15 Q. B. 266; *Newbould* v. *Coltman*, 6 Exch. 189; *Haylock* v. *Sparke*, 1 E. & B. 471; *Pease* v. *Chaytor*, 1 B. & S. 658, 3 Id. 620; *Pedley* v. *Davis*, 10 C. B. N. S. 492; *Bessell* v. *Wilson*, 1 E. & B. 489; *Lawrenson* v. *Hill*, 10 Ir. C. L. R. 177; *Lalor* v.

Bland, 8 Id. 115; and *Bott* v. *Acroyd*, 28 L. J. M. C. 207, where the objection to a conviction and warrant of commitment was that the justices had signed it leaving blanks for the amount of costs, but this omission was held, in an action for false imprisonment against the justices brought after the conviction had been quashed, to be an erroneous exercise of jurisdiction only, and not an excess. 11 & 12 Vict. c. 44.

The summons mentioned in the statute, the non-attendance upon which is to bar the maintenance of an action, is a summons *before* conviction; the section does not apply to a summons and warrant issued after conviction, with a view to the levying of the penalty imposed; *Bessell* v. *Wilson*, 1 E. & B. 489. In *Barton* v. *Bricknell*, 13 Q. B. 393, an action of trespass was brought against a justice for wrongfully seizing the plaintiff's goods. It appeared that the defendant had convicted the plaintiff, under the 29 Car. 2, c. 7 (for Sunday trading), in a penalty and costs to be levied by distress. The conviction directed that in case of non-payment, and if there should be no distress, the plaintiff should be put in the stocks for two hours, unless the penalty and costs were sooner paid. The goods of the plaintiff were distrained, and the conviction was *quashed* on account of the illegal alternative contained in it, as to the stocks. It was held that the defendant was protected under s. 1 of this statute, and that s. 2 did not apply, as the *defendant had jurisdiction to order the distress*, in respect of which alone the action was brought.

S. 3 protects a justice *bonâ fide* granting a warrant upon the conviction of another justice, which is defective for want of jurisdiction, and makes the convicting justice alone liable. S. 3.

S. 4 prohibits actions by parties rated to the poor, though not liable to be rated, or in respect of any defect in such rate, against the justices issuing a distress warrant thereon,—and further provides that the exercise of discretionary powers vested in a justice by statute, shall not furnish ground of action. S. 4.

By s. 5, if a justice refuses to do any act relating to the duties of his office, the Queen's Bench may order him to do the act, and he will not be liable to any proceeding for having obeyed the order. It has been held that this section only applies if the act be one by which the justices incur liability; *R.* v. *Percy*, L. R. 9 Q. B. 64; but in the later case of *R.* v. *Phillimore*, 14 Q. B. D. 474, n., the court S. 5.

11 & 12 Vict. c. 44.

considered that this rule would narrow the operation of the statute too much, though they declined to lay down any absolute rule as to when the proceeding should be under this section, and when by mandamus. The court acts upon this section where justices refuse to determine a case over which they have jurisdiction, and a mandamus to them to hear and determine the case would issue; *R.* v. *Cotton*, 15 Q. B. 569; *R.* v. *JJ. of Bristol*, 3 E. & B. 479, n.; *R.* v. *Paynter*, 7 Id. 328; *R.* v. *Dayman*, Id. 672; *R.* v. *Dunn*, Id. 220; but not where the refusal is merely formal, and made for the purpose of eliciting the opinion of the court, and deciding the case according to the opinion given; *R.* v. *Paynter, supra*; *R.* v. *Dayman, supra*; nor where a summons has been refused upon the ground that the information does not disclose an offence; *Ex p. Lewis*, 21 Q. B. D. 191.

Sometimes a question whether justices have declined jurisdiction or adjudicated.

It is sometimes a nice question whether the justices have declined jurisdiction, or whether they have adjudicated; *R.* v. *Brown*, 7 E. & B. 757; *R.* v. *Paynter*, Id. 328; *R.* v. *Dayman*, Id. 672; *R.* v. *Rochester*, Id. 910; *R.* v. *Wood*, 5 Id. 49; and *R.* v. *Padwick*, 8 Id. 704, where the dismissal by quarter sessions of an appeal for want of jurisdiction was held to be a decision within the meaning of 12 & 13 Vict. c. 45, s. 5. See also *Carr* v. *Stringer*, E. B. & E. 123, where, though an appeal did not lie, yet the court entertained the question so far as to examine whether they had jurisdiction, and to give costs to the respondent; and see *Ex p. Monroe*, 8 E. & B. 822; and *R.* v. *Marsham*, (1892) 1 Q. B. 371.

No summons where liability doubtful.

But the court refused to make an order, directing justices to issue a warrant of distress, where the liability of the person against whom it was sought appeared seriously doubtful; *R.* v. *Browne*, 13 Q. B. 654. Orders to issue warrants of distress were made in *R.* v. *JJ. of Kingston-upon-Thames*, E. B. & E. 256; *R.* v. *Bradshaw*, 29 L. J. M. C. 176; *R.* v. *E. Counties R. Co.*, 5 E. & B. 974; *R.* v. *Linford*, 7 Id. 950; *R.* v. *Boteler*, 33 L. J. M. C. 101; *R.* v. *Higginson*, 31 Id. 189; *Re Hartley*, Id. 232;—to sign an order for the preferment of an indictment, in *R.* v. *Arnould*, 8 E. & B. 550. On a motion against a magistrate under this section, the general rule is, that the court will order the unsuccessful party to pay costs, and will not, on the motion for costs, enter into the merits of the original application; *R.* v. *Ingham*, 17 Q. B. 884.

Costs.

S. 6 makes the confirmation of a conviction or order on appeal a protection to a justice who issues a warrant upon it either before or after such confirmation. 11 & 12 Vict. c. 44. S. 6.

S. 7 empowers a judge to set aside the proceedings in any action brought against a justice contrary to the provisions of the Act. S. 7.

S. 13 provides that the plaintiff shall not in any case recover more than twopence damages where it appears that he was guilty of the offence of which he was convicted, or liable by law to pay the sum ordered to be paid, and that he has undergone no greater punishment than that assigned by law to the offence of which he was convicted, or for non-payment of the money ordered to be paid. S. 13.

The provisions contained in ss. 8—12, and 14, are now repealed by the Public Authorities Protection Act, 1893, except the privilege of exemption from the jurisdiction of the county court given by the latter part of s. 10, as to which, see *Weston* v. *Sneyd*, 1 H. & N. 703. Notice of action is therefore no longer necessary; see 56 & 57 Vict. c. 61, s. 2. Public Authorities Protection Act, 1893, 56 & 57 Vict. c. 61.

The Public Authorities Protection Act, 1893, provides that:—

(a) The action must be brought within six months next after the act complained of:

(b) If judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client:

(c) Tender of amends before the action was commenced may be pleaded. If the action was commenced after the tender, or is proceeded with after payment into court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered or paid, he shall not recover any costs incurred after the tender or payment, and the defendant shall be entitled to costs, to be taxed as between solicitor and client, as from the time of the tender or payment:

(d) If in the opinion of the court the plaintiff has not given the defendant a sufficient opportunity of tendering amends before the commencement of the action, the court may award to the defendant costs to be taxed as between solicitor and client.

Such is a summary of the statutory protection now possessed by justices.

The conviction or order may be drawn up at any time before it is returned to the quarter sessions (see the 11 & 12 Amendment of conviction or order.

Vict. c. 43, s. 14), so that though it may be informal at first, the magistrate has an opportunity of amending it; and it has been declared to be not only legal but laudable so to do; *R.* v. *Barker*, 1 East, 186. Unless, indeed, it have been quashed, or its invalidity otherwise ascertained by the decision of a superior court, as, for instance, by the Queen's Bench on Habeas Corpus; *Chaney* v. *Payne*, 1 Q. B. 725. But it would seem that, after an invalid conviction has been filed at sessions, another might be substituted: *R.* v. *Richards*, 5 Q. B. 926. But the rule is different in case of an order; *R.* v. *JJ. of Cheshire*, 5 B. & Ad. 439. And see, as to the amendment of orders made by justices, 12 & 13 Vict. c. 45, s. 7; *R.* v. *Higham*, 7 E. & B. 557; *R.* v. *Lundie*, 31 L. J. M. C. 157. Even in the case of a conviction, where a rule *nisi* had been obtained for a *certiorari* to bring up a bad conviction, and, after the conviction had been returned to the clerk of the peace and filed, the magistrate drew up a fresh and corrected conviction, it was held that the *certiorari* should go; *Ex p. Austin*, 50 L. J. M. C. 8.

Quære, need the justices' jurisdiction appear affirmatively on the conviction.

In *Griffith* v. *Harries*, 2 M. & W. 335, it was stated by Parke, B., that in a case of *Dimsdale* v. *Clarke*, A.D. 1829, he and Littledale, J., differed from Bayley, J., on the question whether it be necessary that the magistrate's jurisdiction should appear *affirmatively* on the conviction, Bayley, J., thinking that it need not; but see *Day* v. *King*, 5 A. & E. 359; *R.* v. *Lewis*, 8 Id. 885.

The law as to summary conviction generally.

As the law regarding *summary convictions* before justices is of great importance, on account of the immense variety of subjects which fall within this sort of jurisdiction, it seems advisable to make some general remarks on it.

No conviction before justice without jury at common law.

A conviction before a justice or justices of the peace without the intervention of a jury is always under some statute; the common law knows of no such proceeding. It has been regarded by the courts with no particular favour, and formerly the justice was obliged, on the record of it, to show in detail that he had proceeded *recto ordine*. So much precision was required in drawing it up, that magistrates and their clerks were under considerable difficulty, and ran considerable risk, in framing it. For their ease and protection the 3 Geo. 4, c. 23, provided a general form, which, however, was only applicable where no particular form had been given, and required the evidence to be set forth. This Act was repealed, and nearly all difficulty in

Magistrates protected by 3 Geo. 4, c. 23, now repealed.

framing a conviction removed, by one of the three Jervis's Acts relating to justices acting out of quarter sessions (the third of which, 11 & 12 Vict. c. 44, has been above epitomised), namely, by the Summary Jurisdiction Act, 11 & 12 Vict. c. 43, which gave short forms of convictions and of proceedings to obtain and enforce them, and did away with the effect of variances and defects both in substance and form in several parts of the proceedings themselves. This Act has been amended by the Summary Jurisdiction Acts, 1879 and 1884 (42 & 43 Vict. c. 49, 47 & 48 Vict. c. 43), and for the forms contained in the schedule to the Act of 1848 others have been substituted by the rules drawn up under s. 29 of the Act of 1879, and ss. 4 and 12 of the Act of 1884; see *post*, p. 648.

Summary Jurisdiction Act, 1848.

The first section of the Act of 1848 directs that in all cases where an information (which need not be on oath unless a warrant issues in the first instance, s. 10) is laid before a justice or justices, or complaint made (which *need not be in writing* unless the statute require it, s. 8), a summons may issue according to the prescribed form (as to the mode of service, see *per* Quain, J., *R.* v. *Smith*, L. R. 10 Q. B. 609); and by s. 2, in case of non-appearance, upon proof on oath that the summons was served *what shall be deemed by the justice* a reasonable time before the appointed day (see *R.* v. *Smith*, *supra*), he may, upon the information or complaint being substantiated on oath, issue his warrant according to the prescribed form: or in cases of convictions, where the original information is upon oath, he may issue such warrant in the first instance: or in cases where a summons issues without appearance, upon proof on oath that it was served a reasonable time (not as in case of issuing a warrant what *shall be deemed by the justice* a reasonable time) before the appointed day, he may proceed *ex parte*, and adjudicate; and it is provided by s. 1, *that no objection shall be allowed to any information, complaint or summons for any alleged defect therein "in substance or in form,"* or for any variance in the evidence; but, if considered by the justice prejudicial to the defendant, the case may be adjourned; see *Whittle* v. *Frankland*, 31 L. J. M. C. 81; *Rodgers* v. *Richards*, (1892) 1 Q. B. 555. Where the summons was for drunkenness and riotous behaviour, contrary to a special Act, a conviction for drunkenness only was quashed; *Martin* v. *Pridgeon*, 28 L. J. M. C. 179; and see *R.* v. *Brickhall*, 33 Id. 156.

S. 1.

S. 2.

Proviso by S. 1.

Summary Jurisdiction Act, 1848.

S. 3. S. 3 contains a similar provision as to warrants, with a similar power of postponement, and in the meanwhile commitment or enlargement upon recognizances according to the prescribed forms.

S. 4. S. 4 directs the mode in which the ownership of property is in certain cases to be stated.

S. 5. S. 5 makes aiders and abettors in the commission of offences punishable by summary conviction liable to the same punishment as principals.

S. 6. S. 6 extends the provisions of 11 & 12 Vict. c. 42, to this Act, but is not controlled by s. 35 of that Act; see 26 & 27 Vict. c. 77; *Bradford Union* v. *Clerk of the Peace for Wilts*, L. R. 3 Q. B. 604.

S. 7. S. 7 gives the justice power to enforce the attendance of any material witness within his jurisdiction, in the same manner as a defendant, and to commit for seven days any witness refusing to be sworn or to answer.

S. 11. S. 11 gives six months after the cause has arisen, in the absence of special enactment, as the time for complaint or information; see *Eddleston* v. *Francis*, 7 C. B. N. S. 568; *Labalmondiere* v. *Addison*, 1 E. & E. 41; *Reeve* v. *Yeates*, 1 H. & C. 435; *Morant* v. *Taylor*, 1 Ex. D. 188; *Coggins* v. *Bennett*, 2 C. P. D. 568; *R.* v. *Slade*, (1895) 2 Q. B. 247.

Ss. 12—14, and 16. S. 12 (slightly modified by the Act of 1884, s. 4), s. 13 (similarly modified), s. 14, and s. 16 (also so modified) contain precise directions as to the mode in which the hearing upon complaint and information is to be conducted. As to s. 14, see *Ex p. Hayward*, 32 L. J. M. C. 89; *Davis* v. *Scrace*, L. R. 4 C. P. 172; *Morgan* v. *Hedger*, 5 Id. 485; *R.* v. *Hutchins*, 5 Q. B. D. 353; and as to s. 16, see *Gelen* v. *Hall*, 2 H. & N. 739.

S. 17. S. 17 provided for the use of the forms of convictions and orders in the schedule to the Act; but the Summary Jurisdiction Act, 1884, s. 55, repealed so much of this section "as specifies any form of conviction or order for which another form is provided by a rule under the Summary Jurisdiction Acts." The validity of forms so provided is established by s. 29 of the Summary Jurisdiction Act, 1879, explained by s. 12 of the Summary Jurisdiction Act, 1884, and the rules and forms now in force will be found in the Weekly Notes of Oct. 9, 1886. By r. 31 it is provided that the forms in the schedule to the rules, or forms to the like effect, may be used with such variations as the circumstances may require. By r. 32, the forms in the schedule to the

Act of 1848 are annulled. It will be seen that—in convictions (Part I., forms 11—17) neither (1) the *information*, nor (2) the *summons*, nor (3) the *appearance* or *non-appearance* of the defendant is to be mentioned—and (4) the *evidence* is not to be set forth. Summary Jurisdiction Act, 1848.

The requisites of a conviction, which *formerly* must have been recorded in it, are :— Former requisites of conviction.

1. *The information*, which has been usually stated to be absolutely essential in all cases, excepting where the justice is empowered to convict on view (see 1 Wm. Saund. 262, n., and *Jones* v. *Owen*, 2 D. & R. 600). It has been regarded as *the foundation of his jurisdiction* over the case, without which his proceeding would be void (see *R.* v. *Bolton*, 1 Q. B. 66; *Blake* v. *Beech*, 1 Ex. D. 320); and though some of the *dicta* in *R.* v. *Hughes*, 4 Q. B. D. 614, appear somewhat inconsistent with this view, the decision seems merely to negative the necessity of any *formal* information where not required by statute. The same principle applies to other limited jurisdictions created by statute; thus, a presentment is the foundation of the jurisdiction of commissioners of sewers, and if there be not one, their rate is void; *Wingate* v. *Waite*, 6 M. & W. 739; and see the judgment in *Doe* v. *Bristol & Exeter R. Co.*, Id. 320; *R.* v. *Croke*, 1 Cowp. 26; and *Christie* v. *Unwin*, 11 A. & E. 373, where the same principle was held to apply even to the exercise of an authority conferred by statute on the chancellor; see also *R.* v. *Hartley Union*, 1 Q. B. 677; *Lee* v. *Rowley*, 8 E. & B. 857; and *Re Hopper* v. *Warburton*, 32 L. J. Q. B. 104. 1. The information which is the foundation of jurisdiction.

The information need *not* have been *in writing* or even *on oath*, unless expressly directed by statute to be so; *Basten* v. *Carew*, 3 B. & C. 649; *R.* v. *Hughes*, 4 Q. B. D. 614. By the Act of 1848, s. 10, whenever the justice issues a warrant in the first instance without summons, the information must be upon oath. Information need not have been in writing or on oath, unless by statute.

Objections cannot now usually be taken to the information for defects in substance, or form, or for variances between it and the evidence; see the Act of 1848, ss. 1, 9; still, care should be taken in framing it, since it has been usually considered to be the foundation of the magistrate's jurisdiction; *Cave* v. *Mountain*, 1 M. & Gr. 257; *Carpenter* v. *Mason*, 12 A. & E. 629.

When there is no Act giving a particular form, it is sufficient if the jurisdiction is substantially made apparent

Requisites of conviction before 11 & 12 Vict. c. 43.

in the documents, or can be inferred therefrom; *Taylor* v. *Clemson*, *per* Tindal, C.J., 2 Q. B. 978, 1032; see *Ex p. Baker*, 7 E. & B. 697. Before the Act of 1848, ss. 1, 9, the evidence would not supply omissions in the information, for the office of the evidence is to *prove*, not to *supply* a legal charge; *R.* v. *Wheatman*, 1 Dougl. 345; *Wiles* v. *Cooper*, 3 A. & E. 528. It should state the day on which it is exhibited: and the statement of a day inconsistent with, or insufficient to warrant, the conviction formerly vitiated it; *R.* v. *Kent*, 2 Ld. Raym. 1546.

Information should state day on which it is exhibited.

Place of exhibiting.

It should state the place of exhibiting, that the magistrate may appear to have been acting within his jurisdiction; see *Kite's Case*, 1 B. & C. 101; *R.* v. *Martin*, 2 Q. B. 1037; *Re Peerless*, 1 Id. 143.

Name of informer.

The name of the informer should, it seems, be set forth, that the defendant may know who is accusing him; in some cases, at all events, it is necessary; see *R.* v. *Stone*, 2 Ld. Raym. 1545.

Name and style of convicting justices.

It should state the name and style of the convicting justice or justices, and show that he is acting within his jurisdiction; see *Kite's Case*, 1 B. & C. 101; *R.* v. *Martin*, 2 Q. B. 1036; *Re Peerless*, 1 Id. 143; *R.* v. *St. George's, Bloomsbury*, 4 E. & B. 520. Thus it was held, before the Act of 1848, not to be enough to state that he is a justice *in* the county, without stating that he is *of* or *for* the county; *R.* v. *Dobbyn*, 2 Salk. 474;—the name of the offender or offenders; *R.* v. *Harrison*, 8 T. R. 508;—the time of the offence, so that the information may appear to have been laid in due time; *R.* v. *Pullen*, 1 Salk. 369; *R.* v. *Chandler*, Id. 378; *R.* v. *Crisp*, 7 East, 389;—the *place*, that it may appear to have been within the justice's jurisdiction; *Kite's Case*, 1 B. & C. 101;—lastly, the charge should be set forth with proper and sufficient certainty, and contain every ingredient necessary to constitute the offence, leaving nothing to mere inference or intendment. "A conviction," to use the words of Lord Holt, "must be certain, and not taken by collection;" *R.* v. *Fuller*, 1 Ld. Raym. 509; *R.* v. *Trelawney*, 1 T. R. 222.

Name of offender.

Time of offence.

Place.

Every necessary ingredient of offence.

Generally sufficient to state offence in words of Act creating it.

Generally speaking, it is sufficient to state the offence in the words of the Act creating it; see *R.* v. *Speed*, 1 Ld. Raym. 583; *Davis* v. *Nest*, 6 C. & P. 167; *Ex p. Pain*, 5 B. & C. 251; *Re Perham*, 5 H. & N. 30; *Walsby* v. *Anley*, 30 L. J. M. C. 121; and by the Act of 1879, s. 39, sub-s. 1, it is expressly enacted with reference to pro-

ceedings before courts of summary jurisdiction that "the description of any offence in the words of the Act, or any order, bye-law, regulation, or other document creating the offence, or, in similar words, shall be sufficient in law." Cases, however, may occur in which the words of the Act are so general as to render some more certainty in the conviction necessary; *per* Denison, J., *R.* v. *Jarvis*, 1 Burr. 154; *Ex p. Hawkins*, 2 B. & C. 31; *R.* v. *Perrott*, 2 M. & S. 379. Requisites of conviction before 11 & 12 Vict. c. 43.

Where a statute or bye-law creates two distinct offences, and provides the same penalty for both, an information and conviction stating the offence in the alternative, as contrary to the statute or bye-law, are insufficient; *Cotterill* v. *Lempriere*, 24 Q. B. D. 634.

Before the Act of 1848, it was held that exceptions in the statute creating the offence should be negatived where they appeared in the clause creating the offence; *R.* v. *Clarke*, 1 Cowp. 35; *R.* v. *Jukes*, 8 T. R. 542; though it was otherwise when they occurred by way of proviso in subsequent clauses or statutes; *Cathcart* v. *Hardy*, 2 M. & S. 534; *Spieres* v. *Parker*, 1 T. R. 141; *R.* v. *Hall*, Id. 320.

The Act of 1848, s. 14, enacts, that whenever in cases of summary convictions the information or complaint negatives any exception, proviso, or condition, it shall not be necessary for the complainant to prove the negative, but the defendant may prove the affirmative in his defence; see *Tennant* v. *Cumberland*, 1 E. & E. 401; *Davis* v. *Scrace*, L. R. 4 C. P. 172; *Morgan* v. *Hedger*, 5 Id. 485; and, by the Act of 1879, s. 39, sub-s. 2, it is further provided that in proceedings before courts of summary jurisdiction, "any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany in the same section the description of the offence in the act, order, bye-law, regulation, or other document creating the offence, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant." 11 & 12 Vict. c. 43, s. 14.

There are many cases where technical words, that would be necessary in an indictment for the same offence, are unnecessary in a conviction; see *R.* v. *Chandler*, 1 Ld. Raym. 581; *R.* v. *Marsh*, 2 B. & C. 717.

Although the information must, in order to give the Information

Requisites of conviction before 11 & 12 Vict. c. 43.

magistrate jurisdiction, state an offence of which he has a right to take cognizance, it need not state evidence sufficient to support such a charge, for it is the *charge* which gives the jurisdiction; *Cave* v. *Mountain*, 1 M. & Gr. 261; *R.* v. *Bolton*, 1 Q. B. 66.

need not state evidence.

2. Conviction must formerly have recorded the *summons*.

2. That the defendant was *summoned* or brought up by warrant; for it would be contrary to natural justice to convict without giving him an opportunity of being heard; *Painter* v. *Liverpool Gas Co.*, 3 A. & E. 433; and see *R.* v. *Totness*, 7 Q. B. 690; *R.* v. *Lightfoot*, 6 E. & B. 822; *Cooper* v. *Wandsworth District Board*, 32 L. J. C. P. 185; *Labalmondiere* v. *Frost*, 1 E. & E. 527; *Blake* v. *Beech*, 1 Ex. D. 320; but, as before stated, the summons need not, according to the form of convictions given by the present Rules, be mentioned in it.

Form of summons.

A general form of summons is given (Part I., form 2), in the Summary Jurisdiction Rules, 1886, mentioned above. In some cases an Act requires a summons of a particular kind, and in those the justices have no jurisdiction if it be omitted; thus, where the summons was to be *ten days at least* before conviction, and it was served on the 20th to appear on the 30th, the conviction was held void; *Mitchell* v. *Foster*, 9 Dowl. 527, 12 A. & E. 472. Where there is no statutable provision the summons should give him reasonable time; *R.* v. *Mallinson*, 2 Burr. 679; *R.* v. *Johnson*, 1 Str. 261; see *Re Williams*, 21 L. J. M. C. 46.

Appearance dispenses with summons.

If, indeed, he appear of his own accord, that will dispense with a summons; *R.* v. *Stone*, 1 East, 649; see *R.* v. *JJ. of Wiltshire*, 12 A. & E. 793; and appearance and defence cures all defects in the summons; *R.* v. *Johnson, supra*; see *R.* v. *Berry*, 28 L. J. M. C. 86; *Blake* v. *Beech*, 1 Ex. D. 320; *R.* v. *Hughes*, 4 Q. B. D. 614; *R.* v. *Fletcher*, 51 L. T. 334.

If a summons be ineffectual, a warrant may, at least in some cases, be issued; see *Bane* v. *Methuen*, 2 Bing. 63: but then the information ought to have been upon oath; see *R.* v. *Pain*, Comb. 359, *per* Holt, C.J.; and it is the opinion of Mr. Paley that a warrant (in the absence of express enactment) lies only when the offence involves some breach of peace; Paley, 37 (7th ed. 101). The Indictable Offences Act, 1848, 11 & 12 Vict. c. 42, now authorizes justices to issue a warrant to compel appearance in all cases of summary convictions or orders. The warrant or summons is not avoided by reason of the justice, who

signed the same, dying or ceasing to hold office; see the Act of 1879, s. 37.

Requisites of conviction before 11 & 12 Vict. c. 43.

3. The *appearance or non-appearance* of the defendant. This need not now, according to the Rules above referred to, be stated in the conviction. If, being summoned, he do not appear, he may nevertheless be convicted, for otherwise any defendant might escape merely by not appearing; *R.* v. *Simpson*, 1 Str. 44; and see the Act of 1848, ss. 2, 13, which enable the justice to convict on default of appearance, or to issue a warrant to compel appearance and adjourn the case; *R.* v. *Kingsby*, 15 J. P. 65; 1 Cowp. 30.

3. Conviction must formerly have recorded defendant's appearance.

4. If the defendant confess, *the confession* must formerly have been stated; but see now the forms in the Rules of 1886. If he does so, there is no necessity for evidence; *R.* v. *Hall*, 1 T. R. 320; *R.* v. *Clarke*, 1 Cowp. 35; even though the statute direct the conviction to be "on the oath of one or two credible witnesses;" see *R.* v. *Hall, supra*; *R.* v. *Gage*, 1 Str. 546, and 1 Wms. Saund. 262, n.; see the Act of 1848, s. 14, and the Act of 1879, s. 13, under which the justice may convict the defendant at once, or make an order against him, if he admit the truth of the information or complaint.

4. And confession.

5. If the defendant did not confess, *the evidence* must have been set forth; but should not be now, according to the forms given by the Rules of 1886. It should be given in his presence. It is not necessary, in order to warrant the conviction, that the justices should clearly have come to a right decision in point of fact. If there was evidence from which any reasonable person might have drawn the same inference as they did, that will do; *R.* v. *Glossop*, 4 B. & Ald. 616; *Anon.* 1 Id. 382. Indeed, the magistrate being substituted for a jury, his decision cannot be said to be wrong, if the evidence was such as might have been left to a jury, and from which they might have drawn the same conclusion: *R.* v. *Davis*, 6 T. R. 178.

5. Or the evidence.

6. There must be a judgment and an adjudication of the proper forfeiture; see *R.* v. *Harris*, 7 T. R. 238; *R.* v. *Salomons*, 1 Id. 251; *R.* v. *Hawks*, 2 Str. 858; *R.* v. *Crickland*, 7 E. & B. 866; *R.* v. *Williams*, 18 Q. B. 393; *Labalmondiere* v. *Frost*, 1 E. & E. 527; *Re Baker*, 2 H. & N. 219. There is, however, no particular form of judgment; *R.* v. *Thompson*, 2 T. R. 18. And the adjudication may be good in part though it exceed the jurisdiction of the justices, provided the excess be severable; *R.* v. *JJ. of Wiltshire*, 12

6. There must be a judgment.

Requisites of conviction before 11 & 12 Vict. c. 43.

A. & E. 793; *R.* v. *St. Nicholas*, 3 Id. 79; see *Cross* v. *Watts*, *per* Byles, J., 13 C. B. N. S. 247, 248. The application of the penalty, where the Act directs any mode of applying it, has been held to be a necessary part of the judgment; *Chaddock* v. *Wilbraham*, 5 C. B. 645; but at any rate in most cases it would be sufficient to follow the forms in the schedule to the Rules of 1886, which do not provide for the application of the penalty. When, however, the statute leaves the application discretionary, the mode in which the discretion was exercised ought, it would seem, to be stated; *R.* v. *Dimpsey*, 2 T. R. 96. Where the justice is to give *costs or charges*, he must ascertain their amount in the conviction; *R.* v. *Symonds*, 1 East, 189; *Bott* v. *Acroyd*, 28 L. J. M. C. 207; *R.* v. *St. Mary*, 13 East, 57 n.; and as to costs, see now the Act of 1848, s. 18, and the Act of 1879, s. 8; and *R.* v. *Barton*, 13 Q. B. 389.

7. Conviction should be subscribed, dated, and sealed.

7. Lastly, the conviction should be subscribed, dated and sealed; see *R.* v. *Elwell*, 2 Str. 794; *Basten* v. *Carew*, 3 B. & C. 649; and see the Act of 1848, s. 14, which requires the conviction or order to be drawn up under the hand and seal of the justice. The reason of dating it is, that it may appear when it was made; and if that do appear, that is enough, and an impossible date might be rejected; *R.* v. *Picton*, 2 East, 198; see *R.* v. *Bellamy*, 1 B. & C. 500.

The above observations apply to convictions in general; but a conviction is the creature of the statute law; and, if a statute prescribe any particular form for it, no matter what, that form, except when otherwise provided by statute, must be strictly pursued; *Davison* v. *Gill*, 1 East, 72; *Goss* v. *Jackson*, 3 Esp. 198.

By s. 27, sub-s. 5, of the Act of 1879, it is provided that, where an indictable offence is, under the circumstances in that Act mentioned, authorised to be dealt with summarily, "the conviction shall contain a statement either as to the plea of guilty of an adult, or in the case of a child as to the consent or otherwise of his parent or guardian, and in the case of any other person of the consent of such person, to be tried by a court of summary jurisdiction."

Summary Jurisdiction Act, 1848, 11 & 12 Vict. c. 43, continued from p. 649.

To proceed with the summary of the Act of 1848—s. 18 enables the justice to order costs either to the prosecutor or complainant, or to the defendant; as to which see also the Act of 1879, ss. 6, 8, 28.

S. 18.

Ss. 19—29, 31.

Ss. 19 to 29, and s. 31, relate to the mode in which penalties imposed, and costs ordered by justices are, under various

circumstances, to be recovered and paid. Ss. 19 and 20 are partly repealed by the Act of 1884, sched. As to s. 23, see *Leverick* v. *Mercer*, 14 Q. B. 759; as to s. 25, *R.* v. *Cutbush*, L. R. 2 Q. B. 379; and as to s. 26, *Winn* v. *Mossman*, L. R. 4 Ex. 292. Further provisions on the like subject are contained in the Act of 1879, ss. 4 to 9, 21, 24, 28, 34, 35, 39, 43, and in the Act of 1884, s. 3. As to the proper mode of awarding costs in cases of appeal under s. 27 of the Act of 1848, see *R.* v. *Hellier*, 17 Q. B. 229; *R.* v. *Binney*, 1 E. & B. 810; *R.* v. *Huntley*, 3 Id. 172; *R.* v. *JJ. of Ely*, 5 Id. 489; *Gay* v. *Matthews*, 4 B. & S. 425. As to s. 31, see *Mayor of Reigate* v. *Hart*, L. R. 3 Q. B. 244.

S. 32 enacts that the forms in the schedule shall be deemed good, valid, and sufficient in law; but these forms have now been annulled, and others substituted, see *ante*, p. 648. S. 32.

Ss. 33, 34, regulate jurisdictions of metropolitan police, and stipendiary, magistrates; also of the Lord Mayor and aldermen of London; but these sections do not apply to, or restrict the operation of, the Act of 1879; see s. 52. Ss. 33, 34.

S. 35 provides that the Act shall not extend to orders of removal (*R.* v. *JJ. of Somersetshire*, 22 Q. B. D. 623), orders as to lunatics (see, however, *Bradford Union* v. *Clerk of the Peace for Wilts*, L. R. 3 Q. B. 604), *nor to informations concerning the excise, customs, stamps, taxes, or post office* (but the foregoing exception in italics is repealed by the Act of 1879, s. 55), nor to orders, &c., in matters of bastardy, (but the Act of 1879, which is to be construed as one with the Act of 1848, does "apply to the levying of sums adjudged to be paid by an order in any matter of bastardy, or by an order which is enforceable as an order of affiliation, and to the imprisonment of a defendant for non-payment of such sums in like manner as if an order in any such matter or so enforceable were a conviction on information, and to the proof of the service of any summons, notice, process, or document in any matter of bastardy, and of any handwriting or seal in any such matter, and to an appeal from an order in any matter of bastardy,") nor to proceedings under Acts regulating the labour of children in factories, &c. (which last exception was repealed by the Factories and Workshops Act, 1871, 34 & 35 Vict. c. 104, s. 11; see now 41 Vict. c. 16, s. 89). S. 35.

An adjudication by two justices under the Lands Clauses Consolidation and Railway Clauses Consolidation Acts,

1845, as to the compensation payable by a railway company to a person whose lands have been injuriously affected by their works, is not an order within s. 1 of this Act; *R.* v. *Edwards*, 13 Q. B. D. 586, overruling *Re Edmundson*, 17 Q. B. 67.

42 & 43 Vict. c. 49.

By the Summary Jurisdiction Act, 1879, already referred to, the powers of courts of summary jurisdiction have been materially increased. It has not been thought necessary, however, to set out the details of that Act, nor of the later Act of 1884 (47 & 48 Vict. c. 43), which is principally a repealing and explanatory Act.

The alterations in procedure, so far as they relate to the subject-matter of this Act, have been already mentioned.

Jurisdiction as to indictable offences.

But the most important feature of the Act of 1879 is that it gives power to courts of summary jurisdiction to deal summarily with certain specified indictable offences in three cases, viz.:—(1) In the case of a child (*i.e.*, a person who, in the opinion of the court, is under 12 years), unless the parent or guardian objects, charged with any offence except homicide; (2) In the case of a young person (*i.e.*, a person who, in the opinion of the court, is of the age of 12 and under 16 years of age), charged with certain cases of larceny, embezzlement, and receiving, as specified in the First Schedule, if the accused consents; (3) In the case of an adult (*i.e.*, a person who, in the opinion of the court, is of the age of 16 years or upwards), charged with the same class of offences, if he pleads guilty, or with another class of similar offences specified in the same Schedule, if he consents; see ss. 10—17, 24, 27, 28.

By s. 17 the right to claim trial by jury is given to a person charged before a court of summary jurisdiction with an offence, other than an assault, involving a liability on conviction to imprisonment for a term of more than three months; see *Williams* v. *Wynne*, 57 L. J. M. C. 30; *Carle* v. *Elkington*, 67 L. T. 374.

Appeal to Quarter Sessions.

By s. 19, an appeal is given to the general or quarter sessions against certain summary convictions and orders. See as to procedure on appeal, ss. 31, 32.

Recovery of sums as civil debts.

By ss. 6, 7, 8, and 35, 47, special powers are given for the recovery, as a civil debt, of sums ordered to be paid by a court of summary jurisdiction; see *R.* v. *Price*, 5 Q. B. D. 300.

Rules.

By s. 29 power is given to the Lord Chancellor to make, rescind, and alter rules in relation to the Summary Jurisdiction Acts. The present rules will be found in the Weekly Notes, Oct. 9, 1886.

If a conviction be void on the face of it, it follows, as of course, that, as a general rule, no act done in pursuance of it can be justified, and that any seizure of person or property under it will form the subject-matter of an action, as will be seen in the principal case; subject, however, to the provisions of the Justices Protection Act, 1848, and the Public Authorities Protection Act, 1893; *ante*, p. 642 *et seq.*

If conviction void no act under it justifiable.

Cases there are, however, in which the convicting justice, though he has convicted without jurisdiction and his order has been acted upon, is not liable to an action unless he either acted *malâ fide*, or ought to have *known* of his want of jurisdiction. The class of cases referred to occurs where the jurisdiction of the justice depends upon the existence of a certain state of facts. Whether those facts exist is a collateral question which he has to decide; and, though he decide wrongly, and so by his wrong decision attribute to himself and act upon a jurisdiction which he does not possess, he is not liable to an action merely on account of his erroneous decision on the question of *fact*; *Pease* v. *Chaytor*, 3 B. & S. 620.

Justice not liable for erroneous judgment as to facts giving jurisdiction.

It is otherwise if the mistake be one of law; see *Houlden* v. *Smith*, 14 Q. B. 841, cited by Blackburn, J., in his judgment in *Pease* v. *Chaytor, supra*. But, until his erroneous judgment be acted upon so as to make him liable in trespass, he is not liable for his judicial mistake; *Sommerville* v. *Mirehouse*, 1 B. & S. 652.

Secus as to mistake of law.

Besides the remedy by action, there are two modes of impeaching convictions; first, by *appeal*, secondly, by *certiorari*.

Modes of impeaching conviction by (1) appeal. (2) *certiorari*.

An *appeal*, like a *conviction*, is the creature of the statute law, and never lies unless it is given by express terms; *R.* v. *Recorder of Ipswich*, 8 Dowl. 103; *R.* v. *Hanson*, 4 B. & Ald. 519; *R.* v. *JJ. of Warwickshire*, 6 E. & B. 837; *Ex p. Chamberlain*, 8 Id. 644. See also *R.* v. *JJ. of Worcester*, 3 E. & B. 486; *R.* v. *Sandon*, Id. 547; *A.-G.* v. *Sillem*, 10 H. L. C. 704.

Appeal a creature of statute.

The rule with regard to a *certiorari* is the very reverse. It always lies unless *expressly* taken away; *R.* v. *Abbot*, 2 Dougl. 553; and it requires very strong words to do so; for even where a statute gave an appeal to the sessions, and directed that it should be *finally* determined there, and no other court should intermeddle with the causes of appeal, it was held that a *certiorari* lay after the appeal; *R.* v. *Reeve*, 1 W. Bl. 231; *R.* v. *Jukes*, 8 T. R. 542; see *R.* v. *JJ. of*

Certiorari always lies unless expressly taken away.

Certiorari.

West Riding, Yorks., 1 A. & E. 575, where it was taken away; *R.* v. *Fell*, 1 B. & Ad. 380; *R.* v. *JJ. of Lancashire*, 11 A. & E. 144, where an order in pursuance of a statute leaving the *certiorari*, but made by a town council empowered by 5 & 6 W. 4, c. 76, which took it away, was held removable by *certiorari*. The reason of this is, that it is an extremely beneficial writ, being the medium through which the Queen's Bench exercises its corrective jurisdiction over the summary proceedings of inferior courts. A section in a statute taking away the *certiorari* does not apply where there has been an absence of jurisdiction; *Ex p. Bradlaugh*, 3 Q. B. D. 509.

Where it is expressly taken away it has been decided that it cannot issue even to bring up to quash an order of justices in quarter sessions conditionally affirming a conviction subject to a case for the opinion of the court; *R.* v. *Chantrell*, L. R. 10 Q. B. 587. Now, however, a *certiorari* is not in such case required; 42 & 43 Vict. c. 49, s. 40.

Privilege of the Crown.

Even where it is taken away in express terms, they do not include the crown unless named; *R.* v. *Davies*, 5 T. R. 626; *R.* v. *Allen*, 15 East, 333; *R.* v. *Boultbee*, 4 A. & E. 498. Nay, it is said that the attorney-general, on behalf of the crown, might in such case obtain the writ for a defendant; see 1 East, 303, n., and the authorities there cited.

Certiorari.

A *certiorari* is a writ, issuing out of the Chancery or Queen's Bench Division of the High Court, commanding the judges or officers of an inferior court to certify and return the record of a matter before them. See *Walsall* v. *L. & N. W. R. Co.*, 4 App. Cas. 30, 39, *per* Earl Cairns. It is used for a great variety of purposes; but we are at present looking only at its applicability to the case of a conviction. No writ of error lies upon a conviction; so that a *certiorari* is the only mode of bringing it into the Queen's Bench Division in order to reverse it; see *per* Bramwell, L. J., in *R.* v. *Overseers of Walsall*, 3 Q. B. D. 464. And the jurisdiction of the Court of Queen's Bench to issue the writ of *certiorari* formerly applied, and that of the Queen's Bench Division of the High Court now "applies, only where there is some defect of jurisdiction or informality or defect apparent on the face of the proceedings" in the inferior court; *R.* v. *Overseers of Walsall, supra.* The superior court cannot give itself jurisdiction through the writ of *certiorari* when it otherwise possesses none.

It has been held that a *certiorari* is not, like a writ of

Certiorari.

Not a matter of course.

error, granted *ex debito justitiæ*; but "application is made to the sound discretion of the court;" *R.* v. *Bass*, 5 T. R. 252; *R.* v. *Manchester & Leeds R. Co.*, 1 P. & D. 164; *R.* v. *S. Holland Drainage Committee*, Id. 79. But in *R.* v. *JJ. of Surrey*, L. R. 5 Q. B. 466, the court, after taking time to consider this very point, held that where the applicant was "a party grieved" the writ ought to be treated like a writ of error, as *ex debito justitiæ*; but where the applicant is not grieved, but comes forward merely as one of the public, the court has a discretion. They held, however, that the writ is clearly not a matter of course; the court must be satisfied on affidavits that grounds for issuing it exist; see Crown Office Rules, 1886, r. 35; and even where the applicant is a party grieved, if he has by his conduct precluded himself from taking an objection, the court will not permit him to make it. See also *R.* v. *Steward*, 9 Q. B. D. 741; *R.* v. *Drury*, (1894) 2 Ir. R. 489.

Mode of application for *certiorari*, which must be within six months.

The application is by way of motion. Formerly the 13 G. 2, c. 18, s. 5, provided, and now r. 33 of the Crown Office Rules, 1886, provides, that no *certiorari* shall be granted to remove any judgment, order, conviction, or other proceeding before a justice or at the sessions, unless it be applied for within *six calendar months*, and upon affidavit that the party has given *six days' notice in writing* to the justice or justices, or two of them, if more than one; see *R.* v. *Boughey*, 4 T. R. 281; *R.* v. *Bloxam*, 1 A. & E. 386; *R.* v. *Sevenoaks*, 7 Q. B. 136; *Re Hopkins*, E. B. & E. 100; *R.* v. *Allan*, 4 B. & S. 915; *R.* v. *Hodgson*, 9 L. T. 290; *Ex p. Roberts*, 50 J. P. 567. The notice to the justices must be six days before the rule *nisi* is moved for, one day inclusive, the other exclusive; *R.* v. *Goodenough*, 2 A. & E. 463; *Re Flounders*, 4 B. & Ad. 865; C. O. R. 1886, r. 294. It must be by or on behalf of the party intending to move, and must appear to be so; *R.* v. *JJ. of Lancashire*, 4 B. & Ald. 289; *R.* v. *JJ. of Cambridgeshire*, 3 Id. 887; *R.* v. *JJ. of Kent*, Id. 250; *R.* v. *JJ. of Lancashire*, 3 P. & D. 86, 11 A. & E. 144, where the notice was held sufficient; *R.* v. *JJ. of Shrewsbury*, 9 Dowl. 501; S. C. *nom. R.* v. *How*, 11 A. & E. 159. But the crown seems not to be bound by this even where it espouses the defendant's side; *R.* v. *James*, 1 East, 303, n.; *R.* v. *Berkeley*, 1 Ken. 80; *R.* v. *Battams*, 1 East, 298.

If, upon the discussion of the rule, the writ be granted, it removes the conviction into the court above, where it is

Certiorari.

quashed if bad; if good, it remains in the Queen's Bench, unless, indeed, to keep it there would occasion a defect of justice, in which case it may be sent back again by writ of *procedendo*; *R.* v. *Neville*, 2 B. & Ad. 299.

The person prosecuting the *certiorari* must, formerly by 5 G. 2, c. 19, and now by the C. O. R. 1886, r. 36, enter into recognizance for 50*l.*, with competent sureties, to prosecute it with effect, and to pay costs if unsuccessful. The above Act did not apply to the case of a prosecutor obtaining the writ; *R.* v. *Spencer*, 9 A. & E. 485. A writ of *certiorari* may on motion be superseded *quia improvide emanavit*; *R.* v. *Chantrell*, L. R. 10 Q. B. 587.

No appeal from *certiorari* in criminal cases.

Where *certiorari* has gone to bring up a conviction for an offence under the criminal law, no appeal will lie to the Court of Appeal, criminal cases being expressly excepted from the jurisdiction of that court by s. 47 of the Judicature Act, 1873; see *R.* v. *Fletcher*, 2 Q. B. D. 43; *R.* v. *Rudge*, 16 Id. 459; *R.* v. *JJ. of C. C. C.* 18 Id. 314. But where by *certiorari* an order of quarter sessions as to a borough rate had been brought into the Q. B. D., and a rule *nisi* to quash such order was subsequently discharged, and the order of sessions was affirmed by a rule of the Q. B. D., the Court of Appeal were equally divided as to whether an appeal lay from this last rule. Bramwell and Cotton, L.JJ., held that the jurisdiction was given by the general words of s. 19 of the Judicature Act, 1873; whilst Cockburn, C.J., and Brett, L.J., were of the contrary opinion, being of opinion that the Queen's Bench never had jurisdiction to quash such an order of sessions, but merely that a custom had arisen of taking the opinion of the Queen's Bench, upon which the sessions acted, and that therefore there had been no decision of the Q. B. D. on which an appeal would lie. On appeal, the House of Lords adopted the view of Bramwell and Cotton, L.JJ.; *Walsall* v. *L. & N. W. R. Co.*, 4 App. Cas. 30. No leave to appeal under s. 45 of the Act is in such case necessary; *Illingworth* v. *Bulmer East H. B.*, 53 L. J. M. C. 60; and see *R.* v. *Pemberton*, 5 Q. B. D. 95; *R.* v. *JJ. of C. C. C.*, 18 Id. 314.

Merits of the case cannot be gone into on affidavit.

The Queen's Bench Division, exercising its appellate power over a conviction removed into it by *certiorari*, will not allow the merits of the case to be again litigated upon affidavit; for the justices are the proper persons to determine upon those; *R.* v. *Bolton*, 1 Q. B. 66; *R.* v. *JJ. of Buckinghamshire*, 3 Id. 800. And so, where the justices in

Certiorari.

quarter sessions quashed a magistrate's conviction on the ground that certain words of the statute on which it was founded were omitted in it, the Q. B. D., though holding their decision to be erroneous, declined to interfere by *mandamus*; *R.* v. *JJ. of Middlesex*, 2 Q. B. D. 516. Where, however, by consent of the parties, the quarter-sessions of a recorder stated a special case, the court would decide on *certiorari* whether the facts stated in the case amounted to the offence charged, even though the *certiorari* were taken away; *R.* v. *Dickenson*, 7 E. & B. 831; though see *R.* v. *Chantrell*, L. R. 10 Q. B. 587. And now the Summary Jurisdiction Act, 1879, s. 40, provides that "a writ of *certiorari* or other writ shall not be required for the removal of any conviction, order, or other determination, in relation to which a special case is stated by a court of general or quarter sessions for obtaining the judgment or determination of a superior court."

Summary Jurisdiction Act, 1879, s. 40. No *certiorari* required where case stated.

But a question has occasionally arisen whether, in cases where the justices have proceeded *without jurisdiction*, and have nevertheless stated upon the face of the conviction matter showing a jurisdiction, it be competent to the defendant to prove the want of jurisdiction by affidavit. It certainly appears desirable that the court should have the power to entertain the question of jurisdiction. Some cases might easily be suggested, in which not only great private but great public inconvenience might arise from leaving an invalid order or conviction unreversed, and great injustice might be caused by allowing justices out of or in sessions, by making their order or conviction good upon the face of it, to give themselves a jurisdiction over matters not entrusted to them by law.

Whether the defendant can prove want of jurisdiction in justice by affidavit.

Whether a *mandamus* would lie in such a case to oblige them to make a correct statement, is a question which the Q. B. D. would, at least in the majority of instances, probably answer in the negative; for though it is true that in some cases, where there has been a clear omission of some material ingredient in a conviction, the court has by *mandamus* ordered it to be supplied; as in *Re Rix*, 4 D. & R. 352; *R.* v. *Marsh*, Id. 260; *R.* v. *Warnford*, 5 Id. 489; *R.* v. *Allen*, Id. 490; yet this has been done only after the order or conviction had been returned upon a *certiorari*; and it either clearly appeared, or was shown by affidavit, to the court, that the whole or some material portions of the evidence had been omitted (see the observations of the court

Probably *mandamus* to correct the statement would not lie.

Certiorari.

on these cases in *R.* v. *Wilson*, 1 A. & E. 627); and the *mandamus* went, not to compel the court below to insert *a particular thing*, or raise *a particular question*, upon their return, but merely to oblige them to set out an integral part of the case, which *must have existed*, and had been omitted. I say *must have existed*, because in *R.* v. *Wilson*, where evidence might or might not have been acted on, the court would not send the *mandamus*.

The court has refused to compel by *mandamus* the court below to raise a particular question.

And there are cases in which the court has refused to interfere by *mandamus* to compel the courts below to raise *a particular question*; for instance, in *R.* v. *Hewes*, 3 A. & E. 725, the jury had returned a verdict, *guilty by mischance*; the chairman of the sessions told them they *must* find a general verdict; and they found a verdict of *guilty*, and recommended to mercy on the ground that the act was not done with a malicious intent. The motion was for a *mandamus* to set the clerk of the peace's minute right according to the facts, in order that a writ of error might be sued out. The rule was discharged. Patteson, J., said, "The case of a *mandamus* to enter continuances and hear is not like this. There the justices are ordered merely to hear an appeal, and to enter continuances because those are necessary in order to enable them to hear; so, in the present case, if it were necessary for the defendant to have a record made up, and the officer refused to do it, the party having a right to avail himself of the record might apply for a *mandamus*, as in *R.* v. *JJ. of Middlesex*, 5 B. & Ad. 1113. I have always understood that this court might send a *mandamus* to an inferior court to do its duty *in general terms*, but *not to do a particular thing*, as to make an alteration here or there in the clerk of the peace's minutes;" see *R.* v. *JJ. of Middlesex*, 9 A. & E. 540, 546; *R.* v. *Lords of the Treasury*, 10 A. & E. 179; *R.* v. *Lords of the Treasury*, Id. 374; *R.* v. *E. Counties R. Co.*, Id. 531, 547; *R.* v. *JJ. of Buckinghamshire*, 3 Q. B. 800; *R.* v. *JJ. of Bristol*, 18 Jur. 426, note *a*; *R.* v. *Dayman*, 7 E. & B. 672.

Will the court above allow evidence of defect of jurisdiction by affidavit?

Supposing that the court below cannot be compelled by *mandamus* to show the defect of jurisdiction upon the record, the next question is, will the court above allow evidence of such defect of jurisdiction to be laid before it by way of affidavit, on the record being brought before it by a writ of *certiorari*?

Cases in which this has been allowed.

In *R.* v. *St. James's, Westminster*, 2 A. & E. 241, it was remarked by Taunton, J. (a judge whose *obiter dicta* are

always worthy of the greatest attention) that this has been constantly done. In *R.* v. *Great Marlow*, 2 East, 244, an appointment of overseers, good on the face of it, was allowed to be questioned by affidavit on the ground of a defect of jurisdiction, and was finally quashed. The court in that case took time to consider the practice with regard to receiving affidavits; and Lawrence, J., mentioned several similar cases in which that course had been pursued. A similar course seems to have been pursued with an order of the quarter sessions in *R.* v. *JJ. of West Riding of Yorks.*, 5 T. R. 629. In *R.* v. *JJ. of Cheshire*, 1 P. & D. 93, 8 A. & E. 400, the question was a good deal discussed; and it seems to have been admitted that affidavits might be looked at for the purpose of showing a defect of jurisdiction. "It cannot be disputed," said Coleridge, J., in that case, "that there are many cases in which affidavits may be looked at in order to ascertain whether there was jurisdiction or not; for suppose an order made, which was good on the face of it, but which was not made by a magistrate, it is clear that this fact may be shown to the court." Accord. *R.* v. *Sheffield & M. R. Co.*, 11 A. & E. 194. And it seems to be settled by the later cases that a defect of jurisdiction may be shown by affidavit, though the proceeding is so drawn up as to appear valid on the face of it. See the judgments in *R.* v. *Bolton*, 1 Q. B. 66; *Westbury Union Case*, 4 E. & B. 314; *Re Penny*, 7 Id. 660, where on *certiorari* an inquisition under the Lands Clauses Act, 1845, was quashed upon affidavits showing that the jury in assessing the damages took into account an item which was not a subject for compensation within the Act (*Mortimer* v. *S. Wales R. Co.*, 1 E. & E. 375); *Re Hopkins*, E. B. & E. 100; *R.* v. *Recorder of Cambridge*, 8 E. & B. 637; *R.* v. *Metropolitan R. Co.*, 32 L. J. Q. B. 367; *Read* v. *Victoria Station R. Co.*, 32 L. J. Ex. 167; and *R.* v. *Cheltenham Commissioners*, 1 Q. B. 467, where the defect consisted in the presence on the bench of interested parties as justices.

Certiorari.

On the other hand, nothing can be more common than to find it laid down that a conviction or order is conclusive of the matter *stated in it* for the purpose of showing a jurisdiction. See the judgment of Patteson, J., *Re Clarke*, 2 Q. B. 634; see also *Colonial Bank of Australasia* v. *Willan*, L. R. 5 P. C. 417.

Yet conviction or order is said to be conclusive.

Possibly the distinction may be between cases in which the conviction or order is made by persons who are admitted

Possible explanation.

Certiorari.

to constitute a legal court, and who have stated facts which, on information being laid, or a case coming before them, would be matter to be proved, *and adjudicated upon by them*, and cases in which the objection is, that they are not a court at all, because not in fact magistrates, or because interested, or because they sat out of the limit of their jurisdiction, or for some other reason, striking at their existence as a court, so that the objection is, not that the statement of a court is erroneous, but that the source of the statement is not a court at all; see the judgment of Bramwell, B., *Re Baker*, 2 H. & N. 219. But it may well be doubted whether this distinction affords a sufficient test.

Cases in which the Court of Queen's Bench will on *certiorari* entertain affidavits.

It seems that the Queen's Bench Division will on *certiorari* entertain affidavits where the conviction is good on the face of it,—not only to show that preliminary matters, required to give the justice jurisdiction to enter upon an inquiry into the merits of the case, were wanting; see *R.* v. *Bolton*, 1 Q. B. 66; *R.* v. *Badger*, 6 E. & B. 137; *R.* v. *Wood*, 5 Id. 49; *R.* v. *JJ. of Totness*, 2 L. M. & P. 230; the judgments in *R.* v. *St. Olave's D. B.*, 8 E. & B. 529; *Re Smith*, 3 H. & N. 227; *R.* v. *Farmer*, (1892) 1 Q. B. 637—or that circumstances appeared in the course of the inquiry which ousted his jurisdiction: *R.* v. *Nunneley*, E. B. & E. 852; *R.* v. *Cridland*, 7 E. & B. 853; *Backhouse* v. *Bishopwearmouth*, 30 L. J. M. C. 118; *R.* v. *Stimpson*, 4 B. & S. 301—but also that there was *no evidence* to prove some fact, the existence of which was essential to establish the offence charged.

Where there was *no* evidence of an essential fact.

It must be remembered that before 11 & 12 Vict. c. 43, the evidence must have been set forth in the conviction, and, if there was none to support some material part of the information, the conviction would have been quashed; *R.* v. *Smith*, 8 T. R. 588. The alteration by statute of the forms of conviction, though it dispenses with the necessity of setting forth the evidence, plainly does not narrow the jurisdiction of the Queen's Bench to quash convictions void for matter of substance; and, in order to exercise this jurisdiction in respect of convictions bad for want of evidence, but drawn up according to the general form prescribed by statute, it is necessary that the court should receive affidavits. See the judgments in *Bailey's Case*, 3 E. & B. 607, where affidavits were admitted for the purpose of impeaching a conviction under the Masters and Servants Act, 4 Geo. 4, c. 34, by showing that there was no evidence before the

justices from which the relation of master and servant could be inferred.

Scire where evidence conflicting.

"Affidavits," said Pollock, C. B., in *Re Baker*, 2 H. & N. 219, 223, "may be used for the purpose of showing that there was no evidence at all, but if there is conflicting evidence, it is for the justice to decide upon it." (But see *Stanhope* v. *Thorsby*, L. R. 1 C. P. 423.)

In *Re Thompson*, 6 H. & N. 193, where the prisoner had been charged with unlawfully assaulting and abusing Susannah H., and it was plain *upon the evidence* that, if any offence, a rape or assault with intent to ravish had been committed, yet the justices convicted the prisoner of a common assault, it appears to have been the opinion of Pollock, C. B., and Wilde, B., that the conviction was bad, because the justices could not have believed that only a common assault had been committed. But the court was divided, and *Wilkinson* v. *Dutton*, 3 B. & S. 821, may be considered a decision contrary to that opinion.

Jurisdiction ousted where *bonâ fide* claim of title.

As a general rule the jurisdiction of justices to convict summarily ceases as soon as a claim of title in himself (though only colourable, provided the right claimed be one known to the law) is *bonâ fide* made by the party against whom the proceeding is instituted; *R.* v. *Cridland*, 7 E. & B. 853; *Cornwell* v. *Sanders*, 3 B. & S. 206; *R.* v. *Stimpson*, 4 Id. 301. In *Hudson* v. *MacRae*, 4 Id. 585, the claim was made, *bonâ fide*, but to a right impossible in law, and a conviction was upheld; followed in *Foulger* v. *Steadman*, L. R. 8 Q. B. 65 (disapproving of *Jones* v. *Taylor*, 1 E. & E. 20), and in *Hargreaves* v. *Diddams*, L. R. 10 Q. B. 582; see also *Leatt* v. *Vine*, 30 L. J. M. C. 207; *Cornwell* v. *Sanders*, *supra*; and *Watkins* v. *Major*, L. R. 10 C. P. 662, where a distinction is drawn between a conviction under the statutes for the protection of game and the ordinary case of a conviction for which it is said to be necessary to prove a *mens rea*. The question whether there be such a *bonâ fide* claim of right is a collateral question for the justices to decide, but the superior court on affidavit will review their decision; see *R.* v. *Stimpson*, 4 B. & S. 301, and *Leicester U. S. Auth.* v. *Holland*, 57 L. J. M. C. 75, where it was held that there was *not*, and *Paley* v. *Birch*, 16 L. T. 410, where it was held that there *was* evidence to justify the finding that the claim was not *bonâ fide* set up. See also *Williams* v. *Adams*, 2 B. & S. 312; *Legge* v. *Pardoe*, 30 L. J. M. C. 108; *R.* v. *Sandford*,

Certiorari.

30 L. T. 601; *Lovesy* v. *Stallard*, Id. 792; *Mathews* v. *Carpenter*, 16 L. R. Ir. 420; *Coles* v. *Miles*, 57 L. J. M. C. 132; *Johnston* v. *Meldon*, 30 L. R. Ir. 15; *Edwards* v. *Cock*, 58 J. P. 398.

Origin of rule

This rule as to the cesser of the jurisdiction to convict summarily on a *bonâ fide* claim of right being set up is founded, not on statute, but on general principles of law; see *per* Blackburn, J., in *Cornwell* v. *Sanders*, *supra*; and *per* Crompton, J., in *R.* v. *Stimpson*, *supra*.

There are other similar cases in which restrictions are placed on the justices' jurisdiction by statute.

R. v. *Nunneley.* Similar rule in statute.

In *R.* v. *Nunneley*, E. B. & E. 852, an order, made by justices for payment of a church-rate, under 53 Geo. 3, c. 127, which provides that if the validity of the rate be disputed, and the party disputing give notice to the justices, they are to forbear giving judgment thereon, was quashed on affidavits showing that a reasonable objection had been made to the validity of the rate, notwithstanding which the justices proceeded with the case, holding, groundlessly, that the objection was not made *bonâ fide*. Erle, J., said: "Without coming to the much disputed point whether a fact which is in doubt is one which affects the jurisdiction in the first instance, or one upon which magistrates are to judge, I think this case is clear enough. The jurisdiction of the justices is to decide whether the rate is made and demanded. But then there is a collateral point on which the jurisdiction depends, that is, whether the validity of the rate is disputed. If it is, the justices are to hold their hands. That is collateral to the merits; and a matter on which the jurisdiction depends." And, as laid down in the judgment of *Bunbury* v. *Fuller*, 9 Exch. 140, "it is a general rule that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends. . . . . To take the simplest case: Suppose a judge with jurisdiction limited to a particular hundred, and a matter is brought before him as having arisen within it, but the party charged contends that it arose in another hundred, this is clearly a collateral matter independent of the merits; on its being presented, the judge must not immediately forbear to proceed, but must inquire into its truth or falsehood, and for the time decide it, and either proceed or not on the principal subject-matter according as he finds on that point; but this decision must be open to

Certiorari.

question, and if he has improperly either foreborne or proceeded on the main question in consequence of an error, on this the Court of Queen's Bench will issue its *mandamus* or prohibition to correct his mistake." See further *Ex p. Mannering*, 31 L. J. M. C. 153.

Where a statute, 24 & 25 Vict. c. 97, s. 52, enacted that nothing therein contained should "extend to any case where the party acted under a *fair and reasonable* supposition that he had a right to do the act complained of," and the justices found that the appellant did not act under a fair and reasonable supposition and convicted him, the court upheld the conviction, holding that the above express provision overrode the proviso usually implied as to summary convictions, that a *bonâ fide* claim of right is sufficient to oust the jurisdiction of the justices; *White* v. *Feast*, L. R. 7 Q. B. 353. See this case distinguished in *Denny* v. *Thwaites*, 2 Ex. D. 21.

By 24 & 25 Vict. c. 100, s. 46, it is provided that justices "shall not hear and determine any case of assault in which any question shall arise as to the title to land." Under this section it was held that justices are prohibited where title is claimed from going into the question of excess of violence and convicting summarily upon that; *R.* v. *Pearson*, L. R. 5 Q. B. 237.

Effect of clause in statute taking away the *certiorari*.

Assuming that a defect of jurisdiction may in these cases be shown by affidavit, every case, or almost every case, of a defect of jurisdiction in the convicting magistrate or magistrates would be reviewable by *certiorari*; for though it is now usual for the statute creating the offence to contain a clause taking away the *certiorari*, yet such clauses do not, generally speaking, apply to cases where there was no jurisdiction to convict, such cases not falling within the statute at all; *R.* v. *JJ. of Somersetshire*, 5 B. & C. 816; *R.* v. *JJ. of West Riding of Yorks.*, 5 T. R. 629; *R.* v. *Great Marlow*, 2 East, 244; *R.* v. *Wood*, 5 E. & B. 49; S. C., *nom. R.* v. *Rose*, 24 L. J. M. C. 130; *Colonial Bank* v. *Willan*, L. R. 5 P. C. 417; *Ex p. Bradlaugh*, 3 Q. B. D. 509; nor do they apply to cases where the conviction has been obtained *by fraud*, as when a maltster had by collusion, and for the purpose of exonerating himself from penalties, under 7 & 8 Geo. 4, c. 52, procured the conviction of his servant; *R.* v. *Gillyard*, 12 Q. B. 527; *Colonial Bank* v. *Willan*, *supra*.

Distinction between *want of jurisdiction*

But there is a distinction between cases of a *want of jurisdiction* and of an *irregularity in exercising it*: in the former

Certiorari. and *irregularity* in exercising it.

case the *certiorari* lies notwithstanding the private clause, in the latter it is taken away; *R.* v. *Bristol & E. R. Co.*, 1 P. & D. 170, n., 11 A. & E. 202, n.; *R.* v. *Sheffield & M. R. Co.*, 11 A. & E. 194; *R.* v. *JJ. of Warwickshire*, 6 E. & B. 837; *Lalor* v. *Bland*, 8 Ir. C. L. R. 115; *R.* v. *Bradley*, 70 L. T. 379. In the first of these cases, indeed, the court went to an extent which seemed likely very much to confine the applicability of the writ of *certiorari*; they threw out the opinion that in cases where the proceeding was merely irregular the clause taking away the *certiorari* applied, and that where it was void there was no occasion for it, and the court would not grant it. However, in the second case, they were disposed to repudiate the application of this dilemma; at all events, in cases in which the proceeding sought to be removed is not void on the face of it, but is impugned by affidavit. And in *R.* v. *Cheltenham Commissioners*, 1 Q. B. 467, it was distinctly held that in a case of malversation such a clause would not operate.

Court not bound to entertain objection to jurisdiction on *certiorari*.

Though it has been endeavoured to show that the Queen's Bench has a right in case of *defect* of jurisdiction to entertain the objection founded upon such defect on affidavit, yet it must be observed that the court is not *bound* to do so upon *certiorari*; for (except where the application is by the party grieved; *R.* v. *JJ. of Surrey*, L. R. 5 Q. B. 466) a *certiorari*, as has already been pointed out, is a writ, not of right, but in the discretion of the court to grant or to refuse (but see the judgment in *Symonds* v. *Dimsdale*, 2 Exch. 533). And cases may occur in which, though there may have been a *defect* of jurisdiction, still the court may conceive that the interests of justice would be rather impeded than advanced by any summary interference on their part.

In *R.* v. *JJ. of Cambridgeshire*, 4 A. & E. 111, Patteson, J., said, "With regard to the objections in point of jurisdiction, I protest against its being understood that we can on every occasion look into extrinsic matter on motions to bring up orders by *certiorari*." "We must be cautious," said Coleridge, J. "not to exceed our jurisdiction; and when we find there is a court of appeal below, to which the matter brought before us on affidavit might have been carried, I think we are confined to objections appearing on the face of the order."

I do not understand these observations of the learned judges as importing that there are cases of a total defect of jurisdiction which the Queen's Bench has no power to enter-

Certiorari.

tain on affidavit, but that the leaning of the court is against doing so, except where public justice would be thereby furthered. See *R.* v. *JJ. of Denbighshire*, 1 B. & Ad. 616; *R.* v. *S. Holland Drainage Committee*, 1 P. & D. 79; *R.* v. *Manchester & L. R. Co.*, Id. 164. And that its disinclination to interfere is strong and uniform in cases where the legislature has provided another competent tribunal of appeal to which the question might be carried. See *R.* v. *JJ. of Middlesex*, 9 A. & E. 548, *last point.*

No *certiorari* where other tribunal of appeal.

In *Exp. Gifford*, Carrow's New Sess. Cas. 490, Williams, J., refused a *certiorari* on the ground that, if the recognizance sought to be removed were *void*, the applicant might treat it accordingly. It has not, however, been usual to refuse the writ for this reason, which, since the 11 & 12 Vict. c. 44, s. 2, prohibiting actions against justices for anything done under convictions or orders made without jurisdiction until they have been quashed, would scarcely be given in answer to an application to bring up a conviction or order to have it quashed for a defect of jurisdiction.

Certiorari not now refused because order, &c., void.

In *R.* v. *JJ. of Cambridgeshire*, 4 A. & E. 121, Lord Denman, in his judgment, suggested another ground on which an application upon affidavit might possibly be entertained. "I do not say," said his lordship, "that even *on certiorari* the court would not set aside an order if *manifest fraud* were shown. That may be so. In *R.* v. *JJ. of Somersetshire*, 1 D. & R. 443, where a *certiorari* was applied for to remove an appointment of overseers, on a suggestion of corrupt motives in the appointing magistrates, the court refused a rule, saying that the parties complaining might appeal to the sessions, or move for a criminal information. Notwithstanding that refusal, however, I do not say that, if corruption were clearly made out, the court would not, upon an application like this, declare the order invalidated by the fraud." This observation of his lordship is consistent with the principle laid down by De Grey, C.J., in the *Duchess of Kingston's Case*, *post*, vol. ii., where his lordship observed that "fraud is an extrinsic collateral act which vitiates the most solemn proceedings of courts of justice." Lord Coke says, "it avoids all judicial acts, ecclesiastical or temporal;" see *Shedden* v. *Patrick*, 1 Macq. 535: and the nullity of the judgment or decree obtained by it, though the judgment or decree has not been set aside or reversed, may be alleged in a collateral proceeding, see the opinion of Willes, J., in *R.* v. *Saddlers Co.*, 3 E. & E. 42, 10 H. L. C. 404. And see *R.* v.

Fraud may be shown on affidavit.

Certiorari.

Gillyard, 12 Q. B. 527, where, fraud being shown, a conviction obtained by means thereof was brought up by *certiorari* and quashed; and *Colonial Bank* v. *Willan*, L. R. 5 P. C. 417.

No *certiorari* on affidavit that jurisdiction exercised wrongly.

However, where the justice or justices *had* jurisdiction, the court will not grant a *certiorari* to remove the conviction or order upon a suggestion made by affidavit that they have exercised the jurisdiction wrongly; *R.* v. *JJ. of Cheshire*, 1 P. & D. 88, 8 A. & E. 398; *R.* v. *St. James's, Westminster*, 2 A. & E. 241; for that would be to substitute the court above for the tribunal to which the statute has committed the inquiry.

Case for opinion of High Court.

So, in effect, justices were often obliged to determine finally difficult points of law on questions of great general importance without having sufficient materials, or time, for the purpose, and they could not obtain for their guidance any assistance by way of opinion, or decision, from the superior courts; see *R.* v. *Dayman*, 7 E. & B. 672; *R.* v. *Paynter*, Id. 328. This defect in the law has been remedied by the Summary Jurisdiction Act, 1857, by which magistrates are enabled, and may be compelled, to state cases for the opinion of any of the superior courts, and also by the Summary Jurisdiction Act, 1879, s. 33, which gives a further power of stating a case for the opinion of the High Court.

20 & 21 Vict. c. 43.

S. 2

S. 2 of the Act of 1857 provides that after the hearing (*Bradshaw* v. *Vaughton*, 30 L. J. C. P. 93) and determination (*Davys* v. *Douglas*, 4 H. & N. 183) by a justice or justices of *any information or complaint which they have power to determine summarily* (*Townsend* v. *Read*, 10 C. B. N. S. 308; *Ex p. May*, 2 B. & S. 426; *Luton L. B.* v. *Davis*, 29 L. J. M. C. 173; *Diss U. S. Authority* v. *Aldrich*, 2 Q. B. D. 179; *Sandgate L. B.* v. *Pledge*, 14 Q. B. D. 730), either party to the proceeding may, if dissatisfied with the determination (*Davys* v. *Douglas*, *supra*), *as erroneous in point of law* (*Newman* v. *Baker*, 8 C. B. N. S. 200; *Taylor* v. *Smart*, 31 L. J. M. C. 52; *Hargreaves* v. *Taylor*, 32 Id. 111; *Hobbs* v. *Dance*, L. R. 9 C. P. 30; *Bonner* v. *Lushington*, 68 L. T. 91), apply in writing within three days (*Mayer* v. *Harding*, L. R. 2 Q. B. 410) to the justice or justices, to state and sign a case, setting forth the facts, and the grounds of the determination, for the opinion of any one of the superior courts of law.

Within three days after receiving the case the appellant

is to transmit it (*Banks* v. *Goodwin*, 3 B. & S. 548; *Pennell* v. *Uxbridge*, 31 L. J. M. C. 92; *Gloucester L. B.* v. *Gardner*, 32 Id. 66; *Aspinall* v. *Sutton*, (1894) 2 Q. B. 349) to the court named in his application, first giving (*Ashdown* v. *Curtis*, 31 L. J. M. C. 216; *Edwards* v. *Roberts*, (1891) 1 Q. B. 302) written notice of the appeal (*Crick* v. *Ockmand*, Q. B. 17 Jan. 1863), with a copy of the case so written and signed, to the other party. 20 & 21 Vict. c. 43.

As to these *conditions* to the right of appeal, see *Peacock* v. *The Queen*, 4 C. B. N. S. 264; *Morgan* v. *Edwards*, 5 H. & N. 415; *Syred* v. *Carruthers*, E. B. & E. 469; *Woodhouse* v. *Wood*, 29 L. J. M. C. 149; *G. N. R. Co.* v. *Inett*, 2 Q. B. D. 284.

By s. 3 the appellant on applying for the case (*Chapman* v. *Robinson*, 1 E. & E. 25; *Stanhope* v. *Thorsby*, L. R. 1 C. P. 423) must enter into a recognizance (*Stanhope* v. *Thorsby*, *supra*) and pay certain fees, and then, upon a condition being added to the recognizance for his appearance before the justices to abide by their judgment if unreversed, he will, if in custody, be entitled to his liberty. S. 3.

By s. 4 the justices, if of opinion that the application is merely frivolous (and provided it was not directed by the attorney-general), may refuse to state the case; but then by s. 5, the Queen's Bench (now represented by the Queen's Bench Division of the High Court) may grant a rule calling upon them and the respondent to show cause why they should not do so, and may make the rule absolute, or discharge it with or without costs. S. 4. S. 5.

By s. 6 the court to which the case is transmitted may hear and determine the questions of law arising upon it (*Governors of St. James's, Westminster* v. *Battersea, Overseers of*, 6 Jur. N. S. 100; *Jones* v. *Taylor*, 1 E. & E. 20, even on points not taken before the justices; *Knight* v. *Halliwell*, L. R. 9 Q. B. 412), and reverse, affirm, or amend the determination, or remit the matter to the justices with the opinion of the court, or may make such other order in relation to the matter (*Shackell* v. *West*, 29 L. J. M. C. 45), and such orders as to costs (*Budenberg* v. *Roberts*, L. R. 2 C. P. 292; *Garnett* v. *Backhouse*, L. R. 3 Q. B. 699), as to the court shall seem fit; and all such orders are final and conclusive on all parties. The same section provides that the justices are not to be liable for any costs of the appeal. (As to the costs of the appeal, see *Venables* v. *Hardman*, 1 E. & E. 79). Costs are granted S. 6. Costs of appeal.

20 & 21 Vict. c. 43.

even though the case be struck out on account of the failure of the appellant to transmit the case within three days; *G. N. R. Co.* v. *Inett*, 2 Q. B. D. 284, disapproving *Peacock* v. *The Queen*, 4 C. B. N. S. 264; and see *Crowther* v. *Boult*, 13 Q. B. D. 680.

S. 7. By s. 7 the case may be remitted to the justices for amendment; *Christie* v. *Guardians of St. Luke's*, 8 E. & B. 992; *Yorkshire Tire Co.* v. *Rotherham*, 4 C. B. N. S. 362; *Rider* v. *Wood*, 29 L. J. M. C. 1.

S. 8. By s. 8 the powers given to the superior court may be exercised by a judge of the court sitting in chambers in

S. 9. term time or in vacation. S. 9 authorises the justices to enforce any conviction or order affirmed, amended, or made by the superior court, and exempts them from liability by reason of any defect in such conviction or order; see

S. 10. *Waller* v. *G. W. R. Co.*, 29 L. J. M. C. 107. By s. 10 no *certiorari* or other writ is required for the removal of the conviction, order or determination, in reference to which

S. 11. the case is stated. S. 11 enables the superior courts to make rules for the practice and proceedings under the Act.

Ss. 13, 14. S. 13 relates to recognizances taken under the Act, and s. 14 deprives parties who appeal under the Act of their appeal to quarter sessions.

It has been held that the Act does not apply to a decision of justices called in to decide a dispute under the Friendly Societies Acts, it having been enacted by 18 & 19 Vict. c. 63, s. 40, that such a decision shall be binding and conclusive on all parties; see *Callaghan* v. *Dolwin*, L. R. 4 C. P. 288, overruling *R.* v. *Lambarde*, L. R. 1 Q. B. 388; but, where a magistrate refused to state a case upon a summons under s. 129 of the Metropolis Management Act, 1855, which provides that the decision "shall be final and conclusive," the Q. B. D. ordered the magistrate to state a case upon a question of law as to the construction of the section; *R.* v. *Bridge*, 24 Q. B. D. 609.

The fact of another appeal being given by statute does not exclude this Act; *Power* v. *Wigmore*, L. R. 7 C. P. 386.

42 & 43 Vict. c. 49, s. 33. By the Summary Jurisdiction Act, 1879, s. 33, it is further provided that "(1) Any person aggrieved (*Drapers Co.* v. *Hadder*, 57 J. P. 200) who desires to question a *conviction, order, determination, or other proceeding* (*Sandgate L. B.* v. *Pledge*, 14 Q. B. D. 730) of a court of summary jurisdiction on the ground that it is erroneous in point of law, or is in excess of the jurisdiction, may apply *to the*

court (*Ex p. Curtis*, 3 Q. B. D. 13) to state a special case setting forth the facts of the case and the grounds on which the proceeding is questioned, and if the court decline to state the case, may apply to the High Court for an order requiring the case to be stated. (2) The application shall be made and the case stated within such time and in such manner as may be from time to time directed by rules under this Act, and the case shall be heard and determined in manner prescribed by rules of court made in pursuance of" the Judicature Acts; and, subject as aforesaid, the 20 & 21 Vict. c. 43, above stated, "shall, so far as it is applicable, apply to any special case stated under this section, as if it were stated under that Act; provided that nothing in this section shall prejudice the statement of any special case under that Act." 42 & 43 Vict. c. 49, s. 33.

By Rule 18 of the Summary Jurisdiction Rules, 1886, made in pursuance of the above section, "an application to a court of summary jurisdiction" under that section "to state a special case shall be made in writing, and a copy left with the clerk of the court, and may be made at any time within seven clear days from the date of the proceeding to be questioned, and the case shall be stated within three calendar months after the date of the application, and after the recognizance shall have been entered into;" *Walker* v. *Delacombe*, 63 L. J. M. C. 77. The rules are set out *in extenso* in the Weekly Notes, October 9th, 1886. A court has no power to state a special case under s. 33 of the Act of 1879 unless a written application has been made, and a copy thereof left with the clerk, in accordance with the above rule; *S. Stafford. Waterworks Co.* v. *Stone*, 19 Q. B. D. 168; *Lockhart* v. *St. Albans*, 21 Id. 188; *Westmore* v. *Paine*, (1891) 1 Q. B. 482. The provision as to stating the case within three months is only directory; *Hughes* v. *Waxertree L. B.*, 58 J. P. 654. Rules.

LICKBARROW *v.* MASON.

IN B. R., CAM. SCACC., ET DOM. PROC.

[REPORTED 2 T. R. 63; 1 H. BL. 357; AND 6 EAST, 21 (1 R. R. 425).]

The vendee of goods may, by assignment of the bills of lading to a *bonâ fide* transferee, defeat the vendor's right to stop them *in transitu* in case of the vendee's insolvency.

The consignor may stop goods *in transitu* before they get into the hands of the consignee, in case of the insolvency of the consignee; but, if the consignee assign the bills of lading to a third person for a valuable consideration, the right of the consignor, as against such assignee, is divested. There is no distinction between a bill of lading indorsed in blank, and an indorsement to a particular person.

TROVER for a cargo of corn. Plea, the general issue. The plaintiffs, at the trial before Buller, J., at the Guildhall sittings after Easter Term, gave in evidence that Turing and Son, merchants at Middleburg, in the province of Zealand, on the 22nd July, 1786, shipped the goods in question on board the Endeavour for Liverpool, by the order and directions and on the account of Freeman, of Rotterdam. Holmes, as master of the ship, signed four several bills of lading for the goods in the usual form *unto orders or assigns*; two of which were indorsed by Turing and Son, in blank, and sent, on the 22nd July, 1786, by them to Freeman, together with an invoice of the goods, who afterwards received them; another of the bills of lading was retained by Turing and Son; and the remaining one was kept by Holmes. On the 25th July, 1786, Turing and Son drew four several bills of exchange upon Freeman, amounting in the whole to 477*l.*, in respect of the price of the goods, which were afterwards accepted by Freeman. On the 25th July, 1786, Freeman sent to the plaintiffs the two bills of lading, together with the invoice which he had received from Turing and Son, in the same state in which he received them, in order that the goods might be taken possession of and sold by them on Freeman's account;

and on the same day Freeman drew three sets of bills of exchange to the amount of 520*l.* on the plaintiffs, who accepted them, and have since duly paid them. The plaintiffs are creditors of Freeman to the amount of 542*l.* On the 15th August, 1786, and before the four bills of exchange drawn by Turing and Son on Freeman became due, Freeman became bankrupt: those bills were regularly protested, and Turing and Son have since been obliged, as drawers, to take them up and pay them. The price of the goods so shipped by Turing and Son is wholly unpaid. Turing and Son, hearing of Freeman's bankruptcy on the 21st August, 1786, indorsed the bill of lading so retained by them to the defendants, and transmitted it to them, with an invoice of the goods, authorising them to obtain possession of the goods on account of, and for the use and benefit of, Turing and Son, which the defendants received on the 28th August, 1786. On the arrival of the vessel with the goods at Liverpool, on the 28th August, 1786, the defendants applied to Holmes for the goods, producing the bill of lading, who thereupon delivered them, and the defendants took possession of them and for and on account of Turing and Son. The defendants sold the goods on account of Turing and Son, the proceeds whereof amounted to 557*l.* Before bringing this action the plaintiffs demanded the goods of the defendants, and tendered to them the freight and charges; but neither the plaintiffs nor Freeman have paid or offered to pay the defendants for the goods. To this evidence the defendants demurred; and the plaintiffs joined in demurrer.

This was argued in last Trinity Term by *Erskine* in support of the demurrer, and *Manly* against it; and again, on this day, by *Shepherd* in support of the demurrer, and *Bearcroft contra.*

Shepherd (*a*), after observing that, as the defendants were the agents of Turing and Son, the general question was to be considered as between the consignor and the indorsee of the bill of lading, contended, first, that, as between the vendor and vendee of goods, the former has a right to stop the goods *in transitu*, if the latter become insolvent before the delivery of them. And, secondly, that such right cannot be divested by the act of the

(*a*) As the second argument, with the judgment of the court, comprehended everything that was said upon the subject, the former argument is omitted.

(Argument.)

vendee's indorsing over the bill of lading to a third person. The first question has been so repeatedly determined, that it is scarcely necessary to cite authorities in support of it. (The plaintiff's counsel admitted the position.) Then, in order to determine the second, it is material to consider the nature of a bill of lading. A bill of lading cannot by any means be construed into a contract on the part of the consignor to deliver the goods mentioned in it to the consignee; it is only an undertaking by the captain to deliver the goods to the order of the shipper. As between the consignor and consignee, it is a bare authority to the captain to deliver, and to the consignee to receive them. That this is the true nature of a bill of lading appears from all the writers upon mercantile law, as Molloy, Postlethwayte, and Beawes. If it be any sort of instrument, it must be contended to amount to a contract by the consignor to deliver the goods to the consignee; but no such contract arises upon it, because the consignor is not even a party to it; and no action could be framed upon it against the consignor. Then, if it be only a bare authority to the one to carry, and to the other to receive the goods, the consignee cannot transfer a greater right than he has; neither can the right of the consignor be divested by the act of the consignee. If a bill of lading be a negotiable instrument, and convey an indefeasible property in the goods, it must be so by the custom of merchants; but such custom is not to be found in any of the books upon the subject. There are cases which establish a contrary doctrine, in which the courts have held that the rights of the assignees are the same as the rights of the original consignees. It cannot, indeed, be disputed but that, as between the consignee and the indorsee, the indorsement of a bill of lading is a complete transfer of the property which the consignee has in it; but the cases go no further. *Snee* v. *Prescot* (*b*) is precisely similar to the present. There the bill of lading was indorsed in blank, and afterwards indorsed over by the consignee to his assignees: those assignees were some of the defendants in that suit, and they stood in the same situation with the present plaintiffs. In that case, before the goods arrived, and after the indorsement of the bill of lading by the consignee, the consignee

(*b*) 1 Atk. 245.

having become bankrupt, the goods were stopped *in transitu* by order of the consignor, by an indorsement of the bill of lading, which was left with him, to another of the defendants; there Lord Hardwicke decreed that the indorsement did not absolutely transfer the property in the goods in the event of the consignee's becoming bankrupt before the arrival of the goods; that as the goods had been stopped *in transitu*, by order of the consignor, he had a right to detain them till the sum which he was in advance to the consignee on account of them was paid; and that the surplus arising from the produce of the goods should be paid to the indorsees of the consignee. Now, unless Lord Hardwicke had been of opinion that the indorsement by the consignee did not absolutely transfer the property in the goods, he would have decreed that the indorsees should have been first paid the money which they had advanced upon the credit of the bill of lading, and then that the surplus should have been paid to the consignor; but instead of that he gave a priority to the consignor. This doctrine is not only laid down in a court of equity, but confirmed in a court of law in *Savignac* v. *Cuff* (*c*), where the same question was tried between the same parties as at present. There Salvetti, a merchant in Italy, consigned a quantity of skins to Lingham, residing in London, and sent him a bill of lading indorsed in blank. Lingham, the consignee, indorsed it to Savignac for valuable consideration, at the invoice price, showing him at the same time the letters of advice and the bills of parcels. The consignee not accepting the bills of exchange which the consignor had drawn upon him for the amount of the goods, the consignor indorsed the bill of lading remaining in his hands to Cuff, the defendant, with orders to seize the goods before they got into the hands of the consignee, which he did; and the action was brought against him by the indorsee of the consignee to recover the value of the goods. Wallace, Solicitor-General, there argued that by the indorsement of the bill of lading the property was transferred. But Lord Mansfield was of opinion that the consignor had a right to stop the goods *in transitu* in the case of the insolvency of the consignee, and that the plaintiff, standing in the same situation with the original consignee, had lost his lien. Lord Mansfield was first of opinion,

(*c*) Sittings at Guildhall, *cor.* Lord Mansfield, Tr. 1778.

(Argument.)

that there was a distinction between bills of lading indorsed in blank and otherwise; but he afterwards abandoned that ground. But in that case, as the consignor had in point of fact received 150*l.* from the consignee, there was a verdict for the plaintiff for that sum. So that the result of the verdict was, that the consignor was entitled, under those circumstances, to retain all the goods consigned, deducting only the sum which he had actually received for part. Both these cases establish the construction of the bill of lading contended for: and it is to be observed that the verdict in the latter was acquiesced in. And indeed to construe it otherwise would be opening a great door to fraud, and would be placing the indorsee of a consignee of a bill of lading in a better situation than the consignee himself in case of his insolvency. Suppose the consignee assign over to a third person, who becomes insolvent before the delivery of the goods, such assignee would then, notwithstanding his insolvency, have a right to get the goods into his possession; for, if the act of indorsement absolutely divests the property out of the consignor, he can never afterwards get possession of the goods again; or else this consequence would follow, that the vendor would have a right to seize the goods *in transitu* till the indorsement by which his right would be divested, and that by the act of insolvency of the indorsee it would be revested. This has never been considered to be the same sort of instrument as a bill of exchange; they are not assimilated to each other in any treatise upon the subject: nay, bills of exchange are said to be *sui juris*. In their nature they are different: a bill of exchange always imports to be for value received; but the very reverse is the case with a bill of lading. For in few, if any, instances, is the consignor paid for his goods till delivery; and bills of exchange were first invented for the purpose of remitting money from one country to another, which is not the case with bills of lading. As to *Wright* v. *Campbell* (*d*), which may be cited on the other side, it will perhaps be said that the court awarded a new trial only on the ground of fraud; but *non constat* that, if there had been no suspicion of fraud, a new trial would not have been granted. So that the law cannot be considered to have been decided in that

(*d*) 4 Burr. 2046.

case; for when a new trial is moved for, if the facts warrant it, the court awards a new trial without going into the law arising upon those facts. In such cases the law is still left open to be considered on a different finding; since it would be nugatory to determine the point of law, which may not perhaps be applicable to the facts when found. At the most, there is only an inference of law to be drawn from that case, which is not sufficient to overturn established principles. Besides, this case is distinguishable from that; for there it appeared that the consignee was the factor of the consignor, and as such might bind his principal by a sale.

Bearcroft, contra.—The question is whether the *bonâ fide* indorsement for valuable consideration of a bill of lading to a third person is not an absolute transfer of the whole property? This question is of infinite importance to the mercantile world, and has never yet been put in a way to receive a solemn decision in a court of law. For at most it has only been considered in a court of equity upon equitable principles, or at *nisi prius* in a case the correct state of which is to be doubted. The form of the bill of lading is material to be attended to in determining this case; it is, that the goods are to be delivered "*to order or to assigns*;" therefore, on the very face of the instrument, there is an authority to the captain to deliver them to the consignee *or to his assigns*; and the question here is, who are his *assigns*? As between the consignor and consignee the rule contended for is not now to be disputed, since it has been confirmed by so many authorities; though, perhaps, it were much to be wished that it had never been established: but there will be danger in extending it farther. With respect to *Snee* v. *Prescot*, when it is considered who were the parties to the cause, in what court, and upon what principles it was decided, it will not be found sufficient to determine the present case. The actors, the plaintiffs, were not the innocent purchasers of a bill of lading; they were the assignees of a bankrupt, and prayed by their bill to get possession of the goods, notwithstanding they had not paid for them. But this is a case between the consignor and third persons who have paid valuable consideration for the goods. That case was likewise in a court of equity, where the leading principle is, *that he who seeks equity, must first do what is equitable*; there too the decision

(Argument.)

was founded, in some measure, on the custom of the Leghorn trade, and the construction of the statute relating to mutual credit; so that there were united a number of circumstances which, taken altogether, induced Lord Hardwicke's decree, and which do not exist in the present case. And it is to be remarked that Lord Hardwicke, thinking it a harsh demand against the consignors, said, "he would lay hold on anything to save the advantage" which the consignors had, by regaining the possession of the goods before they got into the hands of the indorsees of the consignee. Then, as to *Savignac* v. *Cuff*, that had not even the authority of a *nisi prius* determination. Lord Mansfield gave no opinion upon the question; for though he said there was no doubt but that, as between vendor and vendee, the former might seize the goods *in transitu*, if the latter became insolvent before they were delivered, yet there he stopped: so that the inclination of his mind may be presumed to have been against extending the rule. And, after all, the whole circumstances of that case were left to the consideration of a jury. Since Lord Raymond's time (*e*) it has been taken to be clear and established law that a general indorsement of a bill of lading does transfer the property. And Holt, C.J., then said, "that a consignee of a bill of lading has such a property as that he may assign it over." It has now been contended that the right of the consignor ought not to be divested by the act of the consignee: but it is not by the act of the consignee alone; for the consignor has by his own act enabled the consignee to defeat his right. If he had been desirous of restraining the negotiability of the bill of lading, instead of making a general indorsement, he should have made a special indorsement to his own use. And then the holder of the bill of lading would have been considered as a trustee for the consignor. The custom of merchants has established that the delivery of a bill of lading transfers the whole property; *Evans* v. *Marlett*, 1 Ld. Raym. 271; *Wright* v. *Campbell*, 4 Burr. 2046; and *Caldwell* v. *Ball*, 1 T. R. 205 (*f*). Then it has been said that a bill of lading is not transferable like a bill of exchange: but the custom of merchants has made that transferable which in its nature perhaps is not so; and the cases above referred

(*e*) 1 Ld. Raym. 271. (*f*) See *Hibbert* v. *Carter*, 1 T. R. 745.

to decide that point. Though a new trial in *Wright* v. *Campbell* was granted on a suspicion of fraud, and the law was not expressly adjudged; yet from what was said by the court it may be collected that no new trial would have been awarded, if no fraud had existed; and the opinion of Lord Mansfield, as far as it goes, is expressly in point. But, above all arguments, public convenience ought to have a considerable influence in the decision of this question. By the constant course and the universal consent and opinion of merchants, bills of lading are negotiable; it is highly convenient to trade that they should be so; and, if this case should be determined against the plaintiffs, one of the principal currents of trade will be stopped: besides, it will be a hardship on an innocent vendee.

Shepherd, in reply.—Though there may be some hardship on the vendee if he be to suffer, yet the hardship would be equally great on the vendor, who would by a decision against him be compelled to deliver up possession of his goods, though at the time of the delivery he knew that he should not receive any consideration for them. But convenience requires that, if one of these two innocent persons must suffer, the loss should be sustained by the consignee. For when a vendor consigns his goods, he knows that by the general law he has a right to stop them *in transitu*, if the consignee become insolvent before delivery. But when an indorsee takes an assignment of a bill of lading, he takes it with the knowledge of, and subject to, that general right which the vendor has. Though *Snee* v. *Prescot* was determined in a court of equity, yet that court could not alter the effect and nature of a legal instrument; which it must have done in that case if the right of an indorsee is to be preferred to the consignor. Suppose A. sends a bill of lading of goods to B., and the goods themselves are in fact never sent out of his possession; if the indorsement of the bill of lading can be said to transfer the property, the indorsee would have a right to recover the goods as against the original consignor, who had never parted with the possession of them. So that the rule contended for would not only divest the right which the consignor has to seize the goods *in transitu*, but would also compel him to part with his goods, without receiving any consideration, although he

had never relinquished his possession. The meaning of the dictum of Lord *Holt*, in *Evans* v. *Marlett*, is only that the consignee may assign over that right which he has. *Caldwell* v. *Ball* was merely a question between two solvent indorsees, both of whom had an equitable title; and that case only decided that he who first got possession of one of the bills of lading was entitled to the goods; and there, too, the court determined in favour of him who had the possession.

Ashhurst, J.—As this was a mercantile question of very great importance to the public, and had never received a solemn decision in a court of law, we were for that reason desirous of having the matter argued a second time, rather than on account of any great doubts which we entertained on the first argument. We may lay it down as a broad general principle, that, *wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it* (*g*). If that be so, it will be a strong and leading clue to the decision of the present case. It has been argued that it would be very hard on a consignor, who had received no consideration for his goods, if he should be obliged to deliver them up in case of the insolvency of the consignee, and come in as a creditor under his commission for what he can get. That is certainly true: but it is a hardship which he brings upon himself. When a man sells goods, he sells them on the credit of the buyer: if he delivers the goods, the property is altered, and he cannot recover them back again, though the vendee immediately become bankrupt. But where the delivery is to be at a distant place, as between the vendor and vendee, the contract is ambulatory till delivery; and therefore, in case of the insolvency of the vendee in the meantime, the vendor may stop the goods *in transitu*. But, as between the vendor and third persons, the delivery of a bill of lading is a delivery of the goods themselves; if not, it would enable the consignee to make the bill of lading an instrument of fraud. The assignee of a bill of lading trusts to the indorsement; the instrument is in its nature transferable; in this respect, therefore,

(*g*) See *Swan* v. *N. British Australasian Co.*, 7 H. & N. 603, 2 H. & C. 175; *Foster* v. *Green*, 7 H. & N. 881; *Udell* v. *Atherton*, Id. 786; *Collingwood* v. *Berkeley*, 15 C. B. N. S. 145; *Babcock* v. *Lawson*, 4 Q. B. D. 394, 400.

this is similar to the case of a bill of exchange. If the consignor had intended to restrain the negotiability of it, he should have confined the delivery of the goods to the vendee only: but he has made it an indorsable instrument. So it is like a bill of exchange; in which case, as between the drawer and payee, the consideration may be gone into, yet it cannot between the drawer and indorsee; and the reason is, because it would be enabling either of the original parties to assist in a fraud. The rule is founded purely on principles of law, and not on the custom of merchants. The custom of merchants only establishes that such an instrument may be indorsed; but the effect of that indorsement is a question of law, which is, that as between the original parties the consideration may be inquired into; though, when third persons are concerned, it cannot. This is also the case with respect to a bill of lading. Though the bill of lading in this case was at first indorsed in blank, it is precisely the same as if it had been originally indorsed to this person; for, when it was filled up with his name, it was the same as if made to him only. Then what was said by Lord Mansfield in *Wright* v. *Campbell* goes the full length of this doctrine: "If the goods be *bonâ fide* sold by the factor at sea (as they may be where no other delivery can be given), it will be good notwithstanding the 21 Jac. 1, c. 19. The vendee shall hold them by virtue of the bill of sale, though no actual possession is delivered: and the owner can never dispute with the vendee, because the goods were sold *bonâ fide*, and by the owner's own authority." Now in this case the goods were transferred by the authority of the vendor, because he gave the vendee a power to transfer them; and being sold by his authority, the property is altered. And I am of opinion that this right of the assignee could not be divested by any subsequent circumstances.

Buller, J.—This case has been very fully, very elaborately, and very ably argued, both now and last term; and though the former arguments on the part of the defendant did not convince my mind, yet they staggered me so much that I wished to hear a second argument. Before I consider the effect of the authorities which have been cited, I will take notice of one circumstance in this case which is peculiar to it; not for the purpose of founding

(Buller, J.)

my judgment upon it, but because I would not have it supposed in any future case that it passed unnoticed, or that it may not hereafter have any effect which it ought to have. In this case it is stated that there were four bills of lading: it appears by the books on this subject, that according to the common course of merchants there are only three; one of which is delivered to the captain of the vessel, another is transmitted to the consignee, and the third is retained by the consignor himself, as a testimony against the captain in case of any loose dealing. Now, if it be at present the established course among merchants to have only three bills of lading, the circumstance of there being a fourth in this case might, if the case had not been taken out of the hands of the jury by the demurrer, have been proper for their consideration. I am aware that that circumstance appears in the bill, on which is written, "in witness the master hath affirmed to four bills of lading, all of this tenor and date." But we all know that it is not the practice either of persons in trade or in the profession to examine very minutely the words of an instrument which is partly printed and partly written; and, if we only look at the substance of such an instrument, this may be the means of enabling the consignee to commit a fraud on an innocent person. Then how stood the consignee in this case? He had two of the bills of lading, and the captain must have a third; so that the assignee could not imagine that the consignor had it in his power to order a delivery to any other person. But I mean to lay this circumstance entirely out of my consideration in the present case, which I think turns wholly on the general question; and I make the question even more general than was made at the bar, namely, *whether a bill of lading is by law a transfer of the property?* (*h*). This question has been argued upon authorities: and before I take notice of any particular objections which have been made, I will consider those authorities. The principal one relied on by the defendants is *Snee* v. *Prescot*. Now, sitting in a court of law, I should think it quite sufficient to say that that was a determination in a court of equity, and founded on equitable principles. The leading maxim in that court is, that *he who seeks equity must first do*

(*h*) See, on this question, *Sewell* v. *Burdick*, 10 App. Cas. 74.

equity. I am not disposed to find fault with that determination as a case in equity; but it is not sufficient to decide such a question as that now before us. Lord Hardwicke has, with his usual caution, enumerated every circumstance which existed in the case: and indeed, he has been so particular, that, if the printed note of it be accurate, which I doubt, it is not an authority for any case which is not precisely similar to it. The only point of law in that case is upon the forms of the bills of lading; and Lord Hardwicke thought there was a distinction between bills of lading indorsed in blank, and those indorsed to particular persons: but it was properly admitted at the bar that that distinction cannot now be supported. Thus the matter stood till within these thirty years; since that time the commercial law of this country has taken a very different turn from what it did before. We find in *Snee* v. *Prescot* that Lord Hardwicke himself was proceeding with great caution, not establishing any general principle, but decreeing on all the circumstances of the case put together. Before that period we find that in courts of law all the evidence in mercantile cases was thrown together; they were left generally to a jury, and they produced no established principle. From that time we all know the great study has been to find some certain general principles, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard the principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration at the strength and stretch of the human understanding. And I should be very sorry to find myself under a necessity of differing from any case on this subject which has been decided by Lord Mansfield, who may be truly said to be the founder of the commercial law of this country. I hope to show, before I have finished my judgment, that there has been no inconsistency in any of his determinations: but if there had, if I could not reconcile an opinion which he had delivered at *nisi prius* with his judgment in this court, I should not hesitate to adopt the latter in preference to the former; and it is but just to say, that no judge ever sat here more ready than he was to correct an opinion suddenly given at *nisi prius*. First, as to *Wright* v. *Campbell*, that was a very solemn opinion delivered in

(Buller, J.)

this court. In my opinion that is one of the best cases that we have in the law on mercantile subjects. There are four points in that case, which Lord Mansfield has stated so extremely clear that they cannot be mistaken: The first is, what is the case as between the owner of the goods and the factor; the second, as between the consignor and the assignee of the factor with notice; thirdly, as between the same parties without notice; and, fourthly, as to the nature of a bill of sale of goods at sea in general. It is to be recollected that *Wright* v. *Campbell* was decided by the judge at *nisi prius* upon the ground that the bill of lading transferred the whole property at law: and, when it came before this court on a motion for a new trial, Lord Mansfield confirmed that opinion: but a new trial was granted on a suspicion of fraud; therefore it is fair to infer, that, if there had been no fraud, the delivery of the bill of lading would have been final. If there be fraud, it is the same as if the question were tried between the consignor and the original consignee. According to a note of *Wright* v. *Campbell*, which I took in court, Lord Mansfield said that, since the case in Ld. Raym., it had always been held that the delivery of a bill of lading transferred the property at law; if so, every exception to that rule arises from equitable considerations which have been adopted in courts of law. The next case is *Savignac* v. *Cuff*, the note of which is too loose to be depended upon: but there is a circumstance in that case which might afford ample ground for the decision; for I cannot suppose that Lord Mansfield had forgotten the doctrine which he laid down in this court in *Wright* v. *Campbell*. There he observed very minutely on what did not appear at the trial, that no letters were produced, and that no price was fixed for the goods: but in *Savignac* v. *Cuff*, the plaintiff had not only the bills of lading and the invoice, but he had also the letters of advice, from which the real transaction must have appeared; and, if it appeared to him that Selvetti had not been paid for the goods, that might have been a ground for the determination. *Hunter* v. *Beal* (*i*) does not come up to the point now in dispute; it only determines what is admitted, that, as between the vendor and vendee, the property is not altered till delivery of

(*i*) Sittings after Trin. 1785, at Guildhall, before Lord Mansfield, C.J.

the goods. With respect to *Stokes* v. *La Riviere* (*k*), perhaps there may be some doubt about the facts of it: however, it was determined upon a different ground; for the goods were in the hands of an agent for both parties: that case, therefore, does not impeach the doctrine laid down in *Wright* v. *Campbell*. It has been argued at the bar that it is impossible for the holder of a bill of lading to bring an action on it against the consignor; perhaps that argument is well founded; no special action on the bill of lading has ever been brought (*l*); for, if the bill of lading transfer the property, an action of trover against the captain for non-delivery, or against any other person who seizes the goods, is a proper form of action. If an action be brought by a vendor against a vendee, between whom a bill of lading has passed, the proper action is for goods sold and delivered. Then it has been said that no case has yet decided that a bill of lading does transfer the property: but in answer to that it is to be observed that all the cases upon the subject—*Evans* v. *Marlett*, *Wright* v. *Campbell*, and *Caldwell* v. *Ball*, and the universal understanding of mankind—preclude that question. The cases between the consignor and consignee have been founded merely on principles of equity, and have followed up the principle of *Snee* v. *Prescot*; for, if a man has bought goods and has not paid for them, and cannot pay for them, it is not equitable that he should prevent the consignor from getting his goods back, if he can do it before they are in fact delivered. There is no weight in the argument of hardship on the vendor: at any rate that is a bad argument in a court of law; but in fact there is no hardship on him, because he has parted with the legal title to the consignee. An argument was used with respect to the difficulty of determining at what time a bill of lading shall be said to transfer the property, especially in a case where the goods were never sent out of the merchant's warehouse at all: the answer is, that under those circumstances a bill of lading could not possibly exist, if the transaction were a fair one; for a bill of lading is an acknowledgment, by the captain, of having received the goods on board his ship: therefore it would be a fraud in the captain to sign such a bill of lading, if he had not received

(*k*) Hil. 25 G. 3.

(*l*) As to the right to sue now given by statute, see *post*, *in notâ*, p. 739.

(Buller, J.)

goods on board; and the consignee would be entitled to his action against the captain for the fraud. As the plaintiff in this case has paid a valuable consideration for the goods, and there is no colour for imputing fraud or notice to him, I am of opinion that he is entitled to the judgment of the Court.

Grose, J.—After this case has been so elaborately spoken to by my brethren, it is not necessary for me to enter fully into the question, as I am of the same opinion with them. But I think that the importance of the subject requires me to state the general grounds of my opinion. I conceive this to be a mere question of law, whether, as between the vendor and the assignee of the vendee, the bill of lading transfers the property. I think that it does. With respect to the question as between the original consignor and consignee, it is now the clear, known, and established law that the consignor may seize the goods *in transitu*, if the consignee become insolvent before the delivery of them. But that was not always the law. The first case of that sort was *Wiseman* v. *Vandeputt* in Chancery (*m*), when, on the first hearing, the Chancellor ordered an action of trover to be brought, to try whether the consignment vested the property in the consignees; and it was then determined in a court of law that it did; but the Court of Equity thought it right to interpose and give relief: and since that time it has always been considered, as between the original parties, that the consignor may seize the goods before they are actually delivered to the consignee in case of the insolvency of the consignee. But this is a question between the consignor and the assignee of the consignee, who do not stand in the same situation as the original parties. A bill of lading carries credit with it; the consignor by his indorsement gives credit to the bill of lading, and, on the faith of that, money is advanced. The first case that I find, where an attempt was made to introduce the same law between the consignor and the indorsee of the consignee, is *Snee* v. *Prescot*: but as my brother Buller has already made so many observations on that case, it would be but repetition in me to go over them again, as I entirely agree with him in them all, as well as in those

(*m*) 2 Vern. 203.

which he made on the other cases. Therefore I am of opinion that there should be judgment for the plaintiff.

Judgment for the plaintiff (*n*).

MASON AND OTHERS *v.* LICKBARROW AND OTHERS, IN THE EXCHEQUER CHAMBER, IN ERROR. (*o*)

The defendants in the original action, having brought a writ of error in the Exchequer Chamber, after two arguments, the following judgment of that court was then delivered by

Lord Loughborough.—This case comes before the court on a demurrer to the evidence; the general question, therefore, is, whether the facts offered in evidence by the plaintiffs in the action are sufficient to warrant a verdict in their favour?

The facts are shortly these: On the 22nd July, 1786, Messrs. Turings shipped on board the ship Endeavour, of which Holmes was master, at Middleburgh, to be carried to Liverpool, a cargo of goods by the order and directions and on the account of Freeman, of Rotterdam, for which, of the same date, bills of lading were signed on behalf of the master, to deliver the goods at Liverpool, specified to be shipped by Turings to order or to assigns. On the same 22nd July, two of the bills of lading, indorsed in blank by Turings, were transmitted by them, together with an invoice of the goods, to Freeman at Rotterdam, and were duly received by him, that is, in the course of post, one of the bills being retained by Turings. I take no notice of there being four bills of lading, because on that circumstance I lay no stress. On the 25th July, bills of exchange for a sum of 477*l.*, being the price of the goods, were drawn by Turings, and accepted by Freeman at Rotterdam; and Freeman on the same day transmitted to the plaintiffs in the action, merchants at Liverpool, the bills of lading and invoice, which he had received

(*n*) This judgment was afterwards reversed in the Exch. Cham.; see *Mason* v. *Lickbarrow*, which follows. But, the record being afterwards removed into the H. L., a *venire de novo* was awarded in June, 1793; see *post*, p. 719.

(*o*) They held that, where the consignee of goods becomes insolvent, the consignor may stop them *in transitu* before the consignee gains possession; and that in such cases the consignor may stop the goods *in transitu*, though the consignee assign the bills of lading to a third person for a valuable consideration, the right of the consignor not being divested by the assignment. But this judgment was reversed on account of an informality (see *post*, p. 701), and the latter point is now settled otherwise.

(Lord Loughborough.)

from Turings, in order that the goods might be sold by them on his account; and of the same date drew upon them bills to the amount of 520*l.*, which were duly accepted, and have since been paid by them; and for which they have never been reimbursed by Freeman, who became a bankrupt on the 15th August following. The bills accepted by Freeman, for the price of the goods shipped by Turings, had not become due on the 15th August, but on notice of his bankruptcy they sent the bill of lading which remained in their custody to the defendants at Liverpool, with a special indorsement to deliver to them and no other: which the defendants received on the 28th August, 1786, together with the invoice of the goods and a power of attorney. The ship arrived at Liverpool on the 28th August, and the goods were delivered by the master, on account of Turings, to the defendants, who, on demand and tender of freight, refused to deliver the same to the plaintiffs.

The defendants, in this case, are not stakeholders, but they are in effect the same as Turings, and the possession they have got is the possession of Turings. The plaintiffs claim under Freeman; but, though they derive a title under him, they do not represent him, so as to be answerable for his engagements; nor are they affected by any notice of those circumstances which would bar the claim of him or his assignees. If they have acquired a legal right, they have acquired it honestly; and if they have trusted to a bad title, they are innocent sufferers. The question then is, whether the plaintiffs have a superior legal title to that right which, on principles of natural justice, the original owner of the goods not paid for has to maintain that possession of them, which he actually holds at the time of the demand?

The argument on the part of the plaintiffs asserts that the indorsement of the bill of lading by the Turings is an assignment of the property in the goods to Freeman, in the same manner as the indorsement of a bill of exchange is an assignment of the debt: that Freeman could assign over that property, and that by delivery of the bill of lading to the plaintiffs for valuable consideration, they have a just right to the property conveyed by it, not affected by any claim of the Turings of which they had no notice. On the part of the defendant it is

argued that the bill of lading is not in its nature a negotiable instrument; that it more resembles a *chose in action*; that the indorsement of it is not an assignment that conveys any interest, but a mere authority to the consignee to receive the goods mentioned in the bill; and therefore it cannot be made a security by the consignee for money advanced to him; but the person who accepted it must stand in the place of the consignee, and cannot gain a better title than he had to give. As these propositions on either side seem to be stated too loosely, and as it is of great importance that the nature of an instrument so frequent in commerce as a bill of lading should be clearly defined, I think it necessary to state my ideas of its nature and effect:—

A bill of lading is the written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight. The contract in legal language is a contract of bailment; 2 Ld. Raym. 912. In the usual form of the contract the undertaking is to deliver to the order or assigns of the shipper. By the delivery on board, the ship-master acquires a special property to support that possession which he holds in the right of another, and to enable him to perform his undertaking. The general property remains with the shipper of the goods until he has disposed of it by some act sufficient in law to transfer property. The indorsement of the bill of lading is simply a direction of the delivery of the goods. When this indorsement is in blank, the holder of the bill of lading may receive the goods, and his receipt will discharge the ship-master; but the holder of the bill, if it came into his hands casually without any just title, can acquire no property in the goods. A special indorsement defines the person appointed to receive the goods; his receipt or order would, I conceive, be a sufficient discharge to the ship-master; and in this respect, I hold the bill of lading to be assignable. But what is it that the indorsement of the bill of lading assigns to the holder or the indorsee? a right to receive the goods and to discharge the ship-master, as having performed his undertaking. If any further effect be allowed to it, the possession of a bill of lading would have greater force than the actual possession of the goods. Possession of goods is *prima facie* evidence of title; but that possession may be precarious, as of a deposit;

(Lord Loughborough.)

it may be criminal, as of a thing stolen; it may be qualified, as of things in the custody of a servant, carrier, or a factor. Mere possession, without just title, gives no property; and the person to whom such possession is transferred by delivery must take his hazard of the title of his author. The indorsement of a bill of lading differs from the assignment of a *chose in action*, that is to say, of an obligation, as much as debts differ from effects. Goods in pawn, goods bought before delivery, goods in a warehouse, or on ship-board, may all be assigned. The order to deliver is an assignment of the thing itself, which ought to be delivered on demand, and the right to sue if the demand is refused is attached to the thing. The case in 1 Ld. Raym. 271 was well determined on the principal point, that the consignee might maintain an action for the goods, because he had either a special property in them, or a right of action on the contract: and I assent to the *dictum*, that he might assign over his right. But the question remains, What right passes by the first indorsement, or by the assignment of it? An assignment of goods in pawn, or of goods bought but not delivered, cannot transmit a right to take the one without redemption, and the other without payment of the price. As the indorsement of a bill of lading is an assignment of the goods themselves, it differs essentially from the indorsement of a bill of exchange; which is the assignment of a debt due to the payee, and which, by the custom of the trade, passes the whole interest in the debt so completely, that the holder of the bill for a valuable consideration without notice is not affected even by the crime of the person from whom he received the bill.

Bills of lading differ essentially from bills of exchange in another respect. Bills of exchange can only be used for one given purpose, namely, to extend credit by a speedy transfer, of the debt which one person owes another, to a third person. Bills of lading may be assigned for as many different purposes as goods may be delivered. They may be indorsed to the true owner of the goods by the freighter, who acts merely as his servant. They may be indorsed to a factor to sell for the owner. They may be indorsed by the seller of the goods to the buyer. They are not drawn in any certain form. They some-

times do and sometimes do not express on whose account and risk the goods are shipped. They often, especially in time of war, express a false account and risk. They seldom, if ever, bear upon the face of them any indication of the purpose of the indorsement. To such an instrument, so various in its use, it seems impossible to apply the same rules as govern the indorsement of bills of exchange. The silence of all authors treating of commercial law is a strong argument that no general usage has made them negotiable as bills. Some evidence appears to have been given in other cases (*o*) that the received opinion of merchants was against their being so negotiable. And, unless there was a clear, established, general usage to place the assignment of a bill of lading upon the same footing as the indorsement of a bill of exchange, that country which should first adopt such a law would lose its credit with the rest of the commercial world. For the immediate consequence would be to prefer the interest of the resident factors and their creditors to the fair claim of the foreign consignor. It would not be much less pernicious to its internal commerce; for every case of this nature is founded in a breach of confidence, always attended with a suspicion of collusion, and leads to a dangerous and false credit, at the hazard and expense of the fair trader. If bills of lading are not negotiable as bills of exchange, and yet are assignable, what is the consequence? That the assignee by indorsement must inquire under what title the bills have come to the hands of the person from whom he takes them. Is this more difficult than to inquire into the title by which the goods are sold or assigned? In *Hartop* v. *Hoare* (*p*) jewels deposited with a goldsmith were pawned by him at a banker's. Was there any imputation, even of neglect, in a banker trusting to the apparent possession of jewels by a goldsmith? Yet they were the property of another, and the banker suffered the loss. It is received law, that a factor may sell, but cannot pawn, the goods of his own consignor; *Patterson* v. *Tash*, 2 Str. 1178. The person, therefore, who took an assignment of goods from a factor in security, could not retain them against the claim of the consignor; and yet, in this case, the factor might

(*o*) *Snee* v. *Prescot*, 1 Atk. 245; *Fearon* v. *Bowers*, 1 H. Bl. 364, n.; see *post*, p. 696.

(*p*) 2 Str. 1187; 1 Wils. 8.

(Lord LOUGHBOROUGH.)

have sold them and embezzled the money. It has been argued, that it is necessary in commerce to raise money on goods at sea, and this can only be done by assigning the bills of lading. Is it then nothing, that an assignee of a bill of lading gains by the indorsement? He has all the right the indorser could give him: a title to the possession of the goods when they arrive. He has a safe security, if he has dealt with an honest man. And it seems as if it could be of little utility to trade, to extend credit by affording facility to raise money by unfair dealing. Money will be raised on goods at sea, though bills of lading should not be negotiable, in every case where there is a fair ground of credit: but a man of doubtful character will not find it so easy to raise money at the risk of others.

The conclusions which follow from this reasoning, if it be just, are—1st. That an order to direct a delivery of goods indorsed on a bill of lading is not equivalent, nor even analogous, to the assignment of an order to pay money by the indorsement of a bill of exchange. 2ndly. That the negotiability of bills, and promissory notes, is founded on the custom of merchants, and positive law; but, as there is no positive law, neither can any custom of merchants apply to such an instrument as a bill of lading. 3rdly. That it is, therefore, not negotiable as a bill, but assignable; and passes such right, and no better, as the person assigning had in it.

This last proposition I confirm by the consideration, that actual delivery of the goods does not of itself transfer an absolute ownership in them, without a title of property; and that the indorsement of a bill of lading, as it cannot in any case transfer more right than the actual delivery, cannot in every case pass the property; and I therefore infer, that the mere indorsement can in no case convey an absolute property. It may, however, be said that, admitting an indorsement of a bill of lading does not in all cases import a transfer of the property of the goods consigned, yet, where the goods, when delivered, would belong to the indorsee of the bill, and the indorsement accompanies a title of property, it ought in law to bind the consignor, at least with respect to the interest of third parties. This argument has, I confess, a very specious appearance. The

whole difficulty of the case rests upon it; and I am not surprised at the impression it has made, having long felt the force of it myself. A fair trader, it is said, is deceived by the misplaced confidence of the consignor. The purchaser sees a title to the delivery of the goods placed in the hands of the man who offers them to sale. Goods not arrived are every day sold without any suspicion of distress, on speculations of the fairest nature. The purchaser places no credit in the consignee, but in the indorsement produced to him, which is the act of the consignor. The first consideration which affects this argument is, that it proves too much, and is inconsistent with the admission. But let us examine what the legal right of the vendor is, and whether, with respect to him, the assignee of a bill of lading stands on a better ground than the consignee from whom he received it. I state it to be a clear proposition, that the vendor of goods not paid for may retain the possession against the vendee; not by aid of any equity, but on grounds of law. Our oldest books (*q*) consider the payment of the price (day not being given (*r*)) as a condition precedent implied in the contract of sale; and that the vendee cannot take the goods, nor sue for them, without tender of the price. If day had been given for payment, and the vendee could support an action of trover against the vendor, the price unpaid must be deducted from the damages, in the same manner as if he had brought an action on the contract, for the non-delivery; *Snee* v. *Prescot*, 1 Atk. 245. The sale is not executed before delivery: and, in the simplicity of former times, a delivery into the actual possession of the vendee or his servant was always supposed. In the variety and extent of dealing which the increase of commerce has introduced, the delivery may be presumed from circumstances, so as to vest a property in the vendee. A destination of the goods by the vendor to the use of the vendee; the marking them, or making them up to be delivered; the removing them for the purpose of being delivered, may all entitle the vendee to act as owner, to assign, and to maintain an action against a third person, into whose hands they have come. But the title of the vendor is never entirely divested, till the goods have come into the possession of the

(*q*) See Hob. 41, and the Year Book there cited.

(*r*) See *Martindale* v. *Smith* 1 Q. B. 389.

(Lord Loughborough.)

vendee. He has therefore a complete right, for just cause, to retract the intended delivery, and to stop the goods *in transitu*. The cases determined in our courts of law have confirmed this doctrine, and the same law obtains in other countries.

In an action tried before me at Guildhall, after the last Trinity Term, it appeared in evidence, that one Bowering had bought a cask of indigo of Verrulez and Co. at Amsterdam, which was sent from the warehouse of the seller, and shipped on board a vessel commanded by one Tulloh, by the appointment of Bowering. The bills of lading were made out, and signed by Tulloh, to deliver to Bowering or order, who immediately indorsed one of them to his correspondent in London, and sent it by the post. Verrulez, having information of Bowering's insolvency before the ship sailed from the Texel, summoned Tulloh the ship-master before the court at Amsterdam, who ordered him to sign other bills of lading, to the order of Verrulez. Upon the arrival of the ship in London, the ship-master delivered the goods, according to the last bills, to the order of Verrulez. This case, as to the practice of merchants, deserves particular attention, for the judges of the court at Amsterdam are merchants, of the most extensive dealings, and they are assisted by very eminent lawyers. The cases in our law, which I have taken some pains to collect and examine, are very clear upon this point. *Snee* v. *Prescot*, though in a court of equity, is professedly determined on legal grounds by Lord Hardwicke, who was well versed in the principles of law; and it is an authority, not only in support of the right of the owner unpaid to retain against the consignee, but against those claiming under the consignee by assignment for valuable consideration, and without notice. But (*s*) *Fearon* v.

(*s*) *Fearon* v. *Bowers*, Guildhall, March 28, 1753, *coram* Lee, C.J., 1 H. Bl. 364, n.

Detinue against the master or captain of a ship. On the general issue pleaded, the case appeared to be, that one Hall, of Salisbury, had written to Askell and Co., merchants at Malaga, to send him 20 butts of olive oil, which Askell accordingly bought, and shipped on board the ship Tavistock, of which the defendant was commander, who signed three bills of lading acknowledging the receipt of the goods, to be delivered to the order of the shipper. In the bills was the usual clause—that one being performed, the other two should be void. The goods being thus shipped, Askell sent an invoice thereof, and also one of the bills of lading, to Hall, indorsed by Askell, to deliver the contents to Hall; and Askell at the same time sent to Jones, his partner in England, a bill of exchange drawn on Hall for the amount of the price of the oil; and also another of the bills of lading indorsed by Askell to deliver the

Bowers, tried before Lee, L.C.J., is a case at law, and it is to the same effect as *Snee* v. *Prescot*. So also is *Burghall* v.

contents to Jones. The bill of exchange was presented to Hall, but not being paid by him it was returned protested; whereupon Jones, on 1st Sept. 1752 (a day or two after the ship arrived), applied to the defendant to deliver the oils to him, and having produced his bill of lading, the defendant promised to deliver them accordingly. But the ship not being reported to the custom-house, the oils could not be then delivered; and before they were delivered, the plaintiff, on 3rd Sept., produced the bill of lading sent to Hall, with an indorsement thereon by Hall to deliver the contents to the plaintiff, and also the invoice, upon the credit of which he had advanced to Hall 200*l.*—Notwithstanding this, the defendant afterwards delivered the oils to Jones, and took his receipt for them on the back of the bill of lading.

For the plaintiff it was contended, that the bill of lading indorsed to Hall, and by him to the plaintiff, had fixed the property of the goods in the plaintiff. That the consignee of a bill of lading has such a property that he may assign it over; *Evans* v. *Martlett*, 1 Ld. Raym. 271. There it is laid down, if goods are by bill of lading consigned to A., A. is the owner, and must bring the action against the master of the ship if they are lost: but if the bill be special to deliver to A. for the use of B., B. ought to bring the action; but if the bill be general, and the invoice only shows they are upon the account of B., A. ought to bring the action, for the property is in him, and B. has only a trust; *per totam curiam*. Holt, C.J., said the consignee of a bill of lading has such a property that he may assign it over; and Shower said, it had been adjudged so in the Exchequer. It has been further insisted, that the plaintiff had advanced the 200*l.* on the credit of the bill of lading, in the course of trade, and no objection was made that the oils had not been paid for; for that would prove too much, namely, that the bill of lading was not negotiable. And the indorsement was compared to the indorsement of a bill of exchange, which is good, though the bill originally was obtained by fraud. Merchants were examined on both sides, and seemed to agree that the indorsement of a bill of lading vests the property; but that the original consignor, if not paid for the goods, had a right, by any means that he could, to stop their coming to the hands of the consignee till paid for. One of the witnesses said, he had a like case before the Chancellor, who upon that occasion said, he thought the consignor had a right to get the goods in such a case back into his hands in any way, so as he did not steal them. It also appeared by the evidence of merchants and captains of ships, that the usage was, where three bills of lading were signed by the captain, and indorsed to different persons, the captain had a right to deliver the goods to whichever he thought proper; that he was discharged by a delivery to either with a receipt on the bill of lading, and was not obliged to look into the invoice or consider the merits of the different claims.

Lee, C.J., summing up the evidence, said that, to be sure, nakedly considered, a bill of lading transfers the property, and a right to assign that property by indorsement: that the invoice strengthens that right by showing a farther intention to transfer the property. But it appeared in this case, that Jones had the other bill of lading to be as a curb on Hall, who in fact had never paid for the goods. And it appeared by the evidence, that, according to the usage of trade, the captain was not concerned to examine who had the best right on the different bills of lading. All he had to do was to deliver the goods upon one of the bills of lading, which was done. The jury therefore were directed by the Chief Justice to find a verdict for the defendant, which they accordingly did. *Accord.* as to discharge of the master by delivery under either bill, *The Tigress*, Brown & Lush. 38. But that *Fearon* v. *Bowers* cannot be supported to its full extent in protecting a master who delivers to one indorsee *with notice* that another part of the bill of lading is outstanding with another indorsee; see *Glyn* v. *E. & W. India Dock Co.*, 7 App. Cas. 591.

(Lord Loughborough.)

Howard (*t*), before Lord Mansfield. The right of the consignor to stop the goods is here considered as a legal right. It will make no difference in the case whether the right is considered as springing from the original property not yet transferred by delivery, or as a right to retain the things as a pledge for the price unpaid. In all the cases cited in the course of the argument, the right of the consignor to stop the goods is admitted as against the consignee. But it is contended that the right ceases as against a person claiming under the consignee for valuable consideration, and without notice that the price is unpaid. To support this position, it is necessary to maintain that the right of the consignor is not a perfect legal right in the thing itself, but that it is only founded upon a personal exception to the consignee, which would preclude his demand as contrary to good faith, and unconscionable. If the consignor had no legal title, the question between him and the *bonâ fide* purchaser from the consignee would turn on very nice considerations of equity. But a legal lien, as well as a right of property, precludes these considerations; and the admitted right of the consignor to stop the goods *in transitu* as against the consignee can only rest upon his original title as owner, not divested, or upon a legal title to hold the possession of the goods till the price is paid, as a pledge for the price. It has been asserted in the course of the argument, that the right of the consignor has by judicial determinations been treated as a mere equitable claim in cases between him and the consignee. To examine the force of

(*t*) Assignees of *Burghall*, a bankrupt, v. *Howard*. At Guildhall sittings after Hil. 32 G. 2, *coram* Lord Mansfield.

One Burghall at London gave an order to Bromley at Liverpool to send him a quantity of cheese. Bromley accordingly shipped a ton of cheese on board a ship there, whereof Howard, the defendant, was master, who signed a bill of lading to deliver it in good condition to Burghall in London. The ship arrived in the Thames, but Burghall having become bankrupt, the defendant was ordered, on behalf of Bromley, not to deliver the goods, and accordingly refused, though the freight was tendered. It appeared by the plaintiff's witnesses that no particular ship was mentioned whereby the cheese should be sent, in which case the shipper was to be at the risk of the peril of the seas. The action was on the case upon the custom of the realm against the defendant as carrier. Lord Mansfield was of opinion that the plaintiffs had no foundation to recover; and said he had known it several times ruled in Chancery, that where the consignee becomes bankrupt, and no part of the price had been paid, that it was lawful for the consignor to seize the goods before they come to the hands of the consignee or his assignees; and that this was ruled, not upon principles of equity only, but the laws of property. The plaintiffs were nonsuited.

this assertion, it is necessary to take a review of the several determinations.

The first is *Wright* v. *Campbell*, 4 Burr. 2046, on which the chief stress is laid. The first observation that occurs upon that case is, that nothing was determined by it. A case was reserved by the judge at *nisi prius*, on the argument of which the court thought the facts imperfectly stated, and directed a new trial. That case cannot therefore be urged as a decision upon the point. But it is quoted as containing in the report of it an opinion of Lord Mansfield, that the right of the consignor to stop the goods cannot be set up against a third person claiming under an indorsement for value and without notice. The authority of such an opinion, though no decision had followed upon it, would deservedly be very great, from the high respect due to the experience and wisdom of so great a judge. But I am not able to discover that his opinion was delivered to that extent, and I assent to the opinion as it was delivered, and very correctly applied to the case then in question. Lord Mansfield is there speaking of the consignment of goods to a factor to sell for the owner; and he very truly observes, 1st, that, as against the factor, the owner may retain the goods; 2ndly, that a person into whose hands the factor has passed the consignment with notice is exactly in the same situation with the factor himself; 3rdly, that a *bonâ fide* purchaser from the factor shall have a right to the delivery of the goods, because they were sold *bonâ fide*, and by the owner's own authority. If the owner of the goods entrust another to sell them for him, and to receive the price, there is no doubt but that he has bound himself to deliver the goods to the purchaser; and that would hold equally, if the goods had never been removed from his warehouse. The question on the right of the consignor to stop and retain the goods, can never occur where the factor has acted strictly according to the order of his principal, and where, consequently, he has bound him by his contract. There would be no possible ground for argument in the case now before the court, if the plaintiffs in the action could maintain that Turings had sold to them by the intervention of Freeman, and were therefore bound *ex contractu* to deliver the goods. Lord Mansfield's opinion upon the direct question of the right of the consignor to stop the goods against

(Lord Loughborough.)

a third party, who has obtained an indorsement of the bill of lading, is quoted in favour of the consignor, as delivered in two cases at *nisi prius*; (*u*) *Savignac* v. *Cuff* in 1778, and (*v*) *Stokes* v. *La Riviere* in 1785. Observations are made on these cases, that they were governed by particular circumstances; and undoubtedly when there is not an accurate and agreed state of them, no great stress can be laid on the authority. *Caldwell* v. *Ball* (*x*) is improperly quoted on the part of the plaintiffs in the action, because the question there was on the priority of consignments, and the right of the consignor did not come under consideration. *Hibbert* v. *Carter* (*y*) was also cited on the same side, not having decided any question upon the consignor's right to stop the goods, but as establishing a position that, by the indorsement of the bill of lading, the property was so completely transferred to the indorsee, that the shipper of the goods had no longer an insurable interest in them. The bill of lading in that case had been indorsed to a creditor of the shipper; and, undoubtedly, if the fact had been as it was at first supposed, that the cargo had been accepted in payment of the debt, the conclusion would have been just: for the property of the goods, and the risk, would have completely passed from the shipper to the indorsee; it would have amounted to a sale executed for a consideration paid. But it is not to be inferred from that case, that an indorsement of a bill of lading, the goods remaining at the risk of the shipper, transfers the property so that a policy of insurance upon them in his name would be void. The greater part of the consignments from the West Indies, and all countries where the balance of trade is in favour of England, are made to a creditor of the shipper; but they are no discharge of the debt by indorsement of the bill of lading; the expense of insurance, freight, duties, are all charged to the shipper, and the net proceeds alone can be applied to the discharge of his debt. The case, therefore, has no application to the present question. And from all the cases that have been collected, it does not appear that there has ever been a decision against the legal right of the consignor to stop the goods *in transitu*, before the case now

(*u*) *Ante*, p. 677.
(*v*) *Ante*, p. 687.
(*x*) 1 T. R. 205.
(*y*) 1 T. R. 745.

brought before this court. When a point in law which is of general concern in the daily business of the world is directly decided, the event of it fixes the public attention, directs the opinion, and regulates the practice of those who are interested. But where no such decision has in fact occurred, it is impossible to fix any standard of opinion upon loose reports of incidental arguments. The rule, therefore, which the court is to lay down in this case, will have the effect, not to disturb, but to settle, the notions of the commercial part of this country, on a point of very great importance, as it regards the security and good faith of their transactions. For these reasons we think the judgment of the Court of King's Bench ought to be reversed.

The following account of the further proceedings in this case is given by Mr. East, in a note to his Reports, 6 East, 20.

This case first came on upon a demurrer to evidence, on which there was judgment for the plaintiff; this court holding that, though the vendor of goods might, as between himself and the vendee, stop them *in transitu* to the latter, in case of his insolvency, not having paid for them; yet that, if the vendee, having in his possession the bill of lading indorsed in blank by the vendor, before such stopping *in transitu*, indorse and deliver it to a third person for a valuable consideration and without notice of the non-payment, the right of the vendor to stop *in transitu* is thereby divested as against such *bonâ fide* holder of the bill. This judgment was reversed upon a writ of error in the Exch. Cham., where it was considered that a bill of lading was not a negotiable instrument, the indorsement of which passed the property *proprio vigore*, like the indorsement of a bill of exchange; though to some purposes it was assignable by indorsement, so as to operate as a discharge to the captain who made a delivery *bonâ fide* to the assignee; 1 H. Bl. 357. The latter judgment was in its turn reversed in the House of Lords in T. 33 Geo. 3, and a *venire facias de novo* directed to be awarded by B. R.; 5 T. R. 367, and 2 H. Bl. 211. The ground of that reversal was, that the demurrer to evidence appeared to be informal on the record MS. The very elaborate opinion delivered by Buller, J., upon the principal question before the

House, a copy of which he afterwards permitted me to take, I shall here subjoin, as it contains the most comprehensive view of the whole of this subject which is anywhere to be found. A *venire facias de novo* having been accordingly awarded by B. R., a special verdict was found upon the second trial, containing in substance the same facts as before; with this addition, that the jury found that(z), *by the custom of merchants, bills of lading for the delivery of goods to the order of the shipper or his assigns, are, after the shipment, and before the voyage performed, negotiable and transferable by the shipper's indorsement and delivery, or transmitting of the same to any other person; and that by such indorsement and delivery or transmission the property in such goods is transferred to such other person. And that by the custom of merchants, indorsements of bills of lading in blank may be filled up by the person to whom they are so delivered or transmitted, with words ordering the delivery of the goods to be made to such person: and according to the practice of merchants, the same, when filled up, have the same operation and effect as if it had been done by the shipper.* On this special verdict, the court of B. R., understanding that the case was to be carried up to the House of Lords, declined entering into a discussion of it; merely saying, that they still retained the opinion delivered upon the former case, and gave judgment for the plaintiffs; 5 T. R. 683.

LICKBARROW AND ANOTHER *v.* MASON AND OTHERS, IN ERROR.—DOM. PROC. 1793.

Buller, J.—Before (a) I consider what is the law arising on this case, I shall endeavour to ascertain what the case itself is. It appears that the two bills of lading were indorsed in blank by Turing, and sent so indorsed in the same state by Freeman to the plaintiffs, in order that the goods might, on their arrival at Liverpool, be taken possession of, and sold by the plaintiffs, on Freeman's account. I shall first consider what is the effect of a blank indorsement; and secondly, I will examine whether the

(z) See, as to the effect of this finding, *Sewell* v. *Burdick*, 10 App. Cas. 74.

(a) As to this opinion, see *per* Field, J., *Burdick* v. *Sewell*, 10 Q. B. D. p. 371, and *per* Lord Blackburn, *Sewell* v. *Burdick*, 10 App. Cas. p. 98.

words, "to be so sold by the plaintiffs on Freeman's account,' make any difference in the case. As to the first, I am of opinion that a blank indorsement has precisely the same effect that an indorsement to deliver to the plaintiffs would have. In the case of bills of exchange, the effect of a blank indorsement is too universally known to be doubted; and, therefore, on that head I shall only mention *Russel* v. *Langstaffe*, 2 Dougl. 514, where a man indorsed his name on copper-plate checks, made in the form of promissory notes, but in blank, *i.e.*, without any sum, date, or time of payment; and the court held that the indorsement on a blank note is a letter of credit for an indefinite sum; and the defendant was liable for the sum afterwards inserted in the note, whatever it might be. In the case of bills of lading, it has been admitted at your lordship's bar, and was so in the Court of King's Bench, that a blank indorsement has the same effect as an indorsement filled up to deliver to a particular person by name. In *Snee* v. *Prescot*, Lord Hardwicke thought that there was a distinction between a bill of lading indorsed in blank, and one that was filled up; and upon that ground part of his decree was founded. But that I conceive to be a clear mistake. And it appears from *Sarignac* v. *Cuff* (of which case I know nothing but from what has been quoted by the counsel, and, that case having occurred before the unfortunate year 1780 (*b*), no further account can be obtained), though Lord Mansfield at first thought that there was a distinction between bills of lading indorsed in blank and otherwise, yet he afterwards abandoned that ground. In *Solomons* v. *Nissen*, Mich. 1788, 2 T. R. 674, the bill of lading was to order or assigns, and the indorsement in blank; but the court held it to be clear that the property passed. He who delivers a bill of lading indorsed in blank to another, not only puts it in the power of the person to whom it is delivered, but gives him authority, to fill it up as he pleases; and it has the same effect as if it were filled up with an order to deliver to him. The next point to be considered is, what difference do the words "to be sold by the plaintiffs on Freeman's account" make in the present case? It has been argued that they prove the plaintiffs to be factors only. But it is to be observed that these words are

(*b*) Lord Mansfield's papers were then burnt, together with his house, in the riots of that period.

(Buller, J.)

not found in the bill of lading itself: and, therefore, they cannot alter the nature and construction of it. I say they were not in the bill of lading itself; for it is expressly stated that the bill of lading was sent by Freeman in the same state in which it was received, and in that there is no restriction or qualification whatever; but it appeared by some other evidence—I suppose by some letter of advice, that the goods were so sent, to be sold by the plaintiffs on Freeman's account. Supposing that the plaintiffs are to be considered as factors, yet if the bill of lading, as I shall contend presently, passes the legal property in the goods, the circumstance of the plaintiffs being liable to render an account to Freeman for these goods afterwards will not put Turing in a better condition in this case; for a factor has not only a right to keep goods till he is paid all that he has advanced or expended on account of the particular goods, but also till he is paid the balance of his general account (*c*). The truth of the case, as I consider it, is that Freeman transferred the legal property of the goods to the plaintiffs, who were to sell them, and pay them themselves the 520*l.* advanced in bills out of the produce, and to be accountable to Freeman for the remainder, if there were any. But if the goods had not sold for so much as 510*l.*, Freeman would still have remained debtor to the plaintiffs for the difference; and so far only they were sold on Freeman's account. But I hold that a factor who has the legal property in goods can never have that property taken from him, till he is paid the uttermost farthing which is due to him; *Kruger* v. *Wilcox*, Ambl. 252.

This brings me to the two great questions in the cause, which are undoubtedly of as much importance to trade as any questions which ever can arise. The first is, whether at law the property of goods at sea passes by the indorsement of a bill of lading? The second, whether the defendant, who stands in the place of the original owner, had a right to stop the goods *in transitu*? And, as to the first, every authority which can be adduced from the earliest period of time down to the present hour agrees that at law the property does pass as absolutely and as effectually as

(*c*) Acc. *Houghton* v. *Matthews*, 3 B. & P. 485; *Mann* v. *Shiffner*, 2 East, 529; *Hudson* v. *Granger*, 5 B. & Ald. 27; *Drinkwater* v. *Goodwin*, 1 Cowp. 251.

if the goods had been actually delivered into the hands of the consignee (*d*). In 1690, it was so decided in *Wiseman* v. *Vandeputt*, 2 Vern. 203. In 1697, the court determined again in *Evans* v. *Martlett* that the property passes by the bill of lading. That case is reported in 1 L. Raym. 271, and 12 Mod. 156; and both books agree in the points decided. Lord Raymond states it to be, that, if goods by a bill of lading are consigned to A., A. is the owner, and must bring the action: but, if the bill be special to be delivered to A., to the use of B., B. ought to bring the action: but if the bill be general to A., and the *invoice* only shows that they are on account of B. (which I take to be the present case), A. ought always to bring the action; for the property is in him, and B. has only a trust. And Holt, C.J., says the consignee of a bill of lading has such a property as that he may assign it over; and Shower said it had been so adjudged in the Exchequer. In 12 Mod. it is said that the court held that the invoice signified nothing; but that the consignment in a bill of lading gives the property, except where it is for the account of another; that is, where on the face of the bill it imports to be for another. In *Wright* v. *Campbell*, in 1767 (4 Burr. 2046), Lord Mansfield said, "If the goods are *bonâ fide* sold by the factor at sea (as they may be where no other delivery can be given), it will be good notwithstanding the stat. 21 Jac. 1. The vendee shall hold them by virtue of the bill of sale, though no actual possession be delivered; and the owner can never dispute with the vendee, because the goods were sold *bonâ fide*, and by the owner's own authority." His lordship added (though that is not stated in the printed report) that the doctrine in L. Raym. was right, that the property of goods at sea was transferable. In *Fearon* v. *Bowers* (*e*), in 1753, Lee, C.J., held that a bill of lading transferred the property, and a right to assign that property by indorsement; but that the captain was discharged by a delivery under either bill. In *Snee* v. *Prescot*, in 1743, 1 Atk. 245, Lord Hardwicke says, "Where a factor, by the order of his principal, buys goods with his own money, and makes the bill of lading absolutely in the principal's name, to have the goods delivered

(*d*) As to this, see *Sewell* v. *Burdick*, 10 App. Cas. 74.

(*e*) See *ante*, p. 696, n. Accord, *The Tigress*, Brown & Lush. 38. See, however, *Glyn* v. *E. & W. I. Dock Co.*, 7 App. Cas. 591.

(BULLER, J.)

to the principal, in such case the factor cannot countermand the bill of lading; but it passes the property of the goods fully and irrevocably to the principal." Then he distinguishes the case of blank indorsement, in which he was clearly wrong. He admits, too, that if, upon a bill of lading between merchants residing in different countries, the goods be shipped and consigned to the principal expressly in the body of the bill of lading, that vests the property in the consignee. In *Caldwell* v. *Ball*, in 1786, 1 T. R. 205, the court held that the indorsement of the bill of lading was an immediate transfer of the legal interest in the cargo. In *Hibbert* v. *Carter*, in 1787, 1 T. R. 745, the court held again that the indorsement and delivery of the bill of lading to a creditor *primâ facie* conveyed the whole property in the goods from the time of its delivery. *Godfrey* v. *Furzo*, 3 P. Wms. 185, was quoted on behalf of the defendant. A merchant at Bilboa sent goods from thence to B., a merchant in London, for the use of B., and drew bills on B. for the money. The goods arrived in London, which B. received, but did not pay the money, and died insolvent. The merchant beyond sea brought his bill against the executors of the merchant in London, praying that the goods might be accounted for to him, and insisted that he had a lien on them till paid. Lord Chancellor King says,— "When a merchant beyond sea consigns goods to a merchant in London on account of the latter, and draws bills on him for such goods, though the money be not paid, yet the property of the goods vests in the merchant in London, who is credited for them, and consequently they are liable to his debts. But where a merchant beyond sea consigns goods to a factor in London, who receives them, the factor in this case, being only a servant or agent for the merchant beyond sea, can have no property in such goods, neither will they be affected by his bankruptcy." The whole of this case is clear law; but it makes for the plaintiffs and not the defendants. The first point is this very case; for the bill of lading here is generally to the plaintiffs, and therefore on their account; and in such case, though the money be not paid, the property vests in the consignee. And this is so laid down without regard to the question, whether the goods were received by the consignee or not. The next point there

stated is, what is the law in the case of a pure factor, without any demand of his own? Lord King says he would have no property. This expression is used as between consignor and consignee, and obviously means no more than that, in the case put, the consignor may reclaim the property from the consignee. The reason given by Lord King is, because in this case the factor is only a servant or agent for the merchant beyond sea. I agree, if he be merely a servant or agent, that part of the case is also good law, and the principal may retain the property. But then it remains to be proved that a man who is in advance, or under acceptances on account of the goods, is simply and merely a servant or agent; for which no authority has been, or, as I believe, can be produced. Here the bills were drawn by Freeman upon the plaintiffs upon the same day, and at the same time, as he sent the goods to them; and therefore this must, by fair and necessary intendment, be taken to be one entire transaction; and that the bills were drawn on account of the goods, unless the contrary appear. So far from the contrary appearing here, when it was thought proper to allege on this demurrer that the price of the goods was not paid, it is expressly so stated; for the demurrer says, that the price of the goods is now due to Turing and Son. But it finds that the other bills were afterwards paid by the plaintiffs; and consequently they have paid for the goods in question. As between the principal and mere factor, who has neither advanced nor engaged in anything for his principal, the principal has a right at all times to take back his goods at will: whether they be actually in the factor's possession, or only on their passage, makes no difference; the principal may countermand his order: and though the property remain in the factor till such countermand, yet from that moment the property revests in the principal, and he may maintain *trover*. But in the present case the plaintiffs are not that mere agent or servant; they have advanced 510*l.*, on the credit of these goods, which at a rising market were worth only 557*l.*; and they have besides, as I conceive, the legal property in the goods under the bill of lading. But it was contended at the bar that the property never passed out of Turing; and to prove it, Hob. 41 was cited. In answer to this I must beg leave to say that the position in Hobart does not apply; because there no day of payment was

(Buller, J.)

given; it was a bargain for ready money; but here a month was given for payment. And in Noy's Maxims, 87, this is laid down: "If a man do agree for a price of wares, he may not carry them away before he hath paid for them, if he have not a day expressly given to him to pay for them." *Thorpe* v. *Thorpe*, Rep. temp. Holt, 96, and *Brice* v. *James*, Rep. temp. Lord Mansfield, S. P. So Dy. 30 and 76. And in Shep. Touch. 222, it is laid down, that "If one sell me a horse, or anything for money, or any other valuable consideration, and the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money, it is a good bargain and sale to alter the property thereof; and I may have an action for the thing, and the seller for his money." Thus stand the authorities on the point of legal property; and from hence it appears that for upwards of 100 years past it has been the universal doctrine of Westminster Hall, that by a bill of lading, and by the assignment of it, the legal property does pass. And, as I conceive, there is no judgment, nor even a dictum, if properly understood, which impeaches this long string of cases. On the contrary, if any argument can be drawn by analogy from older cases on the vesting of property, they all tend to the same conclusion. If these cases be law, and if the legal property be vested in the plaintiffs, that, as it seems to me, puts a total end to the present case; for then it will be incumbent on the defendants to show that they have superior equity which bears down the letter of the law, and which entitles them to retain the goods against the legal right of the plaintiffs, or they have no case at all. I find myself justified in saying that the legal title, if in the plaintiffs, must decide this cause by the very words of the judgment now appealed against; for the noble lord who pronounced that judgment emphatically observed in it, "that the plaintiffs claim under Freeman; but, though they derive a title under him, they do not represent him, so as to be answerable for his engagements: nor are they affected by any notice of those circumstances which would bar the claims of him or his assignees." This doctrine, to which I fully subscribe, seems to me to be a clear answer to any supposed lien which Turing may have on the goods in question for the original price of them.

But the second question made in the case is, that, however the legal property be decided, the defendants, who stand in the place of the original owner, had a right to stop the goods *in transitu*, and have a lien for the original price of them. Before I consider the authorities applicable to this part of the case, I will beg leave to make a few observations on the right of stopping goods *in transitu*, and on the nature and principle of liens. 1st, Neither of them are founded on property; but they necessarily suppose the property to be in some other person, and not in him who sets up either of these rights (*f*). They are qualified rights, which in given cases may be exercised over the property of another: and it is a contradiction in terms to say a man has a lien upon his own goods, or right to stop his own goods *in transitu*. If the goods be his, he has a right to the possession of them whether they be *in transitu*, or not: he has a right to sell or dispose of them as he pleases, without the option of any other person: but he who has a lien only on goods has no right so to do; he can only retain them till the original price be paid: and therefore, if goods are sold for 500*l*., and by a change of the market, before they are delivered, they become next day worth 1,000*l*., the vendor can only retain them till the 500*l*. be paid, unless the bargain be absolutely rescinded by the vendee's refusing to pay the 500*l*.—2ndly, Liens at law exist only in cases where the party entitled to them has the possession of the goods; and if he once part with the possession after the lien attaches, the lien is gone (*g*).—3rdly, *The right of stopping in transitu is founded only on equitable principles, which have been adopted in courts of law*; and, as far as they have been adopted, I agree they will bind at law as well as in equity. So late as 1690, this right, or privilege, or whatever it may be called, was unknown to the law. The first of these propositions is self evident, and requires no argument to prove it. As to the second, which respects liens, it is known and unquestionable law, that if a carrier, a farrier, a tailor, or an innkeeper, deliver up the goods, his lien is gone. So also is the case of a factor as to the particular

(*f*) See the distinction drawn by Bayley, J., between the right of possession and that of property, *post, in notis*, p. 720.

(*g*) See *Lucy* v. *Bernard*. 8 Taunt. 149. See *post, in notâ*, p. 720.

(Buller, J.)

goods: but, by the general usage in trade, he may retain for the balance of his account all goods in his hands, without regard to the time when or on what account he received them. In *Snee* v. *Prescot*, Lord Hardwicke says that which not only applies to the case of liens, but to the right of stopping goods *in transitu* under circumstances similar to the case in judgment: for he says, where goods have been negotiated, and sold again, there it would be mischievous to say that the vendor or factor should have a lien upon the goods for the price; for then no dealer would know when he purchased goods safely. So, in *Lempriere* v. *Pasley*, 2 T. R. 485, the court said it would be a great inconvenience to commerce if it were to be laid down as law that a man could never take up money upon the credit of goods consigned till they actually arrived in port. There are other cases which in my judgment apply as strongly against the right of seizing *in transitu* to the extent contended for by the defendants: but before I go into them, with your lordships' permission, I will state shortly the facts of *Snee* v. *Prescot*, 1 Atk. 245, with a few more observations upon it. The doctrine of stopping *in transitu* owes its origin to courts of equity; and it is very material to observe that in that case, as well as many others which have followed it at law, the question is not, as the counsel for the defendants would make it, whether the property vested under the bill of lading, for that was considered as being clear: but whether, on the insolvency of the consignee, who had not paid for the goods, the consignor could countermand the consignment or, in other words, divest the property which was vested in the consignee. Tollet, a merchant in London, shipped to Ragueneau and Co., his factors at Leghorn, serges, to sell, and to buy double the value in silks; for which the factors were to pay half in ready money of their own, which Tollet would repay by bills drawn on him. The silks were bought accordingly, and shipped on board Dawson's ship, marked T.; Dawson signed three bills of lading, to deliver at London to factors, consignors, or their order. The factors indorsed one bill of lading in blank, and sent it to Tollet, who filled up the same and pawned it. The bills drawn by the factors on Tollet were not paid, and Tollet became a bankrupt. The factors sent another bill of

lading, properly indorsed, to Prescot, who offered to pay the pawnee, but he refused to deliver up the bill of lading; on which Prescot got possession of the goods from Dawson, under the last bill of lading. The assignees of Tollet brought the bill to redeem by paying the pawnee out of the money arising by sale, and to have the rest of the produce paid to them: and that the factors, although in possession of the goods, should be considered as general creditors only, and be driven to come in under the commission. Decreed, 1st, That the factors should be paid; 2nd, the pawnees; and 3rd, the surplus to the assignees. The decree was just and right in saying that the consignor, who never had been paid for the goods, and the pawnees, who had advanced money upon the goods, should both be paid out of the goods before the consignee or his assignees should derive any benefit from them. That was the whole of the decree; and if the circumstance of the consignor's interest being first provided for be thought to have any weight, I answer, 1st, That such provision was founded on what is now admitted to be an apparent mistake of the law, in supposing that there was a difference between a full and a blank indorsement. Lord Hardwicke considered the legal property in that case to remain in the consignor, and, therefore, gave him the preference. 2ndly, That whatever might be the law, the mere fact of the consignor's being in possession was a sufficient reason for a court of equity to say, We will not take the possession from you till you have been paid what is due to you for the goods. Lord Hardwicke expressly said—"This court will not say, as the factors have re-seized the goods, that they shall be taken out of their hands till payment of the half-price which they have laid down upon them. *He who seeks equity must do equity*; and, if he will not, he must not expect relief from a court of equity. It is in vain for a man to say in that court, I have the law with me, unless he will show that he has equity with him also. If he mean to rely on the law of his case, he must go to a court of law; and so a court of equity will always tell him under those circumstances." *Snee* v. *Prescot* is miserably reported in the printed book: and it was the misfortune of Lord Hardwicke, and of the public in general, to have many of his determinations published in an incorrect and slovenly way: and, perhaps, even he himself,

(Buller, J.)

by being very diffuse, has laid a foundation for doubts which otherwise would never have existed. I have quoted that case from a MS. note taken, as I collect, by Mr. John Cox, who was counsel in the cause: and it seems to me that, on taking the whole of the case together, it is apparent that, whatever might have been said on the law of the case, in a most elaborate opinion, Lord Hardwicke decided on the equity alone, arising out of all the particular circumstances of it, without meaning to settle the principles of law on which the present case depends. In one part of his judgment he says that, in strictness of law, the property vested in Tollet at the time of the purchase: "but, however that may be," says he, "this court will not compel the factors to deliver the goods without being disbursed what they have laid out." He begins by saying, "the demand is as harsh as can possibly come into a court of equity." And in another part of his judgment he says, "Suppose the legal property in these goods was vested in the bankrupt, and that the assignees had recovered, yet this court would not suffer them to take out execution for the whole value, but would oblige them to account." But further, as to the right of seizing or stopping the goods *in transitu*, I hold that no man, who has not equity on his side, can have that right. I will say with confidence, that no case or authority, till the present judgment, can be produced to show that he has. But on the other hand, in a very able judgment delivered by my brother Ashhurst, in *Lempriere* v. *Pasley*, in 1788, 2 T. R. 485, he laid it down as a clear principle, that, as between a person who has an equitable lien and a third person who purchases a thing for valuable consideration and without notice, the prior equitable lien shall not over-reach the title of the vendee. This is founded on plain and obvious reason: for he who has bought a thing for a fair and valuable consideration, and without notice of any right or claim by any other person, instead of having equity against him has equity in his favour; and if he have law and equity both with him he cannot be beat by a man who has equal equity only. Again, in a very solemn opinion, delivered in this house by the learned and respectable judge (*h*), who has often had the honour of

(*h*) Eyre, then Lord C. B.

delivering the sentiments of the judges to your lordships, when you are pleased to require it, so lately as the 14th May, 1790, in *Kinloch* v. *Craig*, 3 T. R. 787, it was laid down that the right of stopping goods *in transitu* never occurred but as between vendor and vendee; for that he relied on the case of *Wright* v. *Campbell*, 4 Burr. 2050. Nothing remains in order to make that case a direct and conclusive authority for the present, but to show that it is not the case of vendor and vendee. The terms vendor and vendee necessarily mean the two parties to a particular contract: those who deal together, and between whom there is privity in the disposition of the things about which we are talking. If A. sell a horse to B., and B. afterwards sell him to C., and C. to D., and so on through the alphabet, each man who buys the horse is at the time of buying him a vendee; but it would be strange to speak of A. and D. together as vendor and vendee, for A. never sold to D., nor did D. ever buy of A. These terms are correlatives, and never have been applied, nor ever can be applied, in any other sense than to the persons who bought and sold to each other. The defendants, or Turing, in whose behalf and under whose name and authority they have acted, never sold these goods to the plaintiffs; the plaintiffs never were the vendees of either of them. Neither do the plaintiffs (if I may be permitted to repeat again the forcible words of the noble judge who pronounced the judgment in question) represent Freeman so as to be answerable for his engagements, or stand affected by any notice of those circumstances which would bar the claim of Freeman or his assignees. These reasons, which I could not have expressed with equal clearness, without recurring to the words of the two great authorities by whom they were used, and to whom I always bow with reverence, in my humble judgment put an end to all questions about the right of seizing *in transitu*. Two other cases were mentioned at the bar which deserve some attention. One is *Burghall* v. *Howard* (*i*), before Lord Mansfield at Guildhall, in 1759; where the only point decided by Lord Mansfield was, that if a consignee become bankrupt, and no part of the price of the goods be paid, the consignor may seize the goods before they come to the hands of the consignee or his assignees. This was most clearly right; but it does not apply to the present case;

(*i*) See *ante*, p. 698, n.

(BULLER, J.)

for, when he made use of the word "assignees," he undoubtedly meant assignees under a commission of bankruptcy, like those who were then before him, and not persons to whom the consignee sold the goods; for in that case it is stated that no part of the price of the goods was paid. The whole cause turns upon this point. In that case no part of the price of the goods was paid, and therefore the original owner might seize the goods. But in this case the plaintiffs had paid the price of the goods, or were under acceptances for them, which is the same thing; and therefore the original owner could not seize them again. But the note of that case says, Lord Mansfield added, "and this was ruled, not upon principles of equity only, but the laws of property." Do these words fairly import that the property was not altered by a bill of lading, or by the indorsement of it? That the liberty of stopping goods *in transitu* is originally founded on principles of equity, and that it has, in the case before him, been adopted by the law, and that it does not affect property, are all true: and that is all that the words mean; not that the property did not pass by the bill of lading. The commercial law of this country was never better understood, or more correctly administered, than by that great man. It was under his fostering hand that the trade and the commercial law of this country grew to its present amazing size: and, when we find him in other instances adopting the language and opinion of Lord Holt, and saying that, since the cases before him, it had always been held that the delivery of a bill of lading transferred the property at law, and in the year 1767 deciding that very point, it does seem to me to be absolutely impossible to make a doubt of what was his opinion and meaning. All his determinations on the subject are uniform. Even *Savignac* v. *Cuff* (*k*), of which we have no account besides the loose and inaccurate note produced at the bar, as I understand it, goes upon the same principle. The note states that counsel for the plaintiff relied on the property passing by the bill of lading: to which Lord Mansfield answered, the plaintiff had lost his lien, he standing in the place of the consignee. Lord Mansfield did not answer mercantile questions so; which, as stated, was no

(*k*) Cited *ante*, p. 677.

answer to the question made. But I think enough appears on that case to show the grounds of the decision, to make it consistent with *Wright* v. *Campbell*, and to prove it a material authority for the plaintiffs in this case. I collect from it that the plaintiff had notice by the letter of advice that Lingham had not paid for the goods: and if so, then, according to *Wright* v. *Campbell*, he could only stand in Lingham's place. But the necessity of recurring to the question of notice strongly proves, that, if there had been no such notice, the plaintiff, who was the assignee of Lingham the consignee, would not have stood in Lingham's place, and the consignor could not have seized the goods *in transitu*: but that, having seized them, the plaintiff would have been entitled to recover the full value of them from him. This way of considering it makes that case a direct authority in point for the plaintiffs. There is another circumstance in that case material for consideration; because it shows how far only the right of seizing *in transitu* extends, as between the consignor and consignee. The plaintiff in that action was considered as the consignee; the defendant, the consignor, had not received the full value for his goods; but the consignee had paid 150*l.* on account of them. Upon the insolvency of the consignee, the consignor seized the goods *in transitu*; but that was holden not to be justifiable, and therefore there was a verdict against him. That was an action of *trover*, which could not have been sustained but on the ground that the property was vested in the consignee, and could not be seized *in transitu* as against him. If the legal property had remained in the consignor, what objection could be stated in a court of law to the consignor's taking his own goods? But it was holden that he could not seize the goods; which could only be on the ground contended for by Mr. Wallace, counsel for the plaintiff, that the property was in the consignee: but though the property were in the consignee, yet, as I stated to your lordships in the outset, if the consignor had paid to the consignee all that he had advanced on account of the goods, the consignor would have had a right to the possession of the goods, even though they had got into the hands of the consignee: and upon paying or tendering that money, and demanding the goods, the property would have revested in him, and he might have maintained *trover* for them:

(Buller, J.)

but admitting that the consignee had the legal property, and was therefore entitled to a verdict, still the question remained what damages he should recover; and, in ascertaining them, regard was had to the true merits of the case, and the relative situation of each party. If the consignee had obtained the actual possession of the goods, he would have had no other equitable claim on them than 150*l*. He was entitled to no more, the defendant was liable to pay no more; and therefore the verdict was given for that sum. This case proceeded precisely upon the same principles as *Wiseman* v. *Vandeputt*; where, though it was determined that the legal property in the goods before they arrived was in the consignee, yet the Court of Chancery held that the consignee should not avail himself of that beyond what was due to him: but for what was due, the court directed an account; and if anything were due from the Italians to the Bonnells, that should be paid the plaintiffs. The plaintiffs in this cause are exactly in the situation of the plaintiffs in that case; for they have the legal property in the goods; and therefore, if anything be due to them, even in equity, that must be paid before any person can take the goods from them; and 520*l*. was due to them, and has not been paid.

After these authorities, taking into consideration also that there is no case whatever in which it has been holden that goods can be stopped *in transitu* after they have been sold and paid for, or money advanced upon them, *bonâ fide* and without notice, I do not conceive that the case is open to any arguments of policy or convenience; but if it should be thought so, I beg leave to say that, *in all mercantile transactions, one great point to be kept uniformly in view is to make the circulation and negotiation of property as quick, as easy, and as certain as possible*. If this judgment stand, no man will be safe either in buying or in lending money upon goods at sea. That species of property will be locked up; and many a man who could support himself with honour and credit, if he could dispose of such property to supply a present occasion, would receive a check which industry, caution, or attention could not surmount. If the goods are in all cases to be liable to the original owner for the price, what is there to be bought? There is nothing but the chance of the market

and that the buyer expects as his profit on purchasing the goods, without paying an extra price for it. But Turing has transferred the property to Freeman, in order that he might transfer it again, and has given him credit for the value of the goods. Freeman having transferred the goods again for value, I am of opinion that Turing had neither property, lien, nor a right to seize *in transitu*. The great advantage which this country possesses over most, if not all, other parts of the known world, in point of foreign trade, consists in the extent of credit given on exports, and the ready advances made on imports: but, amidst all these indulgences, the wise merchant is not unmindful of his true interests and the security of his capital. I will beg leave to state, in as few words as possible, what is a very frequent occurrence in the city of London:—A cargo of goods of the value of 2,000*l.* is consigned to a merchant in London; and the moment they are shipped, the merchant abroad draws upon his correspondent here to the value of that cargo; and by the first post or ship he sends him advice, and incloses the bill of lading. The bills, in most cases, arrive before the cargo; and then the merchant in London must resolve what part he will take. If he accepts the bills, he becomes absolutely and unconditionally liable; if he refuses them, he disgraces his correspondent, and loses his custom directly. Yet to engage for 2,000*l.*, without any security from the drawer, is a bold measure. The goods may be lost at sea; and then the merchant here is left to recover his money against the drawer as and when he may. The question then with the merchant is, How can I secure myself at all events? The answer is, I will insure; and then if the goods come safe I shall be repaid out of them; or, if they be lost, I shall be repaid by the underwriters on the policy; but this cannot be done unless the property vest in him by the bill of lading; for otherwise his policy will be void for want of interest (*l*); and an insurance, in the name of the foreign merchant, would not answer the purpose. This is the case of the merchant who is wealthy, and has the 2,000*l.* in his banker's hands, which he can part with, and not find any inconvenience in so doing; but there is another case to be considered, viz.—Suppose the merchant here has not got the 2,000*l.*, and cannot raise it before he has sold the goods?

(*l*) St. 19 G. 3, c. 37, s. 1.

(Buller, J.)

—the same considerations arise in his mind as in the former case, with this additional circumstance, that the money must be procured before the bills become due. Then the question is, how can that be done? If he have the property in the goods, he can go to market with the bill of lading and the policy, as was done in *Snee* v. *Prescot*; and upon that idea he has hitherto had no difficulty in doing so: but if he have not the property, nobody will buy of him; and then his trade is undone. But there is still a third case to be considered; for even the wary and opulent merchant often wishes to sell his goods whilst they are at sea. I will put the case, by way of example, that barilla is shipped for a merchant here, at a time when there has been a dearth of that commodity, and it produces a profit of 25*l. per cent.*, whereas, upon an average, it does not produce above 12*l.* The merchant has advices that there is a great quantity of that article in Spain, intended for the British market; and when that arrives, the market will be glutted, and the commodity much reduced in value. He wishes, therefore, to sell it immediately whilst it is at sea, and before it arrives; and the profit which he gets by that is fair and honourable: but he cannot do it if he have not the property by the bill of lading. Besides, a quick circulation is the life and soul of trade; and if the merchant cannot sell with safety to the buyer, that must necessarily be retarded. From the little experience which I acquired on this subject at Guildhall I am confident that, if the goods in question be retained from the plaintiff without repaying him what he had advanced on the credit of them, it will be mischievous to the trade and commerce of this country; and it seems to me that not only commercial interest, but plain justice and public policy, forbid it. To sum up the whole in very few words: the legal property was in the plaintiff; the right of seizing *in transitu* is founded on equity. No case in equity has ever suffered a man to seize goods in opposition to one who has obtained a legal title, and has advanced money upon them; but Lord Hardwicke's opinion was clearly against it; and the law, where it adopts the reasoning and principles of a court of equity, never has and never ought to exceed the bounds of equity itself. I offer to your lordships, as my

humble opinion, that the evidence given by the plaintiff, and confessed by the demurrer, is sufficient in law to maintain the action.

Ashhurst and Grose, Justices, also delivered their opinions for reversing the judgment of the Exchequer Chamber.

Eyre, C.J., Gould, J., Heath, J., Hotham, B., Perryn, B., and Thomson, B., *contra*.

This case stood over from time to time in the House: and was postponed, in order to consider a question which arose in another case of *Gibson* v. *Minet* (*m*), upon the nature and effect of a demurrer to evidence, which was thought to apply also to the present case; and, finally, the House reversed the judgment of the Exchequer Chamber, which had been given for the defendant; and ordered the King's Bench to award a *venire de novo* (upon the ground that the demurrer to evidence appeared to be informal upon the record) and that the record be remitted.

(*m*) It was really *Gibson* v. *Hunter*, 2 H. Bl. 187; see 10 App. Cas. 99.

Two propositions involved in principal case.

This celebrated case involves two important propositions. The former is, that the unpaid vendor may, in case of the vendee's insolvency, stop the goods sold *in transitu*. The latter, that the right to stop *in transitu* may be defeated by negotiating the bill of lading with a *bonâ fide* indorsee.

Law as to stoppage *in transitu* codified by 56 & 57 Vict. c. 71.

S. 39 (1).

The law relating to stoppage *in transitu* is now codified by the Sale of Goods Act, 1893. But this note is nevertheless retained, because the cases illustrate and explain the rules laid down in the Act. The Act states the law generally to be that, "notwithstanding the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law, in case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with possession of them;" s. 39 (1); see also s. 44. "A person is deemed to be insolvent . . . who either has ceased to pay his debts in the ordinary course of business, or cannot pay them as they become due, whether he has committed an act of bankruptcy or not;" s. 62 (3).

Origin of stoppage *in transitu*.

The right of a vendor to stop *in transitu* is bestowed upon him in order to prevent the injustice which would take place, if, in consequence of the vendee's insolvency, while the price of the goods was yet unpaid, they were to be seized upon in satisfaction of his liabilities, and so the property of one man were to be disposed of in payment of the debts of

another. The doctrine was first introduced in equity by the cases of *Wiseman* v. *Vandeputt*, 2 Vern. 203; *Snee* v. *Prescot*, 1 Atk. 246; and *D'Aquila* v. *Lambert*, 2 Eden, 75, Amb. 399. It has since been repeatedly discussed in courts of common law; and it appears strange that though *stoppage in transitu* had been for many years one of the most practically important branches of commercial law, yet its precise effect upon the contract of sale remained uncertain until a comparatively recent period. A highly interesting disquisition upon its history and character will be found in Lord Abinger's judgment in *Gibson* v. *Carruthers*, 8 M. & W. 336.

Question whether stoppage rescinds the contract of sale.

The question whether *stoppage in transitu* rescinds the contract of sale altogether, or only puts the vendor in possession of a lien on the goods defeasible on payment of the price, has often been matter of controversy, particularly in *Clay* v. *Harrison*, 10 B. & C. 99, and was said in *Stephens* v. *Wilkinson*, 2 B. & Ad. 323, to be still undetermined; see also *Wilmhurst* v. *Bowker*, 5 B. N. C. 547, 7 M. & Gr. 882; *Gibson* v. *Carruthers*, 8 M. & W. 321; *Wentworth* v. *Outhwaite*, 10 Id. 451; and *Edwards* v. *Brewer*, 2 Id. 375.

Hodgson v. *Loy.*

Lord Kenyon in *Hodgson* v. *Loy*, 7 T. R. 440, was of opinion that it was not a rescission of the sale, but was "an equitable lien adopted by the law for the purpose of substantial justice;" whence it was held to follow that part payment of the price by the buyer would not destroy the right to stop *in transitu*, but only diminish the lien *pro tanto*.

Vendor's right not like a mere lien which is lost when possession parted with.

Confusion sometimes arose on this subject, from its being assumed that a vendor's right over the goods in respect of his price is subject to the same rules as an ordinary *lien* which cannot exist without both the right and the fact of possession, and is lost and cannot be resumed if the party claiming it abandon either the possession, or the right to possess the thing over which it is claimed: whereas "the vendor's right in respect of his price," said Bayley, J., in *Bloxam* v. *Sanders*, 4 B. & C. 948, "is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion. If goods are sold on credit, and nothing is agreed on as to the time of delivering the goods, the vendee is immediately entitled to the possession; and the right of possession, and the right of property, vest at once in him; but his right of possession is not absolute, it is liable to be defeated if he becomes insolvent before he obtains possession; *Tooke* v. *Hollingworth*, 5 T. R. 215. If the seller has dispatched

Bloxam v. *Sanders.*

the goods to the buyer, and insolvency occur, he has a right in virtue of his original ownership to stop them *in transitu*; *Mason* v. *Lickbarrow*, 1 H. Bl. 357; *Ellis* v. *Hunt*, 3 T. R. 464; *Hodgson* v. *Loy*, 7 Id. 440; *Inglis* v. *Usherwood*, 1 East, 515; *Bothlingk* v. *Inglis*, 3 Id. 381. Why? Because the *property* is vested in the buyer, so as to subject him to the risk of any accident, but he has not an indefeasible right to the *possession*, and his insolvency without payment of the price defeats that right. The buyer, or those who stand in his place, may still obtain the right of possession, if they will pay or tender the price, or they may still act on their right of property if anything unwarrantable is done to that right. If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the damage they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which the right of property and right of possession are both requisite, unless they have both those rights; *Gordon* v. *Harper*, 7 T. R. 9." This luminous view of the principles upon which an unpaid vendor's right depends is totally inconsistent with the idea that *stoppage in transitu* operates as a rescission of the contract of sale. See, too, *Martindale* v. *Smith*, 1 Q. B. 397; the opinion of Buller, J., in the text, p. 709, and the judgment of Williams, J., in *Johnston* v. *Stear*, 15 C. B. N. S. 330, 339.

Wentworth v. Outhwaite.

In *Wentworth* v. *Outhwaite*, 10 M. & W. 451, Parke, B., stated that the question, "What the effect of stoppage *in transitu* is, whether entirely to rescind the contract, or only to replace the vendor in the same position as if he had not parted with the possession, and entitle him to hold the goods until the price be paid down, is a point not yet finally decided," and that "there are difficulties attending each construction." In that case one of several parcels of goods sold under an entire contract had reached the place of destination; and, upon the stoppage of the rest *in transitu*, the vendor insisted that the effect was to rescind the contract of sale altogether, and consequently to revest in him the property in the part which had reached the place of destination. The court decided against that argument, but for different reasons; Parke, Alderson, and Rolfe, BB., being strongly inclined to think that upon the weight of authority a stoppage *in transitu* must be considered, not as a rescission of the contract, but as merely replacing the vendor in the same position as if he had not parted with the possession;

from which it followed that the vendor's right of lien on the part stopped was revested; and no more; whilst Lord Abinger expressed an opinion, to which, on consideration, he adhered, that the effect of stoppage *in transitu* is to rescind the contract; but he did not think that that affected the right of the buyer, in the case before the court, to retain the portion of the goods which had been actually delivered to him; or, in other words, had reached the place of their destination; more especially when the goods and the price might be apportioned and a new contract be implied from the actual delivery and retention of a part.

The arguments in *Wentworth* v. *Outhwaite* contain the earlier authorities on either side of the question. In the later case of *Jenkyns* v. *Usborne*, 8 Scott, N. R. 522, 816, Tindal, C.J., spoke of stoppage *in transitu* as a right *to rescind the contract*; but the nature of the right was not there in question. In *Kemp* v. *Falk*, 7 App. Cas. 373, 581, Lord Blackburn said: "It is pretty well settled now that a stoppage *in transitu* would not rescind the contract." See also *per* Lord Cairns in *Schotsmans* v. *L. & Y. R. Co.*, 2 Ch. 332, 340, where it seems that in accordance with this view the right of stoppage was held to be a proper subject of a bill in equity.

Sale of Goods Act, 1893, s. 48 (1).

The Sale of Goods Act, 1893, now provides that "a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage *in transitu*" (s. 48 (1)); and defines the right of stoppage to

S. 44.

be a right to "resume possession of the goods as long as they are in course of transit and retain them until payment or tender of the price" (s. 44).

Vendor may order redelivery.

The right of stoppage is not only to countermand delivery to the buyer, but to order delivery to the vendor, and the carrier on receiving such order is bound to deliver to the latter as soon as he knows that the order was given by him; *The Tigress*, 32 L. J. Adm. 97; see the Act of 1893, s. 46 (2).

Rights of vendor after stoppage.

As the contract of sale is not rescinded, it seems to follow, that the goods, while detained, remain at the risk of the buyer, and that the vendor has no right at common law to resell them, at all events until the period of credit has expired; after that period, indeed, the refusal of the buyer or his representatives to receive the goods *and* pay the price, would probably be held to entitle the vendor to elect to rescind the contract; see *Langfort* v. *Tiler*, 1 Salk. 113. But

what, it will be said, if the goods be of so perishable a nature that the vendor cannot keep them till the time of credit has expired? In such a case it is submitted that courts of law, having originally adopted this doctrine of *stoppage in transitu* from equity, would act on equitable principles by holding the vendor invested with an implied authority to make the necessary sale. Perishable goods.

On this point the Act of 1893, s. 48 (3), provides that "where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to resell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract." And with regard to rescission of the contract, s. 48 (4) provides that "where the seller expressly reserves a right of re-sale in case the buyer should make default, and, on the buyer making default, resells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages." And where a seller, who has exercised his right of stoppage *in transitu*, resells the goods, the buyer acquires a good title as against the original buyer; s. 48 (2). Sale of Goods Act, 1893, s. 48 (3). S. 48 (4). S. 48 (2).

An unpaid vendor has another right somewhat analogous to that of stoppage *in transitu*; see *Ex p. Chalmers*, 8 Ch. 289, where it was held that "when a purchaser becomes insolvent before the contract for sale has been completely performed, the seller, notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract until the price of the goods not yet delivered is tendered to him; and that, if a debt is due to him for goods already delivered, he is entitled to refuse to deliver any more till he is paid the debt due for those already delivered, as well as the price of those still to be delivered." It has been held by the J. C. that the above right is not destroyed, though the vendor retain the goods as warehouseman for the buyer; *Grice* v. *Richardson*, 3 App. Cas. 319. It exists independently of the question whether there has not been an actual rescission of the contract, for it must not be overlooked that *mere* insolvency by itself does not operate to dissolve the contract. Insolvency, however, coupled with other facts, is evidence of the buyer's intention not to stand by the contract, upon which the vendor may act, so that by the consent of both parties the Right of retention analogous to that of stoppage *in transitu*.

contract may be rescinded; *Morgan* v. *Bain*, L. R. 10 C. P. 15; *Gunn* v. *Bolckow*, 10 Ch. 491; *Re Phœnix Co.*, 4 Ch. D. 108; *Imperial Bank* v. *L. and St. K. Dock Co.*, 5 Id. 195.

Sale of Goods Act, 1893, ss. 41, 42.

By the Act of 1893, an unpaid seller who is in possession of the goods may retain possession of them until payment or tender of the price, where the buyer becomes insolvent (s. 41); and, if he has made part delivery of the goods, he may retain the remainder, unless the part delivery was made under such circumstances as to show an agreement to waive the right of retention (s. 42).

Wrongful stoppage.

It is hardly necessary to add, that a wrongful stoppage *in transitu* has not the effect of rescinding the contract of sale, or of affecting the vendor's right to sue for the price, acquired before the stoppage; *Re Humbertson*, 1 De Gex, 262; see *Gillard* v. *Brittan*, 8 M. & W. 575.

Vendor may be unpaid though bill given.

The taking a bill for the price of the goods does not take away the right to stop, unless the bill is taken in *payment* whether paid or not; *Feise* v. *Wray*, 3 East, 93; *Edwards* v. *Brewer*, 2 M. & W. 375. "Even if he had actually started the goods, and delivered them to a carrier to be carried to the purchaser, it is perfectly well known that at law upon the buyer's insolvency there would be a right of stoppage *in transitu* which would revest the vendor's lien. It would make no difference that a bill had been given which had not yet become due, or that credit had been given;" *Gunn* v. *Bolckow*, 10 Ch. 491, 501, *per* Mellish, L.J.

Sale of Goods Act, 1893, s. 38 (1).

And the Act of 1893 provides that the seller of goods is deemed to be an unpaid seller "when a bill of exchange or other negotiable instrument has been received as conditional payment" and the condition has not been fulfilled (s. 38 (1)).

Who may exercise the right.

The person who stops *in transitu* must be a consignor or vendor. A mere surety for the price of the goods has no right to do so; *Siffken* v. *Wray*, 6 East, 371; though perhaps, where the surety has paid the vendor, he may obtain the right to stop in his name under the Mercantile Law Amendment Act, 1856, s. 5; see *Imperial Bank* v. *L. and St. K. Dock Co.*, 5 Ch. D. 195. But a person residing abroad, who buys goods for a correspondent in England, whom he charges with a commission on the price, but whose name is unknown to those from whom he buys, may stop the goods *in transitu* if his correspondent fail while they are on their passage, for the buyer abroad may be considered as a new vendor, selling the goods over again to

the merchant in England, and only adding to the price the amount of his commission; *Feise* v. *Wray*, 3 East, 93; see *Falk* v. *Fletcher*, 18 C. B. N. S. 403; *Cassaboglou* v. *Gibb*, 11 Q. B. D. 797, 806. In *Newsom* v. *Thornton*, 6 East, 17, a person who had consigned goods to be sold on the joint account of himself and the consignee was held entitled to stop them *in transitu*, on the consignee's insolvency. So a person who buys goods for another on his own credit and takes bills of lading indorsed for delivery to his own order, and then indorses the bills to the party for whom he bought, is a vendor for the purpose of stoppage *in transitu*; *The Tigress*, 32 L. J. Adm. 97; and where a buyer's broker, being liable by custom for the price of goods, paid the vendors, it was held that, "having regard to the terms of the Mercantile Law Amendment Act, 1856, s. 5, and to the justice of the case, the lien of the unpaid vendors was a security which subsisted for the benefit of the broker who paid the money, and therefore he could in their name have stopped the goods;" *Imperial Bank* v. *L. and St. K. Dock Co.*, 5 Ch. D. 195. In *Hathesing* v. *Laing*, 17 Eq. 92, Bacon, V.-C., seems to have held that a broker, who had paid the price of goods for his principal, the buyer, and had shipped them in the buyer's name, was not in the position of a vendor, so as to stop *in transitu*; but the case was decided also on other grounds, and as regards this point is perhaps hardly reconcilable in principle with those last cited.

Sale of Goods Act, 1893, s. 38 (2).

On this point the Act of 1893 provides that "the term 'seller' includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price" (s. 38 (2)).

Property need not have vested in vendor.

In *Jenkyns* v. *Usborne*, 7 M. & Gr. 678, attempt was made, but without success, to confine the right to vendors in whom the property in the goods has actually vested at the time of the stoppage, and to exclude from it a vendor in whom the property in the goods had not vested at the time of the stoppage, but only an interest in and right to receive a part of the goods to be afterwards ascertained and appropriated. Tindal, C.J., there said: "We see no sound distinction, with reference to the right of stoppage *in transitu*, between the sale of goods the property of which is in the vendor, and the sale of an interest which he has in a contract for the

delivery of goods to him. If he may rescind the contract in one case, for the insolvency of the purchaser, he must, by parity of reasoning, have the right to rescind it in the other."

Stoppage by agent; ratification.

The goods may be stopped *in transitu* by an agent on behalf of the unpaid vendor provided that he have sufficient authority to do so; see *Whitehead* v. *Anderson*, 9 M. & W. 518; but a stoppage by an unauthorised person, professing to act for the vendor, is inoperative, though ratified, if such ratification be made after the period during which the vendor himself could have stopped *in transitu*; *Bird* v. *Brown*, 4 Exch. 786.

What is a *transitus* and when does it terminate?

Stoppage *in transitu*, as its name imports, can only take place while the goods are on their way. If the goods once arrive at the termination of their journey, and come into the actual or constructive possession of the consignee, there is an end of the seller's right over them. And, therefore, in most of the cases the dispute has been whether the goods had or had not arrived at the termination of their journey. The rule to be collected from all the cases is, that they are *in transitu* so long as they are in the hands of the carrier as such, whether he was or was not appointed by the consignee, and also so long as they remain in any place of deposit connected with their transmission. "Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee, for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee;" Sale of Goods Act, 1893, s. 45 (1).

Sale of Goods Act, 1893, s. 45 (1).

If, however, after their arrival at their place of destination, the goods be warehoused with the carrier, whose store the buyer uses as his own, or even if they be warehoused with the vendor himself, and rent be paid to him for them, that puts an end to the right to stop *in transitu*. "If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer;" Sale of Goods Act, 1893, s. 45 (3).

Sale of Goods Act, 1893, s. 45 (3).

Thus it was held that the right to stop the goods was gone, because they had reached the warehouse which the

buyer was using as his own, in the following cases: *Richardson* v. *Goss*, 3 B. & P. 127; *Leeds* v. *Wright*, Id. 320; *Scott* v. *Pettit*, Id. 469; *Dixon* v. *Baldwen*, 5 East, 175; *Rowe* v. *Pickford*, 8 Taunt. 83; *Foster* v. *Frampton*, 6 B. & C. 107; and *Hurry* v. *Mangles*, 1 Camp. 452, where the vendor himself warehoused them at a rent; see also *Stovold* v. *Hughes*, 14 East, 308; *Heinekey* v. *Earle*, 8 E. & B. 410, 427; *Cooper* v. *Bill*, 3 H. & C. 722; *Merchant Co.* v. *Phœnix Co.*, 5 Ch. D. 205. The goods were held to be still *in transitu* in *Hodgson* v. *Loy*, 7 T. R. 440; *Mills* v. *Ball*, 2 B. & P. 457; *Smith* v. *Goss*, 1 Camp. 282; *Nicholls* v. *Le Feuvre*, 2 B. N. C. 83; *Edwards* v. *Brewer*, 2 M. & W. 375; and *James* v. *Griffin*, 1 Id. 20, 2 Id. 623, where the majority of the court held that the buyer's statement that he did not intend to take possession was admissible in evidence, though not made to the vendor or the wharfinger. As to *Coates* v. *Railton*, 6 B. & C. 422, see *Kendal* v. *Marshall*, 11 Q. B. D. 356, 366, *per* Lord Esher.

Effect of the goods being at the orders of the buyer, in the hands of agents for keeping them.

The arrival of the goods at a place where they are to be at the orders of the buyer, in the hands of persons who are to keep them for him, is an end of the *transitus*, although the place be not that of their ultimate destination; because in such a case they have got into the hands of agents for the buyer, not concerned merely in their carriage; *Wentworth* v. *Outhwaite*, 10 M. & W. 436; *Dobson* v. *Wentworth*, 4 M. & Gr. 1080; *Cusack* v. *Robinson*, 1 B. & S. 299. And so, it seems, is the arrival of the goods into the hands of a person employed by the buyer to receive them from the first carrier, or out of the warehouse where they were when sold, and give them a new destination; as in *Valpy* v. *Gibson*, 4 C. B. 837, where the goods were ordered for the Valparaiso market, and the court expressed the opinion that the transit was at an end upon the arrival of the goods in the hands of the buyer's shipping agent at Liverpool; see also *Ex p. Gibbes*, 1 Ch. D. 101.

Secus, where the goods have only arrived in a vessel at a port for orders, though the buyer is to give the orders for the ultimate destination; *Fraser* v. *Witt*, 7 Eq. 64; or where the goods were delivered at the port of destination to a warehouseman not named by the consignee, but who considered himself to be acting as agent for the consignee; *Ex p. Barrow*, 6 Ch. D. 783. In *Ex p. Watson*, 5 Id. 35, goods were forwarded by the seller from Yorkshire to London, to be there shipped for Shanghai by the buyer, on the terms

of a special arrangement between the seller and buyer, whereby the former was to have a lien on the bill of lading and shipment; and it was held that the *transitus* continued from Yorkshire to Shanghai.

Bethell v. *Clark.*

In *Bethell* v. *Clark*, 20 Q. B. D. 615, goods were bought by merchants in London of vendors in Wolverhampton, and the buyers wrote to the vendors asking them to consign the goods "to the Darling Downs, to Melbourne, loading in the East India Docks." The goods were delivered to carriers to be forwarded to the ship, and were shipped. The C. A. held that the transit continued until the goods reached Melbourne. In *Lyons* v. *Hoffnung*, 15 App. Cas. 391, a similar decision was given by the Judicial Committee.

Kendal v. *Marshall.*

On the other hand, where the buyer of goods at Bolton directed the seller to send them to M., his agent at Garston, and at the same time instructed M. to forward them to Rouen, it was held that the transit had ceased when the goods had reached Garston and were lying there in the warehouse of the railway company, who had given M. the usual notice that the goods had arrived, and that if delivery were not taken in due course the company would hold them as warehousemen for him and would charge rent; *Kendal* v. *Marshall*, 11 Q. B. D. 356. *Ex p. Miles*, 15 Id. 39, was a somewhat similar case, in which the transit was held as a matter of fact to be over on the arrival of the goods at a place short of their final destination; see also *Re Gurney*, 67 L. T. 598; and the Act of 1893, s. 45 (3), *ante*, p. 726.

Other cases as to what constitutes a *transitus.*

In *Cowasjee* v. *Thompson*, 5 Moo. P. C. 165, the goods were purchased in London "free on board," to be paid for upon delivery on board, in a bill at six months, or cash less discount, at the seller's option. The goods were delivered by the seller into a vessel indicated by the buyer, and a receipt for them was obtained from the mate, which the seller kept. The seller elected to be paid by bill, which was accordingly given, and the master, *without requiring the return of the mate's receipt*, signed bills of lading for the goods as shipped by the buyer. By the custom of the port, the phrase "free on board" imports that the buyer is considered as the shipper, though the seller is to bear the expense of shipment. It was held that the transit was at an end, and the right to stop gone, so soon as the goods were put on board, and the bill given for the price. *Quære.* See *Ex p. Rosevear Co.*, 11 Ch. D. 560; *Brindley* v. *Calgary Co.*, 55 L. J. Q. B. 67.

As to how far the intention with which the goods were shipped may affect the question, and when and how far in this sort of case the question is one of fact, even though the documents are not express upon the point, see also *Van Casteel* v. *Booker*, 2 Exch. 691; *Key* v. *Cotesworth*, 7 Id. 595; *Browne* v. *Hare*, 3 H. & N. 484, 4 Id. 822; *Schuster* v. *McKellar*, 7 E. & B. 705; *Green* v. *Sichel*, 7 C. B. N. S. 747; *Moakes* v. *Nicholson*, 19 Id. 290; *Shepherd* v. *Harrison*, L. R. 5 H. L. 116; and *Bethell* v. *Clark*, 20 Q. B. D. 615. For a case where the facts were held to negative a transit, the ship belonging to the buyer, see *Schotsmans* v. *L. & Y. R. Co.*, 2 Ch. 332; *Ex p. Francis*, 56 L. T. 577. For the reverse case, where the ship was only chartered by the buyer, *Berndtson* v. *Strang*, 4 Eq. 481, 3 Ch. 588; *Ex p. Rosevear Co.*, 11 Ch. D. 560.

How far a question of fact.

The rule given in the Act of 1893, s. 45 (5), is that "when goods are delivered to a ship chartered by the buyer, it is a question depending upon the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer."

Sale of Goods Act, 1893, s. 45 (5).

Whilst, however, goods which have arrived at the termination of their journey remain in the hands of a carrier employed to convey them to their original destination as between the buyer and seller, no kind of *constructive* possession in the buyer arises, unless "the carrier enters expressly, or by implication, into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination pursuant to that contract, but in a new character, for the purpose of custody on his account, and subject to some new or further order to be given to him;" *Whitehead* v. *Anderson*, 9 M. & W. 518, 535. "The *transitus* is not at an end so long as the carrier continues to hold the goods as a carrier. It is not at an end until the carrier, by agreement between himself and the consignee, undertakes to hold the goods for the consignee, not as carrier, but as his agent;" *per* James, L.J., *Ex p. Cooper*, 11 Ch. D. 68, 78. In the absence of such an agreement, it seems that the mere act of marking or sampling the goods, or of giving notice to the carrier to hold the goods for the buyer, though done with intent to take possession, does not establish a constructive possession in the buyer, or affect the right of stoppage; *Whitehead* v. *Anderson*, *supra*; *Coventry* v. *Gladstone*, 6 Eq.

Carrier holds for buyer only under new agreement.

44; see *Dixon* v. *Yates*, 5 B. & Ad. 313. In *Ex p. Golding*, 13 Ch. D. 628, it was held that the signature by the ship-master of the bill of lading made out in the name of a sub-purchaser did not terminate the *transitus* indicated by the original buyer. See the Act of 1893, s. 45 (3), *ante*, p. 726.

Where goods sold on a wharf or in a dock.

The same law holds in the case of goods which, when sold, are on a wharf or in a dock, where they are intended to remain until taken away by the buyer. In such a case the goods are considered as constructively *in transitu* (see *per* Lord Abinger, *Gibson* v. *Carruthers*, 8 M. & W. 341), and the right of the seller to stop them remains so long as the goods are not taken away, or the wharfinger or dock owner has not become the buyer's agent. In *Tanner* v. *Scovell*, 14 M. & W. 28, the wharfinger, upon orders from the seller to weigh and deliver the goods to the buyer, had furnished the seller with the weights and delivered part of the goods to the buyer's order; yet, as he had not received warehouse rent from the buyer, or transferred the goods into his name, or done any other act to become his agent, the rest of the goods were considered subject to the seller's right of stoppage. In *Lackington* v. *Atherton*, 7 M. & Gr. 360, the seller, who had himself bought the goods of the importer, in whose name they were warehoused in the docks, gave the buyer a delivery order upon which the dock company refused to act, because not given by the importer. Upon the subsequent insolvency of the buyer, the seller himself obtained a delivery order from the importer and possessed himself of the goods. See also *Dixon* v. *Yates*, 5 B. & Ad. 313; *Imperial Bank* v. *L. & St. K. Dock Co.*, 5 Ch. D. 195; *Ex p. Cooper*, 11 Id. 68. The question in all such cases seems to be, whether the warehouseman at the time of the stoppage held the goods as agent for the consignor, or as agent for the consignee.

Delivery of part.

If the vendor allow the buyer to take possession of part of the goods sold under an entire contract, without intending to retain the rest, his right to stop *in transitu* is gone; *Hammond* v. *Anderson*, 1 B. & P. N. R. 69; see *Slubey* v. *Heyward*, 2 H. Bl. 504; *Hanson* v. *Meyer*, 6 East, 614; see comments on the first two cases in *Ex p. Cooper*, 11 Ch. D. 68, and in *Ex p. Falk*, 14 Id. 446, *per* Bramwell, L.J. But it is otherwise if he do intend to retain the remainder; *Bunney* v. *Poyntz*, 4 B. & Ad. 570; see *Wentworth* v. *Outhwaite*, 10 M. & W. 451; *Ex p. Chalmers*, 8 Ch. 289.

It has been said that, *primâ facie*, a delivery of part

imports an intention to deliver the whole; *per* Taunton, J., *Betts* v. *Gibbins*, 2 A. & E. 73. That *dictum*, however, which had been questioned by the author in his work on Mercantile Law (5th ed., 488, 530), was overruled in *Tanner* v. *Scovell*, 14 M. & W. 28. In *Ex p. Cooper*, 11 Ch. D., 68, 73, Brett, L.J., laid it down "that a delivery of part, or even of the bulk of a cargo, is not *primâ facie* a delivery of the whole; and that those who rely upon the part delivery as a constructive delivery of the whole are bound to show that the part delivery took place under such circumstances as to make it a constructive delivery of the whole;" and in *Kemp* v. *Falk*, 7 App. Cas. 573, 586, Lord Blackburn said: "If either of the parties does not intend it as a delivery of the whole, if either of them dissents, the part delivery is not a constructive delivery of the whole." "I rather think the onus is upon those who say it was so intended."

Tanner v. Scovell.

In *Tanner* v. *Scovell* it was laid down that if the buyer takes possession of part, not meaning thereby to take possession of the whole, but to separate that part only, it puts an end to the *transitus* only with respect to that part and no more. In that case, under a general order to deliver the goods, the buyer procured the actual delivery of certain portions of them which he had resold, and the delivery of those portions was held not to operate as a delivery of the whole, or to affect the vendor's right as to the rest. In *Jones* v. *Jones*, 8 M. & W. 431, the assignee of a cargo of goods under a trust deed took possession of part of the cargo upon its arrival, and directed the rest to be conveyed to a designated place, with the intention of obtaining possession of the whole for the purposes of the trust; and it was held that such taking possession of part did put an end to the transit; but it was in that case assumed to be clear law that the mere delivery of part to the buyer, if he means to separate that part from the remainder, does not amount to a delivery of the whole so as to defeat the right to stop *in transitu*.

In *Tanner* v. *Scovell*, *supra*, the whole question was stated to depend on *the intention of the buyer*; but perhaps that statement was intended to apply only to cases like *Tanner* v. *Scovell*, where it was in the power of the buyer at the time, if he pleased, to take all. See *Bolton* v. *L. & Y. R. Co.*, L. R. 1 C. P. 431, where the buyer took part, having the power to take all, and refused to take the rest, and the right to stop was held not to be gone, and *Ex p. Catling*,

29 L. T. 431. In *Ex p. Gibbes*, 1 Ch. D. 101, it was held that there was a constructive delivery to the buyer of the whole of the goods by a delivery of part. In *Ex p. Cooper*, 11 Ch. D. 68, it was held that part delivery did not amount to a constructive delivery of the whole where freight had not been paid on part of the undelivered goods; and in *Kemp* v. *Falk*, 7 App. Cas. 573, the facts were also held to exclude the notion of a constructive delivery of the whole cargo.

Sale of Goods Act, 1893, s. 45 (7).

In the Act the law is thus stated: "Where part delivery of goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped *in transitu*, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods" (s. 45 (7)).

Where buyer rejects goods which remain with carrier. S. 45 (4).

"If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back;" Sale of Goods Act, 1893, s. 45 (4). This seems to be founded upon *Bolton* v. *L. & Y. R. Co.*, *supra*.

Vendee may anticipate termination of transit.

It was once thought that, although the determination of the *transit* puts an end to the vendor's right to stop the goods, the buyer could not anticipate its natural determination, as for instance, by going to meet the goods at sea; *Holst* v. *Pownal*, 1 Esp. 240. But the contrary view was expressed in *Mills* v. *Ball*, 2 B. & P. 457, 461; *Oppenheim* v. *Russell*, 3 Id. 42, 54; and *Foster* v. *Frampton*, 6 B. & C. 107. In *Whitehead* v. *Anderson*, 9 M. & W. 518, 534, it was laid down as indisputable, that if the vendee take the goods out of the possession of the carrier into his own before their arrival, with or without the consent of the carrier, the right to stop *in transitu* is at an end; though, if he were to take them without the consent of the carrier, it might be a wrong to him for which he would have a right of action; see also *L. and N. W. R. Co.* v. *Bartlett*, 7 H. & N. 400. And it is laid down in the Act of 1893 that "if the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end" (s. 45 (2)).

s. 45 (2).

Carrier cannot [illegible] transit by refusing to deliver.

The carrier cannot *prolong* the transit of the goods after arrival at the port of destination, by wrongfully refusing to give them up to the consignee upon demand and tender of freight; *Bird* v. *Brown*, 4 Exch. 786. On this point the

Act, s. 45 (6), provides that "where the carrier or other bailee *wrongfully* refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end." S. 45 (6).

Nor can the vendor's right be defeated by the enforcement of a claim against the vendee, as, for instance, by process of foreign attachment at the suit of his creditor; *Smith* v. *Goss*, 1 Camp. 282; or by the carrier's assertion of a general lien against him; *Oppenheim* v. *Russell*, 3 B. & P. 42. Vendor's right not defeated by other claims.

"To make a *notice* effective as a stoppage *in transitu*, it must be given to the person who has the immediate custody of the goods; or, if given to the principal whose servant has the custody, it must be given at such a time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant, in time to prevent the delivery of the goods to the consignee;" *Whitehead* v. *Anderson*, 9 M. & W. 518; see also *Ex p. Watson*, 5 Ch. D. 35; and *Phelps* v. *Comber*, 29 Id. 813. To whom notice of stoppage must be given.

This statement of the law is adopted almost *verbatim* by the Act of 1893, s. 46 (1), which provides that the notice "may be given either to the person in actual possession of the goods or to his principal. In the latter case, the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer." As to whether there is a duty on the shipowner to communicate, see *per* Lord Bramwell, *Ex p. Falk*, 14 Ch. D. 455; *per* Lord Blackburn, *Kemp* v. *Falk*, 7 App. Cas. 585. Sale of Goods Act, 1893, s. 46 (1).

The second vendee of a chattel cannot, generally speaking, stand in a better situation than his immediate vendor; *Small* v. *Moate*, 9 Bing. 574; *Kern* v. *Deslandes*, 10 C. B. N. S. 205; *Sheridan* v. *New Quay Co.*, 4 Id. 618; *Schuster* v. *McKellar*, 7 E. & B. 704. If, therefore, the vendee sell the goods before they have been delivered to him, he sells them, generally speaking, subject to the vendor's right to stop *in transitu*; *Dixon* v. *Yates*, 5 B. & Ad. 313; *Jenkyns* v. *Usborne*, 7 M. & Gr. 678; see Sale of Goods Act, 1893, s. 47, *infra*. Subject to the vendor's rights the subvendee is of course entitled to the goods; *Kemp* v. *Falk*, *supra*; *Ex p. Golding*, 13 Ch. D. 628. Generally vendee's title no better than vendor's.

But on the above rule the principal case engrafted an exception; for the second and main point in *Lickbarrow* v. *Mason* is, that the vendee may, by negotiating the bill of lading to a *bonâ fide* transferee for value, defeat the vendor's But right to stop defeated by indorsement of bill of lading;

or other document of title.

Sale of Goods Act, 1893, s. 47.

right to stop *in transitu*. And under the Act of 1893, s. 47, "where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated, and, if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee." See also the Factors Act, 1889, s. 10. As to what is a document of title under the Factors Act, see *post*, p. 742. It has the same meaning in the Sale of Goods Act, by s. 62 (1). By s. 62 (2), "a thing is deemed to be done 'in good faith' when it is in fact done honestly, whether it be done negligently or not."

"Abbott on Shipping" on this point.

A succinct history of the law on this point is given by Lord Tenterden, in his admirable work on Shipping, where he remarks, that "the earliest mention of the subject in our law books is the case of *Evans* v. *Martlett*, 1 Lord Raym. 271, 12 Mod. 156; in which Holt, C.J., said: 'The consignee of a bill of lading has such a property, that he may assign it over:' and Shower said 'that it had been adjudged so in the Exchequer.' But in that case, the effect of such an assignment was not properly before the court, and does not appear to have been discussed or argued; and the case supposed to be referred to by Shower has not been found. In the case of *Snee* v. *Prescot*, 1 Atk. 246, the right of the pawnee of the bill of lading as against the consignor was not noticed or insisted upon." He then proceeds to comment on the cases of *Wright* v. *Campbell*, 4 Burr. 2046, 1 W. Bl. 628; *Hibbert* v. *Carter*, 1 T. R. 445; *Caldwell* v. *Ball*, Id. 205; and *Lickbarrow* v. *Mason*; and concludes by stating that that cause was tried again, and that "the Court of King's Bench, at the head of which Lord Kenyon had in the meantime been placed, and who had, in another cause, expressed his approbation of the first judgment in this case, as being founded on principles of justice and common honesty, again decided the case without argument, in conformity to the first decision of that court; 5 T. R. 683; and in order that the question might again be carried to the other tribunals, another writ of error was brought; but it was afterwards abandoned, and it is now

the admitted doctrine in our courts that the consignee may, under the circumstances before stated, confer an absolute right and property upon a third person, indefeasible by any claim on the part of the consignor."

To defeat the vendor's right of stoppage, the indorsement of the bill of lading must be for value. In *Rodger* v. *Comptoir d'Escompte*, L. R. 2 P. C. 393, it was held that an antecedent debt was not a sufficient consideration to defeat the right of stoppage *in transitu*. But the C. A. expressly dissented from that view in *Leask* v. *Scott*, 2 Q. B. D. 376. In the former case, the buyers being pressed by their bankers, who were their creditors to a large amount, made an assignment to them of all goods and bills of lading, or other documents for goods, to arrive in December, 1866. In pursuance of their agreement in the assignment, the buyers, on the subsequent arrival of bills of lading, indorsed them to the bankers. They received no consideration for such indorsement except an existing debt and the release of an antecedent agreement by them to furnish bills and shipping documents, on the faith of which the advances were made to them by the bankers. At the time of the assignment it was notorious that the assignors were in difficulties; and by the assignment, if not before, they were made insolvent. It was held that the indorsement of the bills of lading did not defeat the vendor's right to stop *in transitu*. See *Chartered Bank of India* v. *Henderson*, L. R. 5 P. C. 501, a somewhat similar case, where it was held that the indorsement was for a sufficient consideration.

To defeat right of stoppage indorsement must be for value.

Rodger v. *Comptoir d'Escompte.*

In *Leask* v. *Scott*, *supra*, the facts were as follows: On the 22nd Dec., 1875, Geen, a fruit merchant in London, agreed to purchase of the defendants a shipment of nuts from Naples to London, by the *Trinidad*, "reimbursement as usual," which was by acceptance at three months on delivery of the shipping documents. On the 1st Jan., 1876, being prompt day, Geen being already indebted to the plaintiff, his fruit broker, for over 10,000*l*., applied to him for a further advance of 2,000*l*. The plaintiff said, "You may have it, but you must first cover up your account." Geen said he would give him cover, and the plaintiff at once handed Geen a cheque for 2,000*l*. On the 4th Jan., the bill of lading, dated the 29th Dec., 1875, indorsed by defendants in blank (the nuts being made deliverable to their order), was handed by their agent to

Leask v. *Scott.*

Geen, who at once accepted a draft for the price, 224*l*. On the next day Geen handed to the plaintiff the bill of lading and other similar documents to the value of about 5,000*l*. in performance of his promise to give the plaintiff cover. On the 8th Jan. Geen stopped payment. The *Trinidad* arrived off Liverpool on the 3rd Feb., and the defendants sought to stop the nuts *in transitu*, the plaintiff claiming them under the bill of lading. The jury found that the plaintiff received the bill of lading honestly and fairly: that valuable consideration was given on the understanding of security being given: and that the security given was to secure the 2,000*l*., and also the old account. The defendant argued, on the authority of *Rodger* v. *Comptoir d'Escompte*, that the equitable right of stoppage prevailed against a legal title acquired by receiving the bill of lading for a consideration, no part of which was caused to be given by the bill of lading. The C. A., whilst of opinion that this argument was the same as the *ratio decidendi* in *Rodger* v. *Comptoir d'Escompte*, distinctly declined to follow that case, holding that there was "not a trace of such distinction between cases of past and present consideration to be found in the books": and further, that "practically such a past consideration" (*quære*, transaction) "as was then under discussion had always a present operation by staying the hand of the creditor." The judgment of Field, J., based upon *Rodger* v. *Comptoir d'Escompte*, was accordingly reversed. Another view of both these cases might perhaps be that the giving of security should be treated as relating back to the agreement to give it, in which case it would have been given for a present consideration. *Quære*, how far *Leask* v. *Scott* is consistent with or overrules *Spalding* v. *Ruding*, 6 Beav. 376.

Indorsement must be by one having authority to indorse.

Further, "although the shipper may have indorsed in blank a bill of lading, deliverable to his assignees, his right is not affected by an appropriation of it without his authority. It is not a negotiable instrument like a bill of exchange;" *per* Campbell, C.J.; *Gurney* v. *Behrend*, 3 E. & B. 633. See also *Schuster* v. *M'Kellar*, 7 E. & B. 704; *The Marie Joseph*, L. R. 1 P. C. 219; *Hathesing* v. *Laing*, 17 Eq. 92; *Gilbert* v. *Guignon*, 8 Ch. 16; *Gabarron* v. *Kreeft*, L. R. 10 Ex. 274; *Ogg* v. *Shuter*, 1 C. P. D. 47; *Mirabita* v. *Imperial Ottoman Bank*, 3 Ex. D. 164; and *Glyn* v. *E. & W. I. Dock Co.*, 7 App. Cas. 591, as to what state of facts has been held sufficient to establish the ability of the

indorser to confer a good title on a *bonâ fide* indorsee; and also the Factors' Acts, 1889, which will be more fully noticed hereafter.

Assignment must be *bonâ fide*.

If the assignee of a bill of lading act *malâ fide*, for instance, if he knows that the consignee of the goods is insolvent, and takes the assignment of the bill of lading for the purpose of defeating the right to stop *in transitu*, and so defrauding the consignor out of the price, he will be held to stand in the same situation as the consignee: and the consignor will preserve his right of stoppage; *per* Lord Ellenborough, *Cumming* v. *Brown*, 9 East, 506, 514. And if the bill of lading contain a condition, *e.g.*, if it be indorsed upon it that the goods are to be delivered, provided E. F. pay a certain draft, every indorsee takes it subject to that condition, and will have no title to the goods, unless it be performed; *Barrow* v. *Coles*, 3 Camp. 92.

And condition of indorsement must be fulfilled.

Effect of making goods deliverable to shipper's order.

Where the shipper takes and keeps in his own or his agent's hands a bill of lading, making the goods deliverable to his own order to protect himself, the hold retained under the bill of lading is not merely a right to retain possession till the conditions upon which it was given are fulfilled, but involves in it a power to dispose of the goods on the vendee's default, so long at least as the vendee continues in default; *Ogg* v. *Shuter*, 1 C. P. D. 47.

Unless right to possession vest in consignee question does not arise.

Where the goods are shipped under such circumstances as to show an intention that the property or right of possession should not vest in the consignee until some further act is done, such as payment, or handing over the bill of lading, no question of stoppage *in transitu* can arise before that act is done; see *Turner* v. *Liverpool Docks*, 6 Exch. 543; *Sheridan* v. *New Quay Co.*, 4 C. B. N. S. 618.

Vendor may stop subject to pledgee's rights and may marshal assets.

In cases where a bill of lading may be, and has been, pledged by the consignee of the goods, as a security for his own debt, the legal right to the possession of the goods passes to the pledgee; but the right to stop them *in transitu*, in case the consignee should become insolvent, is not absolutely defeated, as it is in the case of a sale of the bill of lading by the consignee; for the vendor may still resume his interest in them, subject to the rights of the pledgee, and will have a right, at least in equity, to the residue which may remain, after satisfying the pledgee's claim. And further, if the goods comprised within the bill of lading be pledged along with other goods belonging to the pledgor himself, the vendor will have a right to have all the pledgor's

own goods appropriated to the discharge of the pledgee's claim before any of the goods comprised within the bill of lading are so.

Re Westzinthus.

This was decided in *Re Westzinthus*, 5 B. & Ad. 817, where Lapage & Co., having purchased oil from Westzinthus, paid for it by acceptance: and being in possession of the bills of lading, pledged them with Hardman, as a security for certain advances. Lapage & Co. became bankrupt, and their acceptance in the plaintiff's favour was dishonoured. At the time of their bankruptcy they owed Hardman 9,271*l.* on account of advances; as a security for which he held, besides the bill of lading, goods to the value of 9,961*l.*, belonging to Lapage himself. The court held that Westzinthus, who had, upon the bankruptcy of Lapage & Co., given notice to the master of the ship that he claimed to stop the oil *in transitu*, had a right to insist upon the proceeds of Lapage's own goods being appropriated to the discharge of Hardman's lien, and, as they proved sufficient to satisfy it, had a right to receive the entire proceeds of his oils. "As Westzinthus," said Lord Denman, "would have had a clear right at law to resume the possession of the goods on the insolvency of the vendee, had it not been for the transfer of the property and right of possession, for a valuable consideration, to Hardman, it appears to us that, in a court of equity, such transfer would be considered as a pledge or mortgage only; and Westzinthus would be considered as having resumed his former interest in the goods, subject to that pledge or mortgage, in analogy to the common case of a mortgage of real estate, which is considered as a mere security, and the mortgagor as the owner of the land. We, therefore, think that Westzinthus, by his attempted stoppage *in transitu*, acquired a right to the goods in equity (subject to Hardman's lien thereon) as against Lapage and his assignees, who are bound by the same equities that Lapage himself was; and this view of the case agrees with the opinion of Buller, J., in his comment on *Snee* v. *Prescot* in *Lickbarrow* v. *Mason*. If then Westzinthus had an equitable right to the oil subject to Hardman's lien thereon for his debt, he would, by means of his goods, have become a surety to Hardman for Lapage's debt; and would then have a clear equity to oblige Hardman to have recourse against Lapage's own goods deposited with him to pay his debt in ease of the surety. And all the goods, both of Lapage and Westzinthus, having been sold, he would have

a right to insist upon the proceeds of Lapage's goods being appropriated, in the first instance, to the payment of the debt." See this last point followed in *Ex p. Alston*, 4 Ch. 168; and see *Coventry* v. *Gladstone*, 6 Eq. 44. *Re Westzinthus.*

Spalding v. *Ruding*, 6 Beav. 376, confirms *Re Westzinthus*, and shows that *the goods cannot be retained as security for a general balance of account*, but only for the specific advance made upon security of the bill of lading. But compare, as to the latter point, *Rodger* v. *Comptoir d'Escompte*, dissented from in *Leask* v. *Scott*, *ante*, p. 735. In *Kemp* v. *Falk*, 7 App. Cas. 573, and *Ex p. Golding*, 13 Ch. D. 628, the cases of *Spalding* v. *Ruding* and *Ex p. Westzinthus* were followed and approved. See Sale of Goods Act, 1893, s. 47, *ante*, p. 734.

Whilst, however, the indorsement of a bill of lading might defeat the right of stoppage *in transitu*, still, before the Bills of Lading Act, 1855, the transfer of a bill of lading did not, like that of a bill of exchange, confer any right on the assignee to sue upon the contract expressed thereby; *Thompson* v. *Dominy*, 14 M. & W. 403; *Howard* v. *Shepherd*, 9 C. B. 297. That Act, however, altered the law in this respect. By s. 1, rights of action and liabilities upon the bill of lading are to vest in and bind the consignee or indorsee *to whom the property in the goods shall pass*. See *Fox* v. *Nott*, 6 H. & N. 630, showing that the section was not intended to exonerate the original shipper; *Short* v. *Simpson*, L. R. 1 C. P. 248; and *The St. Cloud*, Brown & Lush. 4. As to what is *primâ facie* evidence that the property passed, see *Dracachi* v. *Anglo-Egyptian Bank*, L. R. 3 C. P. 190; and *The Freedom*, L. R. 3 P. C. 594. Until Bills of Lading Act, no right of action passed. Bills of Lading Act, 1855, 18 & 19 Vict. c. 111, s. 1.

The question whether by an indorsement and delivery of the bill of lading by way of security for an advance "the property in the goods passes" within this section, so as to make the indorsee liable for freight, was fully discussed in *Burdick* v. *Sewell*, 10 Q. B. D. 363, 13 Id. 159, 10 App. Cas. 74. It was there eventually decided by the H. L. that where such indorsement and delivery operates merely as a pledge, so as to give to the pledgee only a special property, and not as an assignment of the whole property in the goods, the pledgee is not an indorsee to whom the property passes within the Act. Lords Selborne and Blackburn thought that it would be the same if the transaction were in fact a mortgage, but that point was not decided in the H. L.; see 10 App. Cas. 85, 96, 103. See also *Bristol Bank* v. *Mid. R. Co.*, (1891) 2 Q. B. 653. Indorsement by way of pledge. *Burdick* v. *Sewell.*

Bills of Lading Act.

The pledgee is liable, however, irrespectively of the Act, on the bill of lading if and when he takes delivery of the goods under the bill of lading, on the ground that the fact of so doing is evidence of a new agreement by him with the shipowner to comply with the terms of the bill of lading; *per* Lord Selborne, *Sewell* v. *Burdick*, 10 App. Cas. 86, 89; see *Allen* v. *Coltart*, 31 W. R. 841.

S. 2.

By s. 2 it is provided that the Act is not to affect rights of stoppage *in transitu*, or claims for freight against the shipper or owner of the goods, or the consignee or indorsee as owner, or by reason of his receipt of the goods. It seems that the Act has not altered the rule, that the indorsement of a bill of lading gives no better right to the indorsee than the indorser himself had, and that in this respect a bill of lading still differs from a bill of exchange in the same way as it did before the Act; see *Gurney* v. *Behrend*, 3 E. & B. 622. There the bill of lading was sent in a letter from a shipper, stating that he had drawn against the consignment, and it was held that the acceptance of the draft was not thereby made a condition precedent to the right to negotiate the bill of lading, though if it had been, and had not been complied with, an indorsement of the bill of lading would not have defeated the seller's title. See *Key* v. *Cotesworth*, 7 Exch. 595; *The Argentina*, L. R. 1 A. & E. 370; and the cases on this point cited *ante*, p. 736.

Bill of lading still not strictly a negotiable instrument.

If the shipper indorses the bill as a pledge, and whilst it is so held the goods are misdelivered, he may, on reindorsement of the bill to him on payment of the advance for which it was pledged, sue for the misdelivery; *Short* v. *Simpson*, L. R. 1 C. P. 248.

The rights and liabilities of the consignee or indorsee under the Act pass from him by indorsement over; *Smurthwaite* v. *Wilkins*, 11 C. B. N. S. 842; if the indorsement be such as to pass the property under the Act; *Burdick* v. *Sewell*, *supra*.

But a consignee who has sold the goods, but has not indorsed the bill of lading to the buyer, remains a consignee within the Act, so as to be liable under the bill of lading; *Fowler* v. *Knoop*, 4 Q. B. D. 299; and conversely an indorsee has a right to sue thereon, although he has sold the goods before taking proceedings; *The Marathon*, 40 L. T. 163.

S. 3.

S. 3 provides that a bill of lading in the hands of a

consignee or indorsee for value without notice shall be conclusive evidence of shipment *against the master or other person signing the same*, notwithstanding that such goods, or some part thereof, may not have been shipped, provided that he may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or holder, or some person under whom the holder claims. It has been held that this section does not estop an owner who has not personally signed the bill of lading; *Jessel* v. *Bath*, L. R. 2 Ex. 267; *M'Lean* v. *Fleming*, L. R. 2 H. L. Sc. 128; *Blanchet* v. *Powell's Collieries*, L. R. 9 Ex. 74; *Brown* v. *Powell Coal Co.*, L. R. 10 C. P. 562.

Bills of Lading Act. How far signature of bill of lading binding.

See, as to the transfer of a bill of lading after the landing of the cargo at the port of destination, *Barber* v. *Meyerstein*, L. R. 4 H. L. 317.

Negotiability after ship's arrival.

A factor to whom goods were consigned stood at common law in a different position from a buyer with respect to his power to pass the property by an indorsement of the bill of lading. For, though he might bind his principal by a *sale*, he could not by a *pledge*, that not being within the usual scope of his authority; *Martini* v. *Coles*, 1 M. & S. 140; *Shipley* v. *Kymer*, Id. 484; *Newsom* v. *Thornton*, 6 East, 17; see *Thackrah* v. *Fergusson*, 25 W. R. 307. The law upon this subject was, however, altered by the Factors' Acts, 1823 to 1877, which are now repealed and replaced by the Factors' Act, 1889.

Factor could not pledge before Factors' Acts.

The Factors' Act, 1889, deals with sales, pledges, or other dispositions, of goods or of documents of title to goods, when made either by a mercantile agent who is in possession, with the owner's consent, of the goods or the documents (ss. 2 to 7): or by a seller or buyer, who has retained, or obtained, possession of the goods or the documents (ss. 8, 9).

Factors' Act, 1889, 52 & 53 Vict. c. 45.

A person is in possession of goods, or of documents of title to goods, "where the goods or documents are in his actual custody, or are held by any other person subject to his control, or for him or on his behalf" (s. 1 (2)). This provision corresponds with the terms used in the Factors' Act, 1842, s. 4. It has been held that documents pledged are subject to the pledgor's control, so far as to enable him to make a second pledge subject to the first; *Portalis* v. *Tetley*, 5 Eq. 140. "Goods" include "wares and merchandise" (s. 1 (3)). They do not include stock certificates;

"Possession." S. 1 (2).

"Goods." S. 1 (3).

Freeman v. *Appleyard*, 32 L. J. Ex. 175; but they include furniture; *Lee* v. *Butler*, (1893) 2 Q. B. 318.

"Documents of title." S. 1 (4).

"Documents of title" include a bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and "any other document used in the ordinary course of business as proof of the possession or control of goods, *or* authorizing or purporting to authorize, either by indorsement or delivery, the possessor of the document to transfer or receive goods thereby represented" (s. 1 (4)).

How transferable. S. 11.

"The transfer of a document may be by indorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery" (s. 11).

Cases.

The above definition of documents of title is similar to that contained in the Factors' Act, 1842, s. 4. A receipt for the price of goods is not a document of title; *Kemp* v. *Falk*, 7 App. Cas. 573, 585; nor is a mere undertaking by a seller to deliver the goods to the buyer's order, such document not being "a known document amongst merchants;" *Farmeloe* v. *Bain*, 1 C. P. D. 445. It seems that the documents expressly mentioned in the definition clause must, in order to be documents of title, answer the description with which the clause concludes. Thus a wharfinger's certificate is not a document of title, if it only certifies that a seller has the goods ready for shipment pursuant to his contract; *Gunn* v. *Bolckow*, 10 Ch. 491. "Warrants are things warranting a wharfinger, or somebody else who has possession of the goods, to deliver them;" Id., *per* James, L.J. As to the trade custom relating to iron warrants, see *Merchant Bank* v. *Phœnix Co.*, 5 Ch. D. 205 (*ante*, p. 542).

"Mercantile agent." S. 1 (1).

A "mercantile agent" is "a mercantile agent having, in the customary course of his business as such agent, authority *either* to sell goods, *or* to consign goods for the purpose of sale, *or* to buy goods, *or* to raise money on the security of goods" (s. 1 (1)).

S. 6.

And "an agreement made with a mercantile agent through a clerk or other person authorized in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent" (s. 6).

Dispositions by mercantile agent. S. 2 (1).

Where a mercantile agent is, with the consent of the owner, in possession of goods or documents of title to goods, his sale, pledge, or other disposition thereof, is as valid as if made with the owner's express authority, if the agent is acting "in the ordinary course of business of a mercantile agent,"

and if the person taking under the disposition acts in good faith, and without notice of the agent's want of authority (s. 2 (1)).

Cases under the earlier Acts.

The earlier Acts were so construed as to limit their application to mercantile transactions by mercantile agents, like factors, entrusted, as such, with goods for the purpose of selling them. They were held not to apply to dealings by a wharfinger, warehouseman, packer, or carrier; *Monk* v. *Whittenbury*, 2 B. & Ad. 484; or by a bailee entrusted with the custody of household furniture; *Wood* v. *Rowcliffe*, 6 Hare, 191; or by a wine merchant's clerk, entrusted as such with delivery orders; *Lamb* v. *Attenborough*, 31 L. J. Q. B. 41; or by a mortgagor in possession, with power to sell on his own account; *Joseph* v. *Webb*, C. & E. 262; or by a person entrusted with wool, merely as a warehouseman, though, in addition to his business as warehouseman, he carried on an independent business as wool-broker; *Cole* v. *N. W. Bank*, L. R. 9 C. P. 470, 10 Id. 354. They were held, however, to apply to dealings by a factor employed to sell, to whom the goods had been sent for him to see whether they answered a description; *Baines* v. *Swainson*, 4 B. & S. 270; and to dealings by a person whose employment on the particular occasion corresponded with that of a factor, although he did not carry on a factor's business; *Hayman* v. *Flewker*, 13 C. B. N. S. 519; *Tremoille* v. *Christie*, 69 L. T. 338. See also *Johnson* v. *Credit Lyonnais*, 2 C. P. D. 224, 3 Id. 32; *Hellings* v. *Russell*, 33 L. T. 380; *City Bank* v. *Barrow*, 5 App. Cas. 664, 678.

S. 2 of the Act of 1889 is not, in terms, limited to cases where the mercantile agent is in possession *as* a mercantile agent, but it is submitted that the law as laid down in *Cole* v. *N. W. Bank*, *supra*, is not altered by this Act. The Act has been held to apply "only to persons of the class ordinarily carrying on the business of mercantile agents," and therefore not to a man who, being employed at a salary by jewellers to hawk jewels at private houses, improperly pawned them; *Hastings* v. *Pearson*, (1893) 1 Q. B. 62.

Owner's consent. S. 2 (4).

Revocation of consent. S. 2 (2).

The owner's consent to the agent's possession is to be presumed in the absence of evidence to the contrary (s. 2 (4)). The consent cannot be effectually determined without notice to the person taking under a disposition (s. 2 (2)). This latter provision was introduced in the Factors' Act, 1877, s. 2, in consequence of the decision, in *Fuentes* v. *Montis*, L. R. 3 C. P. 268, 4 Id. 93, that the

earlier Acts did not affect a pledge made by a factor after the revocation of his authority to sell.

Consent to possession of documents. S. 2 (3).

The agent's possession of documents of title is to be deemed to be with the owner's consent where the agent has obtained possession of them "by reason of his being or having been," with the owner's consent, "in possession of the goods represented thereby, or of any other documents of title" thereto (s. 2 (3)). This provision, reproduced from the Factors' Act, 1842, was rendered necessary by the decisions in *Phillips* v. *Huth*, 6 M. & W. 605, and *Hatfield* v. *Phillips*, 9 Id. 647, 14 Id. 665, that a factor who, by reason of his being intrusted with a bill of lading, obtained possession of a dock warrant was not a person intrusted with the dock warrant within the Factors' Act, 1825.

Possession through fraud.

Under the earlier Acts it was held that, if the owner in fact intrusted an agent, as such, with possession of goods or documents, it was immaterial that he was induced to do so by fraud; *Sheppard* v. *Union Bank*, 7 H. & N. 661; *Baines* v. *Swainson*, 32 L. J. Q. B. 281; but that possession obtained by fraud did not of itself constitute an "intrustment;" *Kingsford* v. *Merry*, 1 H. & N. 503, 516; *Hardman* v. *Booth*, 1 H. & C. 803; see, on both points, *Cole* v. *N. W. Bank*, L. R. 10 C. P. 354, 373.

Consideration necessary. S. 5.

There must be a consideration for such dispositions by a mercantile agent. The consideration necessary for their validity "may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration" (s. 5). Under the Acts of 1825 (s. 2) and 1842 (ss. 1, 2, 4), the consideration required was *payment* by money or negotiable security; see *Taylor* v. *Kymer*, 3 B. & Ad. 320; *Learoyd* v. *Robinson*, 12 M. & W. 745; *Thackrah* v. *Fergusson*, 25 W. R. 307.

Consideration in case of pledge; substitution of other goods, etc. S. 5.

Where the disposition is by way of pledge, and the consideration is the delivery or transfer of other goods, or of a document of title, or of a negotiable security, the pledgee acquires no right or interest in the pledged goods, greater than the value of the other goods, or the document, or security at the time of the delivery or transfer (s. 5); see the Act of 1842, s. 2, and *Bonzi* v. *Stewart*, 4 M. & Gr. 295, the decision which pointed out the necessity for that section. In *Sheppard* v. *Union Bank*, 7 H. & N. 661, it was held, upon the construction of that section, that the substitution need not be made by the original pledgor.

Where the disposition is by way of pledge and as security for an antecedent debt or liability, the pledgee acquires no further right than could have been enforced by the pledgor at the time of the pledge (s. 4); see *Jewan* v. *Whitworth*, 2 Eq. 692; *Macnee* v. *Gorst*, 4 Eq. 315; and *Kaltenbach* v. *Lewis*, 10 App. Cas. 617; decisions upon s. 3 of the Act of 1825 and s. 3 of the Act of 1842. Antecedent debt. S. 4.

A "pledge" includes "any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability" (s. 1 (5)). And "a pledge of the documents of title to goods shall be deemed to be a pledge of the goods" (s. 3). "Pledge." S. 3.

Under s. 7 of the Act, where the owner of goods has given possession of them to another person for the purpose of consignment or sale, or has shipped them in another person's name, and the consignee of the goods has not had notice that such person is not their owner, the consignee has, in respect of advances made to or for the use of such person, the same lien on the goods as if such person were their owner, and can transfer such lien; see *Mildred* v. *Maspons*, 8 App. Cas. 874, *per* Lord Blackburn. S. 7. Provisions as to consignors and consignees.

It was held that a vendor who had been left by the buyer in possession of documents of title to goods could not, under the earlier Factors' Acts, confer a good title; *Johnson* v. *Credit Lyonnais*, 3 C. P. D. 32. The law in this respect was altered by s. 3 of the Factors' Act, 1877. Now, by the Act of 1889, "where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith, and without any notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same" (s. 8). Section 25 (1) of the Sale of Goods Act, 1893, is to a similar effect. In *Nicholson* v. *Harper*, (1895) 2 Ch. 415, a merchant, who had wine stored with a warehouseman, sold it to a buyer, and afterwards gave the warehouseman a lien thereon for advances made in good faith without notice of the sale; there were no documents of title relating to the wine. North, J., held Disposition by vendor remaining in possession. Factors' Act, 1889. S. 8.

that there had been no "delivery or transfer" to the warehouseman.

Disposition by buyer who is in possession.

In *Jenkyns* v. *Usborne*, 7 M. & Gr. 678, confirmed by *Van Casteel* v. *Booker*, 2 Exch. 691, a buyer who had received a delivery order from the vendor was held not to be able to make a valid pledge of the delivery order, under the earlier Factors' Acts, so as to defeat the right of stoppage *in transitu*. This was altered by the Act of 1877. And now,

S. 9.

by s. 9 of the Act of 1889, "where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title" thereto, their delivery or transfer by him, or by a mercantile agent acting for him, "under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith, and without notice of any lien or other right of the original seller in respect of the goods," has the same effect as a delivery or transfer by a mercantile agent under s. 2, see *ante*, p. 742. Section 25 (2) of the Sale of Goods Act, 1893, is to a similar effect. This section applies to cases where a person is in possession of goods under what is known as a "hire-purchase" agreement, if the agreement binds him to buy them; *Lee* v. *Butler*, (1893) 2 Q. B. 318; but not so, if it merely gives him an option of buying them which he has not exercised; *Helby* v. *Matthews*, in the H. L., overruling (1894) 2 Q. B. 262. In *Shenstone* v. *Hilton*, (1894) 2 Q. B. 452, it was held that delivery to an auctioneer for the purpose of sale is a "delivery under an agreement for sale" within this section. A title acquired by a transfer or delivery under this section is not affected by a conviction of the transferor for larceny of the goods; *Payne* v. *Wilson*, (1895) 1 Q. B. 653 (see 1895, W. N. p. 110).

In *Kitto* v. *Bilbie*, 72 L. T. 266, Vaughan Williams, J., expressed an opinion that a delivery or transfer under an assignment for the benefit of creditors was not within this section.

It is not necessary that there should be a memorandum of the contract of sale so as to satisfy the Statute of Frauds, if there be in fact a contract of sale; *Hugill* v. *Masker*, 22 Q. B. D. 364.

MASTER *v.* MILLER.

TRINITY.—3 GEO. 3, K. B. & CAM. SCACC.

[REPORTED 4 T. R. 320 AND 2 H. BL. 140. (2 R. R. 399).]

An unauthorised alteration of the date of a bill of exchange, after acceptance, whereby the payment would be accelerated, avoids the instrument; and no action can be afterwards brought upon it, even by an innocent holder for a valuable consideration (*a*).

THE first count in this declaration was in the usual form, by the indorsees of a bill of exchange against the acceptor; it stated that Peel and Co., on the 20th March, 1788, drew a bill for 974*l.* 10*s.* on the defendant, payable three months after date to Wilkinson and Cooke, who indorsed to the plaintiffs. The second count stated the bill to have been drawn on the 26th March. There were also four other counts: for money paid, laid out, and expended; money lent and advanced; money had and received; and on an account stated. The defendant pleaded the general issue; on the trial of which a special verdict was found.

It stated that Peel and Co., on the 26th March, 1788, drew their bill on the defendant, payable three months after date to Wilkinson and Cooke, for 974*l.* 10*s.*, which said bill of exchange, made by the said Peel and Co., as the same hath been altered, accepted, and written upon, as hereinafter mentioned, is now produced, and read in evidence to the said jurors, and is now expressed in the words and figures following; *to wit*, "June 23rd, 974*l.* 10*s.*, Manchester, March 20, 1788, three months after date pay to the order of Messrs. Wilkinson and Cooke, 974*l.* 10*s.*, received, as advised, Peel, Yates, and Co. To Mr. Cha. Miller, C. M. 23rd June, 1788." That Peel and Co. delivered the said bill to Wilkinson and Cooke, which the defendant afterwards, and before the alteration of the bill hereinafter mentioned,

(*a*) But see now the Bills of Exchange Act, 1882, s. 64, *post in notis*, p. 780.

accepted. That Wilkinson and Cooke afterwards indorsed the said bill to the plaintiffs for a valuable consideration before that time given and paid by them to Wilkinson and Cooke for the same. That the said bill of exchange, at the time of making thereof and at the time of the acceptance, and when it came to the hands of Wilkinson and Cooke, as aforesaid, bore date on the 26th day of March, 1788, the day of making the same; and that after it so came to and whilst it remained in the hands of Wilkinson and Cooke, the said date of the said bill, without the authority or privity of defendant, was altered by some person or persons to the jurors aforesaid unknown, from the 26th day of March, 1788, to the 20th day of March, 1788. That the words "June 23rd," at the top of the bill, were there inserted to mark that it would become due and payable on the 23rd June next after the date; and that the alteration hereinbefore mentioned, and the blot upon the date of the bill of exchange, now produced and read in evidence, were on the bill of exchange when it was carried to and came into the hands and possession of the plaintiffs. That the bill of exchange was on the 23rd June, and also on the 28th June, 1788, presented to the defendant for payment; on each of which days respectively he refused to pay. The verdict also stated that the bill so produced to the jury and read in evidence was the same bill upon which the plaintiffs declared, &c.

This case was argued in Hilary Term last, by *Wood* for the plaintiffs, and *Mingay* for the defendant; and again on this day by *Chambre* for the plaintiffs, and *Erskine* for the defendant.

For the plaintiffs it was contended that they were entitled, notwithstanding the alteration in the bill of exchange, to recover, according to the truth of the case, which is set forth in the second count of the declaration, namely, upon a bill dated the 26th March; which the special verdict finds was in point of fact accepted by the defendant. More especially as it is clear that the plaintiffs are holders for a valuable consideration, and had no concern whatever in the fraud that was meditated, supposing any such appeared. The only ground of objection which can be suggested is upon the rule of law relative to deeds, by which they are absolutely avoided, if altered even by a stranger in any material part, and upon a supposed analogy between those

instruments and bills of exchange; but upon investigating the grounds on which the rule stands as applied to deeds, it will be found altogether inapplicable to bills; and if that be shown, the objection founded on the supposed analogy between them must fall with it. The general rule respecting deeds is laid down in *Pigot's Case* (*b*), where most of the authorities are collected; from thence it appears that, if a deed be altered in a material point, even by a stranger without the privity of the obligee, it is thereby avoided; and if the alteration be made by the obligee, or with his privity, even in an immaterial part, it will also avoid the deed (*c*). Now that is confined merely to the case of deeds, and does not in the terms or principle of it apply to any other instruments not executed with the same solemnity. There are many forms requisite to the validity of a deed, which were originally of great importance to mark the solemnity and notoriety of the transaction; and on that account the grantees always were, and still are, entitled to many privileges over the holders of other instruments. It was therefore reasonable enough that the party in whose possession it was lodged should, on account of its superior authenticity, be bound to preserve it entire with the strictest attention, and at the peril of losing the benefit of it in the case of any material alteration even by a stranger; and that he is the better enabled to do from the nature of the instrument itself, which, not being of a negotiable nature, is not likely to meet with any mutilation, unless through the fraud or negligence of the owner; whereas bills of exchange are negotiable instruments, and are perpetually liable to accidents in the course of changing hands, from the inadvertence of those by whom they are negotiated, without any possibility of their being discovered by innocent indorsees, who are ignorant of the form in which they were originally drawn or accepted; and the present is a strong instance of that; for the plaintiffs cannot be

(*b*) 11 Co. 27.

(*c*) The second resolution in *Pigot's Case* was that "when any deed is altered in a point *material*, by the plaintiff himself, or by any stranger without the privity of the obligee, be it by interlineation, addition, rasing, or by drawing of a pen through a line, or through the midst of any material word, the deed thereby becomes void. . . . So if the obligee himself alters the deed by any of the said ways, although it is in words *not material*, yet the deed is void: but if a stranger, without his privity, alters the deed by any of the said ways, in any point not material, it shall not avoid the deed;" 11 Co. 27a.

said to be guilty of negligence in not inquiring how the blot came on the bill, which mere accident might have occasioned. That the same reasons, upon which the decisions of the courts upon deeds have been grounded, will not support such judgments upon bills, will best appear by referring to the authorities themselves. When a deed is pleaded, there must be a *profert in curiam* (*d*), unless, as in *Read* v. *Brookman* (*e*), it be lost or destroyed by accident, which must however be stated in the pleadings. The reason of which is, that anciently the deed was actually brought into court for the purpose of inspection; and if, as is said in 10 Co. 92 b, the judges found that it had been rased or interlined in any material part, they adjudged it to be void. Now, as that was the reason why a deed was required to be pleaded with a *profert*, and as it never was necessary to make a *profert* of a bill of exchange in pleading, it furnishes a strong argument that the reason applied solely to the case of deeds. So deeds, in which were erasures, were held void, because they appeared on the face of them to be suspicious, 13 Vin. Abr. tit. *Faits*, 37, 38; Bro. Abr. *Faits*, pl. 11, referring to 44 Edw. 3, c. 42. Nor could the supposition of fraud have been the ground on which that rule was founded with respect to deeds; for in Moore, 35, pl. 116, a deed which had been rased was held void, although the party himself who made it had made the erasure; which was permitting a party to avail himself of his own fraud: but it is impossible to contend that the rule can be carried to the same extent as to bills; nor is it denied but that, if the blot here had been made by the acceptor himself, he would still have been bound. In Keilw. 162, it is said that if A. be bound to B. in 20*l.* and B. rase out 10*l.* all the bond is void, although it is for the advantage of the obligor: and even where an alteration in a deed was made by the consent of both the parties, still it was held to avoid it, 2 Rol. Abr. 29, letter U, pl. 5. [Lord Kenyon observed that there had been decisions to the contrary since.] Fraud could not be the principle on which those cases were determined: whereas it is the only principle on which the rule contended for can be held to extend to bills of exchange, but which is rebutted in the

(*d*) Not so now; C. L. P. Act, 1852, s. 55; S. L. R. & C. P. Act, 1883, s. 6.

(*e*) 3 T. R. 151.

present case by the facts found in the special verdict. According to the same strictness, where a mere mistake was corrected in a deed, and not known by whom, it was held to avoid it, 2 Rol. Abr. 29, pl. 6; and it does not abate the force of the argument that the law is relaxed in these respects, even as to deeds, for the question still remains, whether at any time bills of exchange were construed with the same rigour as deeds. The principle upon which all these cases relative to deeds were founded was, that nothing could work any alteration in a deed, except another deed of equal authenticity; and as the party who had possession of the deed was bound to keep it securely, it might well be presumed that any material alteration even by a stranger was with his connivance, or at least through his culpable neglect. In many of the cases upon the alteration of deeds, the form of the issue has weighed with the court; as in 1 Rol. Rep. 40, which is also cited in *Pigot's Case*, 11 Co. 27, and *Michael* v. *Scockwith*, Cro. Eliz. 120, in both which cases the alteration was after plea pleaded; and on that ground the court held it was still to be considered as the deed of the party on *non est factum*. Now the form of the issue in actions upon deeds and those upon bills is very different; in the one case, the issue simply is, *whether it is the deed of the party*, which goes to the time of the plea pleaded, as appears from the case before cited, and from 5 Co. 119 b, and Dy. 59; but here the issue is, *whether the defendant promised, at the time of the acceptance, to pay the contents*. The form of the issue is upon his promise, arising by implication of law from the act of acceptance, which is found as a fact by the special verdict agreeable to the bill declared on in the second count: and in no instance, where an agreement is proved merely as evidence of a promise, is the party precluded from showing the truth of the case. Not only therefore the forms of pleading are different in the two cases, but the decisions which have been made upon deeds, from whence the rule contended for as to erasures and alterations is extracted, are altogether inapplicable to bills. The reasons for such rigorous strictness in the one case do not exist in the other. On the contrary, all the cases upon bills have proceeded upon the most liberal and equitable principles with respect to innocent holders for a valuable consideration. The case of *Minet* v.

Gibson (*f*) goes much farther than the present; for there this court, and afterwards the House of Lords, held that it was competent to inquire into circumstances extraneous to the bill, in order to arrive at the truth of the transaction between the parties, although such circumstances operated to establish a different contract from that which appeared upon the face of the bill itself; whereas the evidence given in this case, and the facts found by the special verdict, are in order to show what the bill really was; which it is competent for these parties to do against whom no fraud can be imputed, if any exist. If the blot had fallen on the paper by mere accident, it cannot be pretended that it would have avoided the bill; *non constat* upon this finding that it did not so happen. Even if felony were committed by a third person through whose hands the bill passed, although that party could not recover upon it himself, yet his crime shall not affect an innocent party to whom the bill is indorsed or delivered for a valuable consideration. In *Miller* v. *Race* (*g*), where a bank-note had been stolen, and afterwards passed *bonâ fide* to the plaintiff, it was held that he might recover it *in trover* against the person who had stopped it for the real owner. And the same point was held in *Peacock* v. *Rhodes* (*h*), where the bill was payable to order. Again, in *Price* v. *Neal* (*i*) it was held that an acceptor, who had paid a forged bill to an innocent indorsee, could not recover back the money from him. Now, if it be no answer to an action upon a bill against the acceptor to show that it was a forgery in its original making by a third person's having feigned the handwriting of the drawer, still less ought any subsequent attempt at forgery, even if that had been found which is not, to weigh against an innocent holder. But it would have been impossible to have recovered in any of these cases if the deed had been forged in any respect, even by strangers to it: which shows that these several instruments cannot be governed by the same rules. And so little have the forms of bills of exchange and notes been observed, when put in opposition to the truth of the transaction, that in *Russel* v. *Langstaffe* (*k*)

(*f*) 3 T. R. 1 l, in B. R., and 1 H. Bl. 563, in Dom. Proc.

(*g*) 1 Burr. 452; set out at large, *ante*, p. 447.

(*h*) 2 Dougl. 633.

(*i*) 3 Burr. 1354.

(*k*) 2 Dougl. 514.

the court held, in order to get at the justice of the case, that a person, who had indorsed his name on blank checks, which he had entrusted to another, was liable to an indorsee for the sums of which the notes were afterwards drawn; and yet the form of pleading supposes the note to have been a perfect instrument, and drawn before the indorsement. But the case which is most immediately in point to the present is that of *Price* v. *Shute*, E. 33 Car. 2, in B. R. (*l*); there a bill was drawn payable the 1st of January; the person upon whom it was drawn accepted it to be paid the 1st of March: the holder, upon the bill's being brought back to him, perceiving this enlarged acceptance, struck out the 1st of March, and put in the 1st of January; and then sent the bill to be paid, which the acceptor refused; whereupon the payee struck out the 1st of January, and put in the 1st of March again: and in an action brought on this bill, the question was, whether these alterations did not destroy it; and it was ruled they did not. This case therefore has settled the doubt; and having never been impeached, but on the contrary recognised, as far as general opinion goes, by having been inserted in every subsequent treatise upon the subject, it seems to have been acted on ever since. And it would be highly mischievous if the law were otherwise: for however negligent the owner of a deed may be supposed to be, who lets it out of his possession, the holder of a bill of exchange is by the ordinary course of such transactions obliged to trust it, even in the hands of those whose interest it is to avail themselves of this sort of objection. For it is most usual for the bill to be left for acceptance, and afterwards for payment, in the hands of the acceptor, who may be tempted to put such a blot on the date as may not be observed at the time, through the confidence of the parties. But, even if the alteration should be considered as having destroyed the bill, why may not evidence be given of its contents, upon the same principle as governed the case of *Read* v. *Brookman* (*m*)? where it was held that pleading that a deed is lost by time and accident supersedes the necessity of a profert. But at any rate the plaintiffs are entitled to recover on the general counts for money paid, and money had and received, on the authority of *Tatlock* v. *Harris* (*n*);

(*l*) 2 Molloy, c. 10, s. 28.
(*m*) 3 T. R. 151.
(*n*) 3 T. R. 174.

for though it is not expressly stated that so much money was received by the defendant, yet that is a necessary inference from the fact of acceptance which is found.

For the defendant it was contended that the broad principle of law was, that any alteration of a written instrument in a material part thereof avoided such instrument; and that the rule was not merely confined to deeds, though it happened that the illustration of it was to be found among the old cases upon deeds only, because formerly most written undertakings and obligations were in that form. This principle of law was founded in sound sense; it was calculated to prevent fraud, and deter men from tampering with written securities: and it would be directly repugnant to the policy of such a law to permit the holder of a bill to attempt a fraud of this kind with impunity; which would be the case, if, after being detected in the attempt, he were not to be in a worse situation than he was before. If any difference were to be made between bills of exchange and deeds, it should rather be to enforce the rule with greater strictness as to the former; for it would be strange that, because they were more open to fraud from the circumstance of passing through many hands, the law should relax and open a wider door to it than in the case of deeds where fraud was not so likely to be practised. The principle laid down in *Pigot's Case* (*o*) is not disputed as applied to deeds. But the first answer attempted to be given is, that the rule as to deeds is *sui generis*, and does not extend to other instruments of an inferior nature, because it arises from the solemn sanction attending the execution of instruments under seal. As to this, it is sufficient to say that no such reason is suggested in any of the books; but the rule stands upon the broad ground of policy, which applies at least as strongly to bills as to deeds, for the reason above given. Then it is said that there is a material distinction between the several issues in the two cases. But the difference is more in words than in sense; the substance of the issue in both cases is, whether in point of law the party be liable to answer upon the instrument declared on, and therefore any matter which either avoids it *ab initio*, or goes in discharge of it, may be shown as much in the one case as in the other. Upon *non est factum* the

(*o*) 11 Co. 27.

question is, whether in law the deed produced in evidence be the deed of the party; so on *non assumpsit* the question is, whether the bill given in evidence be in point of law the bill accepted by the defendant, because the promise only arises by implication of law upon proof of the acceptance of the identical bill accepted, and given in evidence. Now, neither of the counts in the declaration was proved by the facts found. For in the first count the bill is dated the 20th March; but as there is no evidence of the defendant's having accepted such a bill, of course the plaintiffs are not entitled to recover on that count. Neither can they recover on the second, because though it is found that he accepted a bill dated the 26th March, as there stated, yet inasmuch as the bill stated to have been produced in evidence to the jury is dated the 20th, of course the evidence did not support the count. With respect to the cases cited of bills of exchange having been always construed by the most liberal principles, and particularly *Minet* v. *Gibson*, the same answer may be given to all of them, which is, that, so far from the original contracts having been attempted to be altered, all those actions were brought in order to enforce the observance of them in their genuine meaning against the party who, in the latter case particularly, endeavoured by a trick to evade the contract: whereas here the contract has been substantially altered by the parties who endeavour to enforce it; or at least by those whom they represent, and from whom they derive title. Then the case in Molloy, of *Price* v. *Shute*, is chiefly relied on by the plaintiffs; to which several answers may be given. First, the authenticity of it may be questioned; for it is not to be found in any reports, although there are several contemporaneous reporters of that period. In the next place, the bill, as originally drawn, was not altered upon the face of it; and therefore, as against all other persons at least than the acceptor, it might still be enforced. But principally it does not appear but that the action was brought against the drawer, who, as the acceptor had not accepted it according to the tenor of the bill, was clearly liable; as the payee was not bound to abide by the enlarged acceptance, but might consider it as no acceptance at all. Then, if this bill be void for this fraud, no evidence could be given to prove its contents, as in the case of a deed lost; because in that there is

no fraud. But, even if any other evidence might have been given, it is sufficient to say that in this case there was none. And as to the common counts, if the general principle of law contended for applies to bills of exchange, it will prevent the plaintiffs from recovering in any other shape. Besides which, it is not stated that the defendant has received any consideration; upon which ground *Tatlock* v. *Harris* was decided.

In reply it was urged, that the issue was not whether the defendant had accepted this bill in the state in which it was shown to the jury, but whether he had promised to pay, in consequence of having accepted a bill dated the 26th March, drawn by, &c.; and those facts being found, the promise necessarily arises. It is said that the policy of the law will extend the same rule to the avoidance of bills of exchange which have been altered as to deeds; because there is even greater reason to guard against fraudulent alterations in the former than in the latter case. To which it may be answered that the foundation of the rule fails in this case; for no fraud is found, and none can be presumed: and it is admitted that, if the blot had been made by accident, it would not have avoided the bill; and nothing is stated to show that it was not done by accident. Besides, the policy of the law is equally urgent in favour of the plaintiffs, it being equally politic to compel a performance of honest engagements. Here the defendant is only required to do that which in fact and in law he has promised to do. And if he be not liable on this contract, he will be protected in withholding payment of that money which he has received, and which by the nature of his engagement he undertook to repay. No answer has been given to the case cited from Molloy: for though the case is not reported in any other book, it bears every mark of authenticity, by noting the names of the parties, the court in which it was determined, and the time of the decision: and it has been adopted by subsequent writers on the same subject. Again, the alteration there was full as important as this, for it equally tended to accelerate the day of payment; and, lastly, it is not denied but that the action might have been maintained on the bill against any other person than the acceptor; which is an admission that the policy of the law does not attach so as to

avoid such instruments upon any alteration, for otherwise it would have avoided the bill against all parties.

Lord KENYON, C.J.—The question is not whether or not another action may not be framed to give the plaintiffs some remedy, but whether this action can be sustained by these parties on this instrument—for the instrument is the only means by which they can derive a right of action. The right of action which subsisted in favour of Wilkinson and Cooke could not be transferred to the plaintiffs in any other mode than this, inasmuch as a chose in action is not assignable at law. No case, it is true, has been cited either on one side or the other, except that in Molloy, of which I shall take notice hereafter, that decides the question before us in the identical case of a bill of exchange. But cases and principles have been cited at the bar, which, in point of law, as well as policy, ought to be applied to this case. That the alteration in this instrument would have avoided it, if it had been a deed, no person can doubt. And why, in point of policy, would it have had that effect in a deed? *Because no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event when it is detected.* At the time when the cases cited, of deeds, were determined, forgery was only a misdemeanour: now the punishment of the law might well have been considered as too little, unless the deed also were avoided; and therefore the penalty for committing such an offence was compounded of those two circumstances, the punishment for the misdemeanour, and the avoidance of the deed. And though the punishment has been since increased, the principle still remains the same. I lay out of my consideration all the cases where the alteration was made by accident: for here it is stated that this alteration was made while the bill was in the possession of Wilkinson and Cooke, who were then entitled to the amount of it: and from whom the plaintiffs derive title; and it was for their advantage (whether more or less is immaterial here) to accelerate the day of payment, which in this commercial country is of the utmost importance. The cases cited, which were all of deeds, were decisions which applied to and embraced the simplicity of all the transactions at that time; for at that time almost all written engagements were by deed only. Therefore those decisions, which were indeed

(Lord KENYON.)

confined to deeds, applied to the then state of affairs: but they established this principle, that all written instruments which were altered or erased should be thereby avoided. Then let us see whether the policy of the law, and some later cases, do not extend this doctrine farther than to the case of deeds. It is of the greatest importance that these instruments, which are circulated throughout Europe, should be kept with the utmost purity, and that the sanctions to preserve them from fraud should not be lessened. It was doubted so lately as in the reign of George the First, in *Ward's Case* (*p*), whether forgery could be committed in any instrument less than a deed, or other instrument of the like authentic nature; and it might equally have been decided there that, as none of the preceding determinations extended to that case, the policy of the law should not be extended to it. But it was there held that the principle extended to other instruments as well as to deeds, and that the law went as far as the policy. It is on the same reasoning that I have formed my opinion in the present case. The case cited from Molloy, indeed, at first made a different impression on my mind: but, on looking over it with great attention, I think it is not applicable to this case. No alteration was there made on the bill itself; but the party to whom it was directed accepted it as payable at a different time, and afterwards the payee struck out the enlarged acceptance; and, on the acceptor refusing to pay, it is said that an action was maintained on the bill. But it does not say against whom the action was brought; and it could not have been brought against the acceptor, whose acceptance was struck out by the party himself who brought the action. Taking that case in the words of it, "that the alterations did not destroy the bill," it does not affect this case: not an iota of the bill itself was altered; but, on the person to whom the bill was directed refusing to accept the bill as it was originally drawn, the holder resorted to the drawer. Then, it was contended that no fraud was intended in this case; at least that none is found; but I think that, if it had been done by accident, that should have been found, to excuse the party, as in one of the cases where the seal of the deed was torn off by an infant (*pp*).

(*p*) 2 Str. 747, and 2 Ld. Raym. 1161. (*pp*) *Argoll* v. *Cheney*, Palm. 402.

With respect to the argument drawn from the form of the plea, it goes the length of saying, that a defendant is liable, on *non assumpsit*, if at any time he has made a promise, notwithstanding a subsequent payment: but the question is, whether or not the defendant promised in the form stated in the declaration; and the substance of that plea is, that according to that form he is not bound by law to pay. On the whole, therefore, I am of opinion that this falsification of the instrument has avoided it; and that, whatever other remedy the plaintiffs may have, they cannot recover on this bill of exchange.

Ashhurst, J.—It seems admitted that, if this had been a deed, the alteration would have vitiated it. Now, I cannot see any reason why the principle on which a deed would have been avoided should not extend to the case of a bill of exchange. All written contracts, whether by deed or not, are intended to be standing evidence against the parties entering into them. There is no magic in parchment or in wax: and a bill of exchange, though not a deed, is evidence of a contract as much as a deed; and the principle to be extracted from the cases cited is, that any alteration avoids the contract. If indeed the plaintiffs, who are innocent holders of this bill, have been defrauded of their money, they may recover it back in another form of action: but I think they cannot recover upon this instrument, which I consider to be a nullity. It is found by the verdict that the alteration was made while the bill was in possession of Wilkinson and Cooke; and it certainly was for their advantage, because it accelerated the day of payment. Now, upon these facts, the jury would perhaps have been warranted in finding that the alteration was made by them: at all events, it was their business to preserve the bill without any alteration. If Wilkinson and Cooke had brought this action, they clearly could not have recovered, because they must suffer for any alteration of the bill while it was in their custody: then, if the objection would have prevailed in an action brought by them, it must also hold with regard to the plaintiffs who derive title under them. For whenever a party takes a bill under such suspicious circumstances appearing on the face of it, it is his duty to inquire how the alteration was made; he takes it at his risk, and must take it subject to the same objection as lay against the party from

(Ashhurst, J.)

whom he received it. Upon the whole, there seems to be no difference between deeds and bills of exchange in this respect in favour of the latter: but, on the contrary, if there be any difference, the objection ought to prevail with greater force in the latter than in the former; for it is more particularly necessary that bills of exchange, which are daily circulated from hand to hand, should be preserved with greater purity than deeds which do not pass in circulation. It would be extremely dangerous to permit the party to recover on a bill as it was originally drawn, after an attempt to commit a fraud, by accelerating the time of payment. For these reasons, therefore, I concur in opinion with my Lord.

Buller, J.—In a case circumstanced as the present is, in which it is apparent, as found, and has been proved beyond all doubt, that the bill of exchange in question was given for a full and valuable consideration, that the plaintiffs are honest and innocent holders of it, and that the defendant has the amount of the bill in his hands, it is astonishing to me that a jury of merchants should hesitate a moment in finding a verdict generally for the plaintiffs, more especially as I understand it was left to them by the Chief Justice to read the bill as it undoubtedly was drawn, and by that means to put an end to the question at once. It was rightly so left to the jury by his Lordship; for that was the furtherance of the justice of the case, and it tended to prevent expense, litigation, and delay, which are death to trade. That the defendant cannot be suffered to pocket the money for which this bill was drawn, or to enable the drawer to do so, but that sooner or later, provided a bankruptcy do not intervene, it must be paid, I presume no man will doubt. The drawer has received the value, the plaintiffs have paid it, and the defendant has it in his hands. On this short statement, every one who hears me must anticipate me in saying that the defendant must pay it. Nay, if actual forgery had been committed, the defendant could not be permitted to retain the money: he must not get 900*l.* by the crime of another; but, in such a case, I agree it would be difficult to sustain the present or any action for the money till something further had happened than has yet been done. The law, pro-

ceeding on principles of public policy, has wisely said (*q*) that, where a case amounts to felony, you shall not recover against the felon in a civil action; but that rule does not appear by any printed authority to have been extended beyond actions of trespass or *tort*, in which it is said that the trespass is merged in the felony. That is a rule of law calculated to bring offenders to justice. But whether that rule extend to any case after the offender is brought to justice, or whether at any time it may be resorted to in an action between persons guilty of no crime, are questions upon which I have formed no opinion, because this case does not require it. Upon this special verdict there is no foundation for saying that any one has been guilty of forgery, nor even of a fraud, as it strikes my mind. Fraud or felony is not to be presumed; and, unless it be found by the jury, the court cannot imply it. *Minet* v. *Gibson* is a most decisive authority for that proposition, if any be wanted, and I do not think there is any foundation for the distinction attempted to be taken between that case and the present. It has been contended that the party there recovered, because the nature of the obligation was not altered: but the determination did not proceed entirely on that ground, but on this, that, according to the true intent and meaning of the parties, the bill was intended to be made payable to bearer: so here the plaintiffs do not attempt to enforce the contract according to the terms of it, but according to that form by which the defendant originally consented to be bound, as stated in the second count. The special verdict finds that Peel and Co., on the 26th March, 1788, drew a bill of exchange on the defendant for 974*l.* 10*s.*, payable to Wilkinson and Co.: which bill, as the same has been altered, accepted, and written upon, is set out *in hæc verba*. Upon the *fac-simile* copy of the bill set out in the verdict, there appears to be a blot over the date: and the jury have thought fit to read it, as it now stands, the 20th. I must confess I should never have read it so; for seeing that there was something above the figure 0, that is the last reading which I should have given to it. I should have said on the face of the bill this must have been either a 6 or an 8; it could not have been 8, because the 0 is as high as the 2, and therefore it must be a 6:

(*q*) See, however, *ante*, pp. 278, 279.

(Buller, J.)

but the jury have found no difficulty in saying it was a 6; and I will examine presently whether there be any objection to let it remain as a 6. The verdict further finds that the defendant, before any alteration of the bill, accepted it; and Wilkinson and Co. indorsed it to the plaintiffs, who paid a valuable consideration for it. Then it is stated that, whilst the bill was in the hands of Wilkinson and Cooke, the date, without the authority of the defendant, was altered by persons unknown from the 26th to the 20th of March. They further find that the words "23rd of June" were inserted at the top of the bill, to mark that the bill would then become due; and that the alteration and the blot were on the bill when it was delivered to the plaintiffs. This is the full substance of the special verdict; and there is neither forgery, felony, nor fraud, found or supposed by the jury; we therefore can neither intend nor infer it. The verdict amounts only to saying there is a blot on the bill, but how it came there we don't know; and we beg to ask the court whether the circumstance of a blot being on the bill which we cannot account for makes the bill void. Provided I have accurately stated the question, surely such a verdict is without precedent. Suppose a child had torn out a bit of the bill on which the top of the 6 is written, is the holder of the bill to lose his 974*l.*? or is the defendant to get 974*l.* by such an accident? But to decide whether I have accurately stated the question in the cause, it is necessary to examine the words of the special verdict minutely, and by degrees. The jury have said that the bill was altered. The word "altered" may raise a suspicion and alarm in our minds; but let not our judgment be run away with by a word, without examining the true sense and meaning of it as it is used in the place where we find it. How was it altered, what was the alteration, when was it made, and for what purpose? The jury have said it was altered by means of putting a blot over the date: but by whom or when that was done we don't know, further than that it was done whilst the bill was in the possession of Wilkinson and Cooke: but we do not find that it was done for any bad purpose, or with any improper view whatever. Upon this finding, the court are bound to say it was done innocently. But the jury have also said that "June 23rd" was inserted at the top of

the bill to mark when the bill would become due. When and by whom was that done? The jury have not said one word upon the subject. Was that done even during any part of the time whilst the bill was in the possession of Wilkinson and Cooke? No. It is consistent with the finding, that the plaintiffs, who are found to be *bonâ fide* holders of the bill, upon reading the date to be the 20th, and calculating the time which it had to run from that date, put down "June 23rd" with the most perfect innocence. If the bill had been originally dated on the 20th, the 23rd June would have been the true time of payment. But admitting that a wrong date had been put down, as denoting the time of payment, is there any case or authority which says that that circumstance shall render the bill void? Every bill which has been negotiated within the memory of man is marked by some holder or another with the day when it will become or is supposed to become due. That in some sense of the word is an alteration; for it makes an addition to the bill which was not there when it was drawn or accepted. But was it done fraudulently? The answer is—It was not, and therefore it is of no avail. So here the jury have not said it was done fraudulently, and therefore it affords no objection. When the jury have stated what the alteration is, and how it was made, namely, by making a blot, and having fixed no sinister or improper motive for so doing, it is the same as if they had said only "here is a blot on the bill." Suppose the jury had said in a few words that this bill was drawn, indorsed, and accepted, by the defendant, as the plaintiffs allege, but here is a blot upon it which makes the date look like the 20th instead of the 26th. The true answer would have been—Blot out the blot by your own understanding and conviction, and pronounce your verdict according to the truth of the case. It was nobly said in another place, (I heard it with pleasure, and thought it becoming the dignity of the person who pronounced it, and the place in which it was pronounced (*r*)), "*That the law is best applied when it is subservient to the honesty of the case.* And if there be any rule of law which says you cannot recover on any instrument but according to the terms of it, forlorn would be the case of plaintiffs. By the temperate rules

(*r*) The quotations which follow seem to be reminiscences of *Gibson* v. *Minet* in the H. L., see 1 H. Bl. 569, 585, 589.

(Buller, J.)

of law we must square our conduct." The honesty of the plaintiffs' case has been questioned by no one; and therefore I should imagine the wishes of us all would have been in favour of their claim, provided we are not bound down by some stubborn rule of law to decide against them. Here again I must beg leave to resort to what was forcibly said in another place, upon a similar subject, and which I shall do as nearly in the words which passed at the time as I can: because they carried conviction to my mind; because they contain my exact sentiments, and because they are more emphatical than any which I could substitute in the place of them. "The question (it was said) is whether there be any rule of law so reluctant that it will not recede from words to enforce the intention of the parties. I believe there is no such rule. For half a century there have been various cases which have left the question of forgery untouched. If a bill be forged, the acceptor is bound." Speaking of the case of *Stone* v. *Freeland* (*s*), it was said, "if any one say that case is not law, let him show why it is not so. Judges can only look to former decisions. This has been a rule in the commercial world above 20 years." This reasoning seems to me to be sound and decisive, if it apply to the present case; and to prove that it does apply, I need only quote the case, mentioned at the bar, of *Price* v. *Shute*, reported in Beawes's Lex Mercat., tit. Bill of Exchange, pl. 222, and 2 Molloy, 109. There a bill was payable 1st January, and the person to whom it was directed accepted it to pay on the 1st of March, with which the servant returned to his master, who, perceiving this enlarged acceptance, struck out the 1st of March and put in the 1st of January, and at that time sent the bill for payment, which the acceptor refused; whereupon the possessor struck out the 1st of January and inserted the 1st of March again. In an action brought on this bill, the question was whether these alterations did not destroy the bill; and ruled by Lord Chief Justice Pemberton, that they did not. Now, on reading this case, I cannot consider it in any other light than as an action brought against the acceptor; for it only states what passed between those parties. Here then is a rule which has prevailed in the commercial world for 110 years: it stands uncontradicted

(*s*) 1 H. Bl. 316, n.

and unimpeached: it was decided by great authority; and, as I take it, on deliberation. For when it is said to have been in B. R., that must either have been in this court, or on a case saved by Chief Justice Pemberton for his own opinion: which was a common way of proceeding in those days. In that case the term "alteration" is used, and therefore we need not be frightened or alarmed at that word. The effect of the alteration was to accelerate the payment; so it is here. But in one respect that case goes beyond the present; for there the alteration was made by the plaintiff himself; here it was not. It is true, in that case, when the plaintiff found he could not receive the money on the 1st of January, he altered it back to the 1st of March; but if the first alteration vitiated the bill, no subsequent alteration could set it up against the acceptor without his consent. Here the plaintiffs have not re-altered the bill; but they have acted a more honest part; they have left the bill as it was to speak for itself; but they have treated it as a bill of the 26th of March; they have proved that it was a bill of the 26th of March; they demanded payment according to that date; and the jury have found all these facts to be true. And it is material to consider what was the issue joined between the parties; for there is a great deal of difference between the plea of *non est factum* and the present: here the question is, whether the drawer made such a bill, and whether the defendant accepted it; and this is found by the jury. Then the case of *Price* v. *Shute*, in sense and substance, is a direct authority in point with the present; though it vary in a minute and immaterial circumstance. The plaintiffs, in treating the bill and making a demand as they have done, seemed to have followed the sober advice and directions given by Beawes in pl. 190; where he says, "He that is possessor of a bill which only says 'pay,' without mentioning the time when, or that is without a date, or not clearly and legibly written, payable some time after date, &c., so that the certain precise time of payment cannot be calculated or known, must be very circumspect, and demand the money whenever there is any probable appearance of the time being completed that was intended for its payment; or that he can demonstrate any circumstance that may determine it, or make it likely when it shall be paid." It is impossible that this writer could have

(BULLER, J.)

supposed that the bill was rendered void by any blot, obliteration, or erasure: on the contrary, he tells you that it must be demanded in time, and that you may make out by circumstances or other evidence when it was, or was likely to be, payable. That has been made out by evidence in the present case. Upon this head I shall only add one authority more, which is Carth. 460, where a bill was accepted after a day of payment was elapsed. It was objected that it was impossible in such a case for the defendant to pay according to the tenor of the bill, and therefore the declaration was bad; but the court held it good, and said the effect of the bill was the payment of the money, and not the day of payment. So here the defendant having accepted this bill, whatever may be the construction as to the date, must pay the money. I hold that in this case there is no fraud either express or implied; and that, as the plaintiffs have proved that they gave a valuable consideration for the bill, and that it was indorsed to them by those through whose hands it passed, their case is open to no objection whatever. But I will suppose for a moment, though the case do not warrant it, that Wilkinson and Cooke did mean a fraud; still I am of opinion that would not affect the case between the plaintiffs and the defendant. It is a common saying in our law-books, that *fraud vitiates everything.* I do not quarrel with the phrase, or mean in the smallest degree to impeach the various cases which have been founded on the proof of fraud. But still we must recollect that the principle which I have mentioned is always applied *ad hominem.* He who is guilty of a fraud shall never be permitted to avail himself of it; and if a contract founded in fraud be questioned between the parties to that contract, I agree, that, as against the person who has committed the fraud, and who endeavours to avail himself of it, the contract shall be considered as null and void. But there is no case in which a fraud intended by one man shall overturn a fair and *bonâ fide* contract between two others. Even as between the parties themselves we must not forget the figurative language of Lord Chief Justice Wilmot, who said that "the statute law is like a tyrant; where he comes he makes all void; but the common law is like a nursing father, and makes void only that part where the fault is, and preserves the rest;"

2 Wils. 351 (*t*). If an alteration be made to effect a fraud, the alteration shall be laid out of the question; but still the contract shall exist to its original and honest purpose, and shall be carried into execution as if the fraud had never existed. A case somewhat similar to this is to be found in the book which I have before quoted, and which, though not a binding legal authority, yet, where its propositions are founded on practice and good sense, is deserving of some attention. Beawes, tit. Bill of Exchange, pl. 132, says: "Where the possessor of a bill payable to his order fails, and to defraud his creditors indorses it to another, who negotiates it, and effectually receives the value, indorsing it again to a third, &c., and though the creditors, having discovered the fraud, oppose it, yet the acceptant must pay it to him who comes to receive it, on proof that he paid the real value for it." But it has been contended that there is an analogy between bills of exchange and deeds, and that in the case of deeds any erasure or alteration will avoid the deed. In answer to this, first, I deny the analogy between bills of exchange and deeds, and there is no authority to support it. In the case of deeds, there must be a *profert* (*u*), and, as we learn from 10 Co. 92 b., in ancient times the judges pronounced upon view of the deed, though Lord Coke says that practice was afterwards altered. But there never is a *profert* of a bill of exchange; the judges cannot determine on a view of that, but it must be left to a jury to decide upon the whole of the evidence, according to the truth of the case. Again, in the case of joint and several bonds the objection was founded on its being a substantial injury to the defendant; for if it were considered as a sole bond, the defendant would be answerable for the whole debt; but if it were a joint bond, he would be liable to only half or other proportionable part of it. So far in those days did the court look into the equity of the case. But the blot on this bill is no injury to the defendant; he is not liable to pay till the bill became due, computing the time from the original date; then he must pay it: he alone is liable; and he never can be charged a second time on the bill. Secondly, it is not universally true that a deed is destroyed by an alteration, or by tearing off the

(*t*) *Collins* v. *Blantern*, see *ante*, p. 362.

(*u*) By the C. L. P. Act, 1852, s. 55, it was made unnecessary to make *profert*.

(Buller, J.)

seal. In Palm. 403, a deed which had erasures in it, and from which the seal was torn, was held good, it appearing that the seal was torn off by a little boy. So in any case where the seal is torn off by accident after plea pleaded, as appears by the cases quoted by the plaintiff's counsel. And in these days, I think, even if the seal were torn off before the action brought, there would be no difficulty in framing a declaration, which would obviate every doubt upon that point, by stating the truth of the case. The difficulty which arose in the old cases depended very much on the technical forms of pleading applicable to deeds alone. The plaintiff made a *profert* of the deed under seal, which he still must do, unless he can allege a sufficient ground for excusing it; when that is done, the deed or the *profert* must agree with that stated in the declaration, or the plaintiff fails. But a *profert* of a deed without a seal will not support the allegation of a deed with a seal. For these reasons I am of opinion that the plaintiffs are entitled to judgment on the second count, which is drawn upon the bill, stating it to bear date the 26th March.

But, supposing there could be any doubt on this part of the case, I am also of opinion that the plaintiffs are entitled to their judgment on either of the two counts for money paid, or for money had and received. Here it is material to recall to our minds the facts found by the verdict. The bill produced to the jury was drawn for value, and was accepted by the defendant. He is not found to have no effects of the drawers in his hands; and his accepting the bill imports, and is at the least *primâ facie* evidence, that he had: and on this verdict he must be taken to have the amount in his hands. In 3 Burr. 1675, Aston, J., said, it is an admission of effects. By his acceptance he gave faith to the bill; and the plaintiffs, giving credit to that fact, have actually paid the value of the bill on receiving it. On this case the money paid by the plaintiffs is money paid for the use of the defendant: for the money was advanced on the credit of the defendant, and in consequence of his undertaking to pay the bill. Again, the money in the defendant's hands is so much money received by him for the use of the plaintiffs, who were holders of the bill when it became due. The defendant has got

that money in his pocket, which in justice and conscience the plaintiffs ought to have, and therefore they are entitled to recover it in an action for money had and received.

In answer to this, it was in the last term suggested for consideration, whether this bill after the alteration were not a *chose in action*, which could not be assigned. It is laid down in our old books, that for avoiding maintenance a *chose in action* cannot be assigned, or granted over to another; Co. Litt. 214 a., 266 a.; 2 Roll. Abr. 45, l. 40 (*v*). The good sense of that rule seems to me to be very questionable; and in early as well as modern times it has been so explained away, that it remains at most only an objection to the form of the action in any case (*x*). In 2 Roll. Abr. 45 & 46, it is admitted that an obligation or other deed may be granted, so that the writing passes: but it is said that the grantee cannot sue for it in his own name. If a third person be permitted to acquire the interest in a thing, whether he is to bring the action in his own name or in the name of the grantor does not seem to me to affect the question of maintenance. It is curious, and not altogether useless, to see how the doctrine of maintenance has from time to time been received in Westminster-hall. At one time, not only he who laid out money to assist another in his cause, but he that by his friendship or interest saved him an expense which he would otherwise be put to, was held guilty of maintenance (*y*). Bro. tit. *Maintenance*, 7, 14, 17, &c. Nay, if he officiously gave evidence, it was maintenance; so that he must have had a *subpœna*, or suppress the truth. That such doctrine, repugnant to every honest feeling of the human heart, should be soon laid aside must be expected. Accordingly a variety of exceptions were soon made: and, amongst others, it was held that, if a person has any interest in the thing in dispute, though on contingency only, he may lawfully maintain an action on it; 2 Roll. Abr. 115; but in the

(*v*) See a curious passage in Termes de la Ley, tit. *Chose in Action.*

(*x*) The doctrine that there cannot be an assignment of a debt has been long ago exploded; see Noy's Maxims, p. 72; and the judgment of Willes, J., in *Balfour* v. *The Sea, Fire, and Life Ass. Co.*, 3 C. B. N. S. 300, 308. By the Judicature Act, 1873, s. 25, subs. 6, an absolute assignment in writing of a debt or other legal *chose in action*, of which express notice in writing has been given to the debtor, is effectual in law to transfer the legal right thereto and all the remedies therefor.

(*y*) See *per* Lord Abinger in *Findon* v. *Parker*, 11 M. & W. 675, 682; 4 Ken. Comm. 10th ed., 31, note; *Williamson* v. *Henley*, 6 Bing. 299; and the cases cited, *ante*, p. 371.

(Buller, J.)

midst of all these doctrines on maintenance, there was one case in which the courts of law allowed of an assignment of a *chose in action*, and that was in the case of the crown; for the courts did not feel themselves bold enough to tie up the property of the crown, or to prevent that from being transferred. 3 Leon. 198; Cro. Jac. 180. Courts of equity from the earliest times thought the doctrine too absurd for them to adopt, and therefore they always acted in direct contradiction to it; and we shall soon see that courts of law also altered their language on the subject very much. In 12 Mod. 554, the court speaks of an assignment of an apprentice, or an assignment of a bond, as things which are good between the parties, and to which they must give their sanction and act upon. So an assignment of a *chose in action* has always been held a good consideration for a promise. It was so in 1 Roll. Abr. 29, Sid. 212, and T. Jones, 222; and lastly, by all the judges of England in *Mouldsdale* v. *Birchall*, 2 W. Bl. 820, though the debt assigned was uncertain. After these cases, we may venture to say that the maxim was a bad one, and that it proceeded on a foundation which fails. But still it must be admitted that, though the courts of law have gone the length of taking notice of assignments of *choses in action* and of acting upon them, yet in many cases they have adhered to the formal objection, that the action shall be brought in the name of the assignor, and not in the name of the assignee. I see no use or convenience in preserving the shadow when the substance is gone; and that it is merely a shadow is apparent from the later cases, in which the court have taken care that it shall never work injustice. In *Bottomley* v. *Brooke* (*z*), C. B. Mich. 22 G. 3, which was debt on bond, the defendant pleaded that the bond was given for securing 103*l.* lent to the defendant by E. Chancellor, and was given by her direction in trust for her, and that E. Chancellor was indebted to the defendant in more money. To this plea there was a demurrer, which was withdrawn by the advice of the court. In *Rudge* v. *Birch* (*z*), K. B.

(*z*) See 1 T. R. 621, 622. These cases were disapproved of in *Tucker* v. *Tucker*, 4 B. & Ad. 745. In *Wake* v. *Tinkler*, 16 East, 36, Lord Ellenborough said that the doctrine laid down in them was rather to be restrained than extended. This is, however, at variance with the policy of the C. L. P. Act, 1854, and the Judicature Acts. See notes to *George* v. *Clagett*, *post*, vol. ii.

Mich. 25 G. 3, on the same pleadings there was judgment for the defendant. And in *Winch* v. *Keeley* (*a*), K. B. Hil. 27 G. 3, where the obligee assigned over a bond and afterwards became a bankrupt, the court held that he might notwithstanding maintain the action. Mr. Justice Ashhurst said: "It is true that formerly courts of law did not take notice of an equity or a trust: but of late years, as it has been found productive of great expense to send the parties to the other side of the hall, wherever this court have seen that the justice of the case has been clearly with the plaintiff, they have not turned him round upon this objection. Then if this court will take notice of a trust, why should they not of an equity? It is certainly true that a *chose in action* cannot strictly be assigned; but this court will take notice of a trust, and see who is beneficially interested." But, admitting that on account of this quaint maxim there may still be some cases in which an action cannot be maintained by an assignee of a *chose in action* in his own name, it remains to be considered, whether that objection ever did hold or ever can hold in the case of a mercantile instrument or transaction. The law-merchant is a system of equity, founded on the rules of equity, and governed in all its parts by plain justice and good faith. In *Pillans* v. *Van Mierop* (*b*), Lord Mansfield said, "if a man agree to do what if finally executed would make him liable, as in a court of equity, so, in mercantile transactions, the law looks on the act as done." I can find no instance in which the objection has prevailed in a mercantile case; and in the two instances most universally in use it undoubtedly does not hold; that is, in the cases of bills of exchange and policies of insurance. The first is the present case; and bills are assignable by the custom of merchants; so in the case of policies of insurance; till the late act was made, requiring that the name of the person interested should be inserted in the policy, the constant course was to make the policy in the name of the broker; and yet the owner of the goods maintained an action upon it. Circulation and the transfer of property are the life and soul of trade, and must not be checked in any instance. There is no reason for confining the power of assignment to the two instruments which I have mentioned; and I will show you other cases in which the court have allowed it: 1st, In *Fenner*

(*a*) 1 T. R. 619. (*b*) 3 Burr. 1664, 1669.

(Buller, J.)

v. *Meares*, where the defendant, a captain of an East Indiaman, borrowed 1000*l.* of Cox, and gave two respondentia bonds, and signed an indorsement on the back of them, acknowledging that, in case Cox chose to assign the bonds, he held himself bound to pay them to the assignees. Cox assigned them to the plaintiff, who was allowed to recover the amount of them in an action for money had and received. De Grey, Chief Justice, in disposing of the motion for a new trial, said (*c*), "Respondentia bonds have been found essentially necessary for carrying on the India trade; but it would clog these securities, and be productive of great inconvenience, if they were obliged to remain in the hands of the first obligee. This contract is therefore devised to operate upon subsequent assignments, and amounts to a declaration, that upon such assignment the money which I have borrowed shall no longer be the money of A., but of B., his substitute. The plaintiff is certainly entitled to the money in conscience, and therefore, I think, entitled also at law: for the defendant has promised to pay any person who is entitled to the money." So, in the present case, I say the plaintiffs are in conscience entitled to the money, and the defendant has promised to pay, or, which is the same thing, is by law bound to pay the money to any person who is entitled. The very nature and foundation of an action for money had and received is that the plaintiff is in conscience entitled to the money; and on that ground it has been repeatedly said to be a bill in equity. We all remember the sound and manly opinion given by my Lord Chief Justice here in the beginning of the last term on a motion made by Mr. Bearcroft for a new trial, wherein he said, if he found justice and honesty on the side of the plaintiff here, he would never turn him round, in order to give him the chance of getting justice elsewhere.—2ndly, *Clarke* v. *Adair*, sittings after Easter, 4 Geo. 3: Debray, an officer, drew a bill on the agent of a regiment payable out of the first money which should become due to him on account of arrears or non-effective money. Adair did not accept the bill, but marked it in his book, and promised to pay when effects came to hand. Debray died before the bill was paid; and the administratrix brought an action against Adair for money had and received. It was allowed

(*c*) 2 W. Bl. 1272.

by all parties that this was not a bill within the custom of merchants: but Lord Mansfield said that it is an assignment for valuable consideration, with notice to the agent; and he is bound to pay it. He said he remembered a case in Chancery, where an agent under the like circumstances had paid the money to the administrator, and was decreed notwithstanding to pay to the person in whose favour the bill was drawn.—3rdly. In *Israel* v. *Douglas*, C. B. East, 29 G. 3 (*d*), A. being indebted to B., and B. indebted to C., B. gave an order to A. to pay C. the money due from A. to B.; whereupon C. lent B. a further sum, and the order was accepted by A. On the refusal of A. to comply with the order, it was held that C. might maintain an action for money had and received against him. And Mr. Justice Heath expressly said he thought "in mercantile transactions of this sort such an undertaking may be construed to make a man liable for money had and received." This opinion was cited with approbation in the House of Lords in *Gibson* v. *Minet*. Lastly, I come to the case of *Tatlock* v. *Harris*, 3 T. R. 182, in which Lord Kenyon, in delivering the judgment of the court, said it "was an appropriation of so much money to be paid to the person who should become the holder of the bill. We consider it is an agreement between all the parties to appropriate so much property to be carried to the account of the holder of the bill; and this will satisfy the justice of the case, without infringing any rule of law." All these cases prove that the remedy will be enlarged, if necessary, to attain the justice of the case; and that, if the plaintiff has justice and conscience on his side, and the defendant has notice only, the plaintiff shall recover in an action for money had and received. Let us not be less liberal than our predecessors, and even we ourselves, have been on former occasions. Let us recollect, as Lord Chief Justice Wilmot said in the case I have alluded to (*e*), that not only *boni judicis est ampliare jurisdictionem*, but *ampliare justitiam*: and that the common law of the land is the birthright of the subject, under which we are bound to administer him justice, without sending him to his writ of *subpœna*, if he can make that justice appear. The justice, equity, and good conscience of the case of these plaintiffs can admit of no question; neither can it be doubted but that the defendant has got the

(*d*) 1 H. Bl. 242. (*e*) *Collins* v. *Blantern*, *ante*, p. 360.

(Buller, J.)

money which the plaintiffs ought to receive. For these reasons, I am of opinion that the plaintiffs are entitled to judgment on either of these three counts in the declaration, namely, on the count on the bill of exchange, stating the date to be the 26th; or on the count for money paid; or on the count for money had and received.

Grose, J.—The only question in this case is, whether there appears on the face of this special verdict a right of action in the plaintiffs on any of the counts. The first count is on a bill of exchange dated the 20th March; but, there being no proof of any bill of that date, there is clearly an end of that count. The second is on a bill dated the 26th March; but the defendant objects to the plaintiffs' recovering on this count also, because, the bill having been altered while it was in the hands of Wilkinson and Cooke, it is not the same bill as that which was accepted; and that is the true and only question in the cause. My idea is, that the plaintiffs' right of action, as stated in this count, cannot be maintained at common law, but is supported only on the custom of merchants, which permits these particular *choses in action* to be transferred from one person to another. The plaintiffs, as indorsees, in order to recover on this bill, must prove the acceptance by the defendant, the indorsement from Wilkinson and Cooke to them, and that this was the bill which was presented when it became due. Now, has all this been proved? The bill was drawn on the 26th March, payable at three months' date; the defendant's engagement by his acceptance was, that it should be paid when it became due, according to that date; but afterwards the date was altered; the date I consider as a very material part of the bill, and by the alteration the time of payment is accelerated several days: according to that alteration, the payment was demanded on the 23rd June, which shows that the plaintiffs considered it as a bill drawn the 20th March; then the bill which was produced in evidence to the jury was not the same bill which was drawn by Peel and Co., and accepted by the defendant; and here the cases which were cited at the bar apply. *Pigot's* is the leading case; from that I collect that when a deed is erased, whereby it becomes void, the obligor may plead *non est factum*, and give the matter in evidence,

because at the time of plea pleaded it was not his deed; and, 2ndly, that when a deed is altered in a material point by himself, or even by a stranger, the deed thereby becomes void. Now the effect of that determination is, that a material alteration in a deed causes it no longer to be the same deed. Such is the law respecting deeds (*f*): but it is said that that law does not extend to the case of a bill of exchange; whether it do or not must depend on the principle on which this law is founded. The policy of the law has been already stated, namely, that a man shall not take the chance of committing a fraud, and, when that fraud is detected, recover on the instrument as it was originally made. In such a case the law intervenes, and says that the deed thus altered no longer continues the same deed, and that no person can maintain an action upon it. In reading that and the other cases cited, I observe that it is nowhere said that the deed is void merely because it is the case of a deed, but because it is not the same deed. A deed is nothing more than an instrument or agreement under seal: and the principle of those cases is, that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument. And this principle is founded on great good sense, because it tends to prevent the party, in whose favour it is made, from attempting to make any alteration in it. This principle too appears to me as applicable to one kind of instrument as to another. But it has been contended that there is a difference between an alteration of bills of exchange and deeds; but I think that the reason of the rule affects the former more strongly, and the alteration of them should be more penal than in the latter case. Supposing a bill of exchange were drawn for 100*l.*, and after acceptance the sum was altered to 1000*l.*: it is not pretended that the acceptor shall be liable to pay the 1000*l.*: and

(*f*) In *Dr. Leyfield's Case*, 10 Rep. 92 b, one of the reasons for requiring *profert* of a deed is stated to be "that it be not rased or interlined in material points or places; and upon that the judges in ancient time did judge upon their view the deed to be void, but of late times have left that to be tried by the jury if the rasing or interlining were before delivery." On similar principles a deed, the name of the grantee in which is introduced after delivery, is void; *Hibblewhite* v. *M'Morine*, 6 M. & W. 200; *Société Générale* v. *Walker*, 11 App. Cas. 20. But, if the grantee be sufficiently identified, such an addition as filling up a blank left for his Christian name will not hurt; *Eagleton* v. *Gutteridge*, 11 M. & W. 465. So filling in a blank with the date does not vitiate; *Keane* v. *Smallbone*, 17 C. B. 179.

(Grose, J.)

I say that he cannot be compelled to pay the 100*l.*, according to his acceptance of the bill, because it is not the same bill. So, if the name of the payee had been altered, it would not have continued the same bill. And the alteration in every respect prevents the instrument's continuing the same, as well as when applied to a bill as to a deed. It was said that *Pigot's Case* only shows to what time the issue relates: but it goes further, and shows that, if the instrument be altered at any time before plea pleaded, it becomes void. It is true that the court will inquire to what time the issue relates in both cases. Then, to what time does the issue relate here? The plaintiffs in this case undertook to prove everything that would support the *assumpsit* in law, otherwise the *assumpsit* did not arise. It was incumbent on them to prove that, before the action was brought, this identical bill, which was produced in evidence to the jury, was accepted by the defendant, presented, and refused: but if the bill, which was accepted by the defendant, were altered before it was presented for payment, then that identical bill, which was accepted by the defendant, was not presented for payment; the defendant's refusal was a refusal to pay another instrument: and therefore the plaintiffs failed in proving a necessary averment in their declaration. If the bill had been presented and refused payment, and it had been altered after the action was brought, then it might have been like the case mentioned at the bar. It was contended at the bar, that the inquiry before a jury in an action like the present should be, whether or not the defendant promised to pay the bill at the time of his acceptance: but, granting that he did so promise, that alone will not make him liable unless that same bill were afterwards presented to him. I will not repeat the observations which have been already made by my lord on the case in Molloy: but the note of that case is a very short one; and the principle of it is not set forth in any other book, nor indeed do the facts of it sufficiently appear. I doubt also whether it was a determination of this court: it only appears that there was a point made at *nisi prius*, but not that it was afterwards argued here. But it has been said that a decision in favour of the plaintiffs will be the most convenient one for the commercial world; but that is much to be doubted; for if, after

an alteration of this kind, it be competent to the court to inquire into the original date of the instrument, it will also be competent to inquire into the original sum and the original payee, after they have been altered, which would create much confusion, and open a door to fraud. Great and mischievous neglects have already crept into these transactions ; and I conceive that keeping a strict hand over the holders of bills of exchange, to prevent any attempts to alter them, may be attended with many good effects, and cannot be productive of any bad consequences, because the party who has paid a value for the bill may have recourse to the person who immediately received it from him. On these grounds, therefore, I am of opinion that the plaintiffs cannot recover on the second count. Neither do I think that they can recover on the general count, because it is not stated as a fact in the verdict that the defendant received the money, the value of the bill.

Per curiam. Judgment for the defendant.

MASTER *v.* MILLER, IN THE EXCHEQUER CHAMBER, IN ERROR.

On behalf of the plaintiff, *Wood* argued as follows : It has been contended, on the other side, in the court below, that the acceptor of the bill was discharged from his acceptance by the alteration of the date, though made without the knowledge of the holder : but no case has been cited to show that an alteration, such as was made in the present instance, would vitiate a written instrument, except it were a deed. But there is a material difference between deeds and bills of exchange. Deeds seldom if ever pass through a variety of hands, and are not liable to the same accidents to which bills are, from their negotiability, exposed. There is therefore good reason in the rule, which requires that deeds should be strictly kept, and which will not suffer the least alteration in them ; but the same rule is not applicable to bills. In ancient times the court decided on the inspection of deeds, for which reason a profert was necessary, that they might see whether any rasure or alteration had taken place : but bills of exchange were always within the cognizance of the jury. The form of the issue on a deed, also, is different from that on a bill ;

(Argument for Plaintiff.)

in the one it is, that it is not then, *i.e.*, at the time of plea pleaded, the deed of the party; 11 Co. 27 a, *Pigot's Case*; but the issue on a bill is, that the defendant did not undertake and promise. Here the jury have expressly found that the defendant did accept the bill, and the promise arises by implication of law from the acceptance. An alteration in the date, subsequent to the acceptance, will not do away the implied promise. In *Price* v. *Shute*, "a bill was drawn payable the 1st of January; the person upon whom it was drawn accepts the bill to be paid the 1st of March; the servant brings back the bill; the master, perceiving the enlarged acceptance, strikes out the 1st of March, and puts in the 1st of January, and then sends the bill to be paid; the acceptor then refuses: whereupon the person to whom the monies were to be paid strikes out the 1st of January, and puts in the 1st of March again. In an action brought on this bill, the question was, Whether these alterations did not destroy the bill? and ruled they did not;" 2 Molloy, 109. In *Nichols* v. *Haywood*, Dyer, 59, it was holden in the case of a bond that, where the seal was destroyed by accident before the trial, the jury might find the special matter, and, being after plea pleaded, it could not be assigned for error, but the plaintiff recovered.

To the same point also is Cro. Eliz. 120, *Michael* v. *Scockwith*. So, in the present case, it was competent to the jury to find the special matter, and an alteration in the bill, subsequent to the time of the acceptance, ought not to prevent the plaintiff from recovering. In *Dr. Leyfield's Case*, 10 Co. 92 b, it is said, "in great and notorious extremities, as by casualty of fire that all his evidences were burnt in his house, there, if that should appear to the judges, they may, in favour of him who has so great a loss by fire, suffer him upon the general issue to prove the deed in evidence to the jury by witnesses:" the casualty by fire is only put as an instance, for the principle is applicable to all cases of accident. Thus also in *Read* v. *Brookman*, 3 T. R. 151, a deed was pleaded as being lost by time and accident, without a profert: and the present case is within the reason and spirit of that determination.

Bearcroft, contra.—On principles of law and sound policy, the

plaintiff ought not to recover. The reason of the rule, that a material alteration shall vitiate a deed, is applicable to all written instruments, and particularly to bills of exchange, which are of universal use in the transactions of mankind. And here there was a material alteration in the bill, inasmuch as the time of payment was accelerated. As to *Price* v. *Shute*, it is but loosely stated, and that not in any book of reports; and it does not appear against whom the action was brought.

Lord Chief Justice Eyre.—I cannot bring myself to entertain any doubt on this case; and, if the rest of the court are of the same opinion, it is needless to put the parties to the delay and expense of a second argument. When it is admitted that the alteration of a deed would vitiate it, the point seems to me to be concluded; for by the custom of merchants a duty arises on bills of exchange from the operation of law, in the same manner as a duty is created on a deed by the act of the parties. With respect to the argument from the negotiability of bills of exchange and their passing through a variety of hands, the inference is directly the reverse of that which was drawn by the counsel for the plaintiff: there are no witnesses to a bill of exchange, as there are to a deed; a bill is more easily altered than a deed; if therefore courts of justice were not to insist on bills being strictly and faithfully kept, alterations in them highly dangerous might take place, such as the addition of a cipher in a bill for 100*l*., by which the sum might be changed to 1000*l*., and the holder, having failed in attempting to recover the 1000*l*., might afterwards take his chance of recovering the 100*l*., as the bill originally stood. But such a proceeding would be intolerable. It was said in the argument that the defendant could not dispute the finding of the jury, that they found he accepted the bill, and therefore that the substance of the issue was proved against him. But the meaning of the plea of *non assumpsit* is, not that he did not accept the bill, but that there was no duty binding on him at the time of plea pleaded (*g*). There are many ways by which the obligation of the acceptance might be discharged; for instance, by payment. And it was certainly competent to him to show that the duty, which arises *primâ facie* from the acceptance of a bill,

(*g*) See *Sullivan* v. *Montague*, 1 Dougl. 111, 112, and the note there.

(EYRE, L.C.J.)

was discharged in the present case by the bill itself being vitiated by the alteration which was made.

Lord Chief Baron MACDONALD.—I see no distinction as to the point in question between deeds and bills of exchange: and I entirely concur with my Lord Chief Justice, in thinking there would be more dangerous consequences follow from permitting alterations to be made on bills than on deeds.

The other Judges declared themselves of the same opinion.

Judgment affirmed.

Material alteration satisfies bill except against consenting parties.

SINCE the decision of this case it never has been doubted that at common law a material alteration in a bill or note not satisfactorily accounted for operates as a satisfaction thereof, *except as against parties consenting* to such alteration. The question of materiality has been held to be one of law and not to depend upon surrounding circumstances; *Vance* v. *Lowther*, 1 Ex. D. 176.

Bills of Exchange Act, 1882.

The Bills of Exchange Act, 1882, enacts that "where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers; provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour" (s. 64 (1)). And further that "in particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent" (s. 64 (2)). The above provisions apply also to cheques and notes (ss. 73, 89).

The proviso to s. 64 (1), it will be observed, protects a holder in due course of a bill, cheque, or note which has been materially altered, unless such alteration is "apparent." In *Scholfield* v. *Londesborough*, (1894) 2 Q. B. 660, an alteration was held not to be apparent. In *Leeds Bank* v. *Walker*, 11 Q. B. D. 84, an alteration to a Bank of England

note was held to be apparent, and it was further held that such a note does not come within s. 64.

Effect on debt for which the bill is a security.

The doctrine of *Master* v. *Miller* was carried still further in *Alderson* v. *Langdale*, 3 B. & Ad. 660, where it was held that such an alteration made by the plaintiff operated as a satisfaction, not only of the bill, but of the debt which it was given to secure. In that case, the debtor was the *drawer* of the bill altered; but in *Atkinson* v. *Hawdon*, 2 A. & E. 628, it was held that, where the debtor, being himself the maker or acceptor, could have had no remedy on the instrument against any other party to it, his liability to pay the debt secured thereby was not extinguished by the alteration. In that case the declaration, so far as is material to the point, was for goods sold and delivered, and on an account stated. *Plea*, that the defendant accepted a bill at two months for the debt; *Replication*, that it was not paid when due; *Rejoinder*, that the plaintiff had altered it without the defendant's assent. *Demurrer*, and judgment for the plaintiff, the defendant's counsel admitting that the rejoinder could not be supported. It is obvious that this case has no bearing upon the effect of such an alteration in an action on the bill itself.

Instances of material alterations.

Alterations in the date, the sum payable, the time or place of payment, or by adding a place of payment without the acceptor's consent, have been held to be material alterations within the above rule; *Cardwell* v. *Martin*, 9 East, 190; *Walton* v. *Hastings*, 4 Camp. 223; *Cock* v. *Coxwell*, 2 C. M. & R. 291; *Harrison* v. *Cotgreave*, 4 C. B. 562; *Hirschman* v. *Budd*, L. R. 8 Ex. 171, where the observations of Parke, B., in *Parry* v. *Nicholson*, 13 M. & W. 778, were commented on; *Vance* v. *Lowther*, 1 Ex. D. 176; *Leeds Bank* v. *Walker*, 11 Q. B. D. 84; *Trapp* v. *Spearman*, 3 Esp. 57; *Hamelin* v. *Bruck*, 9 Q. B. 306; *Bowman* v. *Nichol*, 5 T. R. 537; *Outhwaite* v. *Luntley*, 4 Camp. 179; *Alderson* v. *Langdale*, 3 B. & Ad. 660; *Tidmarsh* v. *Grover*, 1 M. & S. 735; *R.* v. *Treble*, 2 Taunt. 328; *Cowie* v. *Halsall*, 4 B. & Ald. 197; *Crotty* v. *Hodges*, 4 M. & Gr. 561; *Burchfield* v. *Moore*, 3 E. & B. 683; *Hanbury* v. *Lovett*, 16 W. R. 795. All the above alterations are defined as "material" in s. 64 of the Bills of Exchange Act, 1882, *supra*.

So also are alterations expressing the value to be received on some particular account; *Knill* v. *Williams*, 10 East, 431; changing a joint into a joint and several note; *Perring*

v. *Hone*, 4 Bing. 28; adding or changing the rate of interest; *Sutton* v. *Toomer*, 7 B. & C. 416; *Warrington* v. *Early*, 2 E. & B. 763; adding the rate of exchange on a bill drawn abroad; *Hirschfeld* v. *Smith*, L. R. 1 C. P. 340; altering the number of a bank note; *Suffell* v. *Bank of England*, 9 Q. B. D. 555, where *Caldwell* v. *Parker*, Ir. Rep. 3 Eq. 519, was disapproved of; and, *semble*, the cutting off or erasure of a signature; *Mason* v. *Bradley*, 11 M. & W. 590; *Nicholson* v. *Revill*, 4 A. & E. 675. Any crossing of a cheque authorized by the Bills of Exchange Act, 1882, is "a material part of the cheque; and it shall not be lawful for any person to obliterate, or, except as authorized by the Act, to add to or alter the crossing" (s. 78).

Place of payment added to acceptance.

When an *acceptance* is altered by inserting a place of payment, without adding the words "there only," or "not elsewhere," the alteration, if made with the acceptor's consent, is immaterial in an action against him; for formerly under the 1 & 2 G. 4, c. 78, and now under the Bills of Exchange Act, 1882, s. 19 (2) (*c*), the above words are necessary in order to create a special acceptance; see *Walter* v. *Cubley*, 2 C. & M. 151. But, if made without his sanction, it avoids the bill, being the unauthorized appointment of an agent to pay the bill; *Taylor* v. *Moseley*, 6 C. & P. 278; *Macintosh* v. *Haydon*, Ry. & M. 362; *Desbrowe* v. *Wetherby*, 1 M. & Rob. 438; *Calvert* v. *Baker*, 4 M. & W. 417; *Cowie* v. *Halsall*, *supra*; *Crotty* v. *Hodges*, *supra*; and *Hanbury* v. *Lovett*, 16 W. R. 795. In *Burchfield* v. *Moore*, 3 E. & B. 683, Campbell, C.J., said: "Such words, although they do not alter the direct liability of the acceptor, do vary the contract between others who are parties to the bill; therefore if interpolated without his consent, they may prejudice the acceptor; they amount to a material alteration of the bill." See now also the Bills of Exchange Act, 1882, s. 64 (2), *ante*.

Alteration need not be of part of contract.

In *Suffell* v. *Bank of England*, 9 Q. B. D. 555, it was held, disapproving of *Caldwell* v. *Parker*, 17 W. R. 955, that an alteration to be material within the rule need not be an alteration of some part of the contract contained in the altered instrument, and that the rule applies even to an instrument not containing any contract at all; see also *Lowe* v. *Fox*, 12 App. Cas. 206.

If the alteration be material, it makes no difference that it would operate, if at all, to the benefit of the maker; *Gardner* v. *Walsh*, 5 E. & B. 83, overruling *Catton* v. *Simpson*, 8 A. & E. 136.

Effect of stamp laws.

Even if the alteration be made *with the consent* of all the parties to the bill or note, still, as it thereby becomes a new contract, the old stamp will not suffice; *Bowman* v. *Nicholl*, 5 T. R. 537; *Bathe* v. *Taylor*, 15 East, 412; unless, indeed, the alteration was merely to correct a mistake, and so render the instrument what it was originally intended to have been; *Kershaw* v. *Cox*, 3 Esp. 246; *Jacob* v. *Hart*, 6 M. & S. 142; *Clark* v. *Blackstock*, Holt, N. P. 474; *Byrom* v. *Thomson*, 11 A. & E. 31; *Cariss* v. *Tattersall*, 2 M. & Gr. 890; *Wright* v. *Inshaw*, 1 Dowl. N. S. 802; or unless it was made before issue; *Scholfield* v. *Londesborough*, (1894) 2 Q. B. 660. The intent of the alteration is a question for the jury; Byles on Bills, 15th ed., 337.

An alteration made to carry out the original intention of the parties does not vitiate the instrument; *Cariss* v. *Tattersall*, *supra*; *London & Provincial Bank* v. *Roberts*, 22 W. R. 402.

Addition of parties.

The addition of a new contractor does not hurt where made with the assent of all parties; *Zouch* v. *Clay*, 1 Vent. 185, 2 Lev. 35; or where he was originally intended to be added; *Dodge* v. *Pringle*, 29 L. J. Ex. 115. According to *Catton* v. *Simpson*, 8 A. & E. 136, the addition of a contracting party without consent is merely inoperative; but according to the later authority of *Gardner* v. *Walsh*, *supra*, it vitiates the instrument.

In *Ex p. Yates*, 2 De G. & J. 191, the executor of the payee of a promissory note forebore, at the request of one of the makers, to press for payment on his procuring an additional security, and accordingly another party placed his name on the note, not under the signature of the makers, but in the opposite corner. This addition was held to be an endorsement, and not an alteration; see Bills of Exchange Act, 1882, s. 56.

Immaterial alterations.

The addition of anything perfectly immaterial does not affect the liability of the parties; *Catton* v. *Simpson*, 8 A. & E. 136. Where the alteration is an *immaterial* one, the Q. B., declining to be bound by the second resolution in *Pigot's Case*, 11 Rep. 27a (see *ante*, p. 749), have decided that it does not vitiate the instrument, even though made by a party thereto; *Aldous* v. *Cornwell*, L. R. 3 Q. B. 573, where, in an action by the payee against the maker of a promissory note, the addition of the words "on demand" was held to be immaterial. In *Garrard* v. *Lewis*, 10 Q. B. D. 30,

decided before the Bills of Exchange Act, 1882, it was held that "no alteration (even if it be fraudulent and unauthorized) of the marginal figure in a bill vitiates it as a bill for the full amount inserted in the body when the bill reaches the hand of a holder who is unaware that the marginal index has been improperly altered." As to figures in bills, see the Bills of Exchange Act, 1882, ss. 9 (2), 20 (2) proviso.

Additions to deeds.

In *Sellin* v. *Price*, L. R. 2 Ex. 189, the addition of a schedule of creditors to a composition deed after execution and registration was held to be a material alteration which vitiated the deed; but in *Wood* v. *Slack*, L. R. 3 Q. B. 379, the addition to the schedule of the names of two creditors after execution and registration was held to be immaterial. See also *Weeks* v. *Maillardet*, 14 East, 568; *Daines* v. *Heath*, 3 C. B. 938; *Dyer* v. *Green*, 1 Exch. 71; *Re Batten*, 22 Q. B. D. 685.

Alteration with consent before issue.

An alteration made with the consent of parties before the issue of the bill or note is of no importance, for, up to the time of issue, it is *in fieri*; *Downes* v. *Richardson*, 5 B. & Ald. 674; *Johnson* v. *Marlborough*, 2 Stark. 313. And a bill or note is said to be "issued" when it is in the hands of some party entitled to make a claim upon it; *Downes* v. *Richardson*, *supra*; *Cardwell* v. *Martin*, 9 East, 190; *Kennerly* v. *Nash*, 1 Stark. 452; *Webber* v. *Maddocks*, 3 Camp. 1; *Engel* v. *Stourton*, 53 J. P. 535, a case of an accommodation bill; *Scholfield* v. *Londesborough*, (1894) 2 Q. B. 660. See the Act of 1882, s. 2.

On whom lies onus of accounting for alteration.

If a bill or note exhibit the appearance of alteration, it lies upon the holder to account for it; *Henman* v. *Dickenson*, 5 Bing. 183; *Bishop* v. *Chambre*, 1 M. & W. 116; *Knight* v. *Clements*, 8 A. & E. 215; *Clifford* v. *Parker*, 2 M. & Gr. 909. Whether an interlineation, like an alteration, raises a *primâ facie* case of suspicion, so that the onus of explaining it is thrown upon the party producing the instrument, see 2 Wms. Saund. 200 *c.* n. (*b*). It has been laid down that, although in the case of a bill of exchange there is a distinct rule that an alteration must be explained, yet in the case of a deed the presumption is that the alteration was made before execution; *Doe* v. *Catomore*, 16 Q. B. 745.

Deeds.

Wills.

The presumption is to the contrary in the case of a will, because that may be altered by the testator, without wrong, after it is executed; *Doe* v. *Palmer*, 16 Q. B. 747; see *Christmas* v. *Whingates*, 3 Sw. & Tr. 81, where the same

principle was applied to the case of a mutilation of a will; *Re Cadge*, L. R. 1 P. & D. 543; *Re Adamson*, 3 Id. 253. *Quære* whether the distinction between an alteration and an interlineation was much considered in *Doe* v. *Catomore*.

Cancellation by mistake.

In the case of bills and notes a cancellation by mistake does not affect the liability of the parties whose signatures are cancelled; *Raper* v. *Birkbeck*, 15 East, 17; *Wilkinson* v. *Johnson*, 3 B. & C. 428; *Novelli* v. *Rossi*, 2 B. & Ad. 765; *Warwick* v. *Rogers*, 5 M. & Gr. 352; *Prince* v. *Oriental Bank*, 3 App. Cas. 325; Bills of Exchange Act, 1882, s. 63 (3); nor does a cancellation by an agent without authority; see *Bank of Scotland* v. *Dominion Bank*, (1891) A. C. 592. It appears that a mistake annuls the cancellation of a deed; *Perrott* v. *Perrott*, 14 East, 423. "If the absence of *intention* to cancel be clearly shown, the thing is not cancelled;" *per* Maule, J., *Bamberger* v. *Commercial Co.*, 15 C. B. 693.

Doctrine extended to other instruments.

Although for a long time *Pigot's Case*, 11 Rep. 26a, and *Master* v. *Miller*, were the authorities always referred to upon questions of alteration, and although such questions seldom arose except in actions upon deeds, bills of exchange, and promissory notes, yet the doctrine of those two cases has been extended to other written instruments.

Bought and sold notes.

In *Powell* v. *Divett*, 15 East, 29, the K. B. applied it to the case of bought and sold notes, and held that a vendor who, after the notes had been exchanged, prevailed on the broker, without the vendee's consent, to add a term to the bought note for his, the vendor's, benefit, thereby lost all right against the vendee. The same law was acted upon in *Mollett* v. *Wackerbarth*, 5 C. B. 181, where the buyer made the alteration in the sold note.

Guarantee.

In *Davidson* v. *Cooper*, 11 M. & W. 778, 13 Id. 343, to a count in *assumpsit* on a guarantee, the defendant pleaded that after it was given to the plaintiff it was altered in a material particular *by some person to the defendant unknown*, without his consent, by affixing a seal so as to make it appear to be the *deed* of the defendant. Upon a motion for judgment *non obstante veredicto*, the Court of Exch. reviewed and expounded the law upon the general subject of alteration, and, holding the case to fall within the doctrine of *Pigot's Case*, gave judgment for the defendant; and that judgment was affirmed by the Exch. Cham. "after much doubt." The doubt at first entertained by the Exch. Cham. may however be considered as fortifying their ultimate

decision, which was founded on the principle, "*that a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state.*" "It is," said Lord Denman, in delivering the judgment, "highly important for preserving the purity of legal instruments, that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud or laches on his part."

Charter-party.

Building contract.

Davidson v. *Cooper* was acted upon in *Croockewit* v. *Fletcher*, 1 H. & N. 893, where the instrument vitiated by alteration was a charter-party, and in *Pattinson* v. *Luckley*, L. R. 10 Ex. 330, where it was a building contract.

In *Lowe* v. *Fox*, 12 App. Cas. 206, Lord Herschell, referring apparently to the expressions used in *Davidson* v. *Cooper*, and *Croockewit* v. *Fletcher*, *supra*, said: "I do not feel at present prepared to say that in every case an alteration, which would invalidate the document when made with the privity and knowledge of the person having the custody of it and relying upon it, would invalidate it if made in fraud of him and against his will." See *per* Alderson, B., *Hutchins* v. *Scott*, 2 M. & W. 809, 814; and *per* Lord Ellenborough, *Henfree* v. *Bromley*, 6 East, 309. It must be observed that in *Davidson* v. *Cooper*, *supra*, no explanation whatever was offered of the alteration.

Instrument not necessarily avoided for all purposes.

An instrument which, by reason of an alteration, becomes invalid as the foundation of an action, is not thereby necessarily avoided for all purposes. For instance, the alteration of a deed of conveyance, though it may deprive the covenantee of all right to sue upon the covenants therein contained, does not affect the ownership of the property conveyed; *Bolton* v. *Carlisle*, 2 H. Bl. 263; *Roe* v. *York*, 6 East, 86; *Doe* v. *Bingham*, 4 B. & Ald. 672; and the deed may, it seems, still be adduced in evidence, to show what was originally conveyed thereby; *West* v. *Stewart*, 14 M. & W. 47. In such cases, to use the words of Lord Abinger, in *Davidson* v. *Cooper*, *supra*, "the deed is produced merely as a proof of some right or title created by or resulting from its *having been executed*;" see *Green* v. *Attenborough*, 3 H. & C. 468, where this distinction was adopted; and also *per* Brett, L.J., *Suffell* v. *Bank of England*, 9 Q. B. D. 555, 568.

Falmouth v. *Roberts*.

In *Falmouth* v. *Roberts*, 9 M. & W. 469, the rule as to the destructive effect of altering a written instrument was

stated by Parke, B., to apply where the obligation sought to be enforced is *by reason of the instrument*. That was an action by landlord against tenant for mismanagement of a farm, and an instrument purporting to be a written agreement for the letting of the farm with stipulations as to the mode of tillage, though exhibiting an erasure and interlineation of the term of years not satisfactorily accounted for, was admitted as evidence of the terms upon which the farm was held by the defendant, who had become tenant from year to year under a contract, implied from the fact of occupation, to abide by all the terms of the written agreement applicable to a tenancy from year to year. In that case the instrument given in evidence does not appear to have operated specifically as an agreement upon the terms of the existing tenancy; for it did not contain the contract which the plaintiff sought to enforce; but was only part of the evidence to prove that such a contract existed, though not in writing; and, as such evidence, only that part of the written instrument which stated the mode of tillage was material, and that part had not been altered. It was like the printed paper in *Bolton* v. *Tomlin*, 5 A. & E. 856, with the additional circumstance that it was identified by the tenant's signature.

Other instances.

In *Gould* v. *Coombs*, 1 C. B. 543, a promissory note, assumed to have been avoided as a contract because the name of a maker had been added, was yet admitted in evidence together with an "I O U" for the amount given whilst the note was valid, to sustain a count upon an account stated. In *Sutton* v. *Toomer*, 7 B. & C. 416, an altered promissory note was admitted in evidence to show the terms of deposit of money for which it had been given. In *Agricultural Co.* v. *Fitzgerald*, 16 Q. B. 432, the deed of settlement of the company was admitted in evidence to prove that the defendant was a shareholder, though the names of other shareholders, who signed before he did, had been erased since his execution of it. In *Hutchins* v. *Scott*, 2 M. & W. 809, likewise, an altered agreement was admitted in evidence for a collateral purpose.

Pattinson v. *Luckley*.

In *Pattinson* v. *Luckley*, L. R. 10 Ex. 330, the plaintiff had done work for the defendant after the execution of a written building contract. That instrument was after execution altered in a material part by the defendant's architect. By the contract no work was to be paid for until after the architect had given a certificate. But the

plaintiff, whilst admitting that a certificate had not been given for the work in respect of which he sued, contended that the alteration of the instrument annulled the contract and that he might sue upon a *quantum meruit*. The court, however, entered the judgment for the defendant, holding that, though the defendant might have been disentitled to sue upon the contract as such, the instrument must still be looked at in that action to see what were the terms of the contract. See also *Stewart* v. *Aston*, 8 Ir. C. L. R. 35; *Reynolds* v. *Hall*, 28 L. J. Ex. 257; *Caldwell* v. *Parker*, 17 W. R. 955.

The cancellation of a deed of lease with the mutual consent of the lessor and lessee does not defeat the right of the former to recover the rent in an action of debt on the demise; *Ward* v. *Lumley*, 5 H. & N. 87; and in such action the cancelled instrument is admissible in evidence for the plaintiff on the issue joined on a plea of non-demisit; *Ward* v. *Lumley*, Id. 656.

What must be shown in pleading an alteration.

In pleading an alteration the defendant was bound, before the Judicature Acts, to show that it was in writing; *Harden* v. *Clifton*, 1 Q. B. 522: that it was made after his contract was complete (as, for instance, in the case of the acceptor of a bill, by acceptance); *Langton* v. *Lazarus*, 5 M. & W. 629: and, either that it was made without his consent, or that it was of such a character as to render a new stamp necessary, and made under circumstances in which a new stamp could not legally be affixed; *Bradley* v. *Bardsley*, 14 M. & W. 873: and also, perhaps, that the alteration was made when the instrument was in the plaintiff's custody, though made by a stranger; *Davidson* v. *Cooper*, 13 M. & W. 343; *Pattinson* v. *Luckley*, L. R. 10 Ex. 330.

Stamp Acts.

As to when a defence under the Stamp Acts was available by plea, see *Lazarus* v. *Cowie*, 3 Q. B. 459; *Marc* v. *Rouy*, 23 W. R. 89; and see also the last-named case as to the cancellation of stamps on foreign bills of exchange.

FLETCHER *v.* RYLANDS AND ANOTHER.

E. T. 29 *VICT., EXCH. CHAM.: SESS.* 31 *&* 32 *VICT., H. L.*

[REPORTED, L. R. 1 EX. 265: L. R. 3 H. L. 330.]

A person who, for his own purposes, brings on to his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God.

ERROR (*a*) from the judgment of the Court of Exchequer on a special case.

Declaration. First count, that the defendants were possessed of land in the township of Ainsworth, except the mines and veins of coal under the surface; and that the plaintiff was possessed of coal mines lying near the defendants' land; and that by reason thereof, and of a licence from the person in possession of certain underground cavities near the mines, he was entitled to use those cavities for the purpose of working the mines, and getting coals from the mines and carrying them through the cavities; yet the defendants so carelessly and negligently constructed on the said land a reservoir to contain water, and kept therein, in their possession and under their care, large quantities of water, and took so little and such bad care of the water, that large quantities thereof, by reason of the premises, escaped from the reservoir and flowed towards and into the said mines and cavities, whereby the plaintiff was prevented for a long time from working the mines, and getting coal therefrom, and carrying the same through the cavities, and was put to expense in pumping out the water and repairing damage done by it, and lost gains and profits; and that such reasonable fear of being drowned in the mines and cavities was caused in the minds of workmen then and theretofore em-

(*a*) The report of this case in the Exch. Cham. and the H. L. is reprinted from the Law Reports, with the permission of the Council of Law Reporting.

ployed in the mines, and of others, that the working of the mines was rendered permanently more expensive and more difficult than it had been or would otherwise have continued to be.

Second count, that the plaintiff was possessed of coal mines, and that by reason thereof, and of a licence, &c. (repeating the allegations as to the cavities); and that the defendants were possessed of large quantities of water then by the defendants kept in a reservoir near to the mines and cavities; yet the defendants took so little and such bad care, &c. (repeating the allegations as to negligence and damage to the end of the first count).

Third count, that the plaintiff was possessed of mines and veins of coal in and under certain land, and the defendants were possessed of the said land above part of the said mines and veins; yet the defendants so negligently, carelessly, and improperly made and constructed a reservoir on the said land, and collected and dammed up thereon large quantities of water on the surface; that by reason of the premises large quantities of the said water flowed and forced their way through and out of the reservoir, towards, to, and into the mines and veins of coal of the plaintiff, whereby the mines and veins of coal were much damaged, and the plaintiff was prevented, &c. (repeating the allegations as to damage).

Plea, Not guilty. Issue thereon.

The action came on to be tried at the Liverpool summer assizes, 1862, and a verdict was entered for the plaintiff for 5,000*l.*, subject to an award on the terms mentioned in an order of *nisi prius*, made 3rd of September, 1862. By a subsequent order of Channell, B., made 31st of December, 1864, the arbitrator was empowered, instead of making an award, to state a special case for the opinion of the Court of Exchequer, in such form as he should think fit, and it was ordered that the verdict should be subject to such special case, and that error might be brought on the judgment thereon, and on the judgment of the Exchequer Chamber, in the same manner as on a judgment on a special verdict.

The special case was argued in the Court of Exchequer in Trinity Term, 1865, before Pollock, C.B., and Martin and Bramwell, BB., and judgment was given for the defendants by Pollock, C.B., and Martin, B.; Bramwell, B., dissenting (*b*).

(*b*) 3 H. & C. 774; 34 L. J. Ex. 177.

On this judgment the plaintiff brought error. The case stated as follows :—

The plaintiff had, since 1850, occupied a colliery in the township of Ainsworth, called the Red House Colliery, as tenant to the Earl of Wilton.

The defendants owned a mill, called the Ainsworth Mill, lying to the west of the Red House Colliery.

In 1860, the defendants, in pursuance of an arrangement with Lord Wilton, made a reservoir for their mill in other land of Lord Wilton's lying to the north-west of the colliery, and separated from it, and from the mill, by lands belonging to two persons named Hulton and Whitehead. Whitehead's land lay to the north of and adjoining the land over the Red House Colliery; on the west it adjoined Hulton's land; and on all other sides was surrounded by Lord Wilton's land. Hulton's land lay to the west of and adjoining Whitehead's land; on the north it adjoined the land of Lord Wilton, in which the reservoir was constructed, and on the south it adjoined the Red House Colliery and the defendants' mill, the mill being to the west of the colliery.

The seams of coal belonging to the Red House Colliery are continued under the lands of Hulton and Whitehead, and under the lands in which the reservoir was made, and their dip is downwards from north-east to south-west. The coal under the site of the reservoir, and under Lord Wilton's land lying between that site and Hulton's land, as well as under the lands of Hulton and Whitehead, had at some time beyond living memory been partially worked; and, before the commencement of the plaintiff's workings at the Red House Colliery, the old coal workings under the site of the reservoir communicated with old coal workings under Whitehead's land by means of the intervening old coal workings under the land of Hulton and under the land of Lord Wilton lying to the north of Hulton's land.

Soon after the plaintiff commenced to work the Red House Colliery in 1850, he made arrangements with Whitehead to work the ungotten coal lying under Whitehead's land by means of the Red House pit; and in 1851 he accordingly worked through from the Red House Colliery into the coal under Whitehead's land, and so into the old workings there. This was done in the first instance without the knowledge of Lord Wilton; but afterwards,

and whilst the plaintiff was working this coal by the Red House pit, the fact became known to the earl's agents, and from that time the plaintiff so worked it without any objection on the part of the earl or his agents.

In consequence of these workings, the old coal workings under the site of the reservoir were, by means of the intervening underground workings, made to communicate with the plaintiff's coal workings in the Red House Colliery; so that water which found its way into the old workings under the reservoir would, by means of this communication, flow down to and into the Red House Colliery.

These underground communications were effected several years before the defendants commenced making their reservoir, and continued down to the time when it burst; but until that time their existence was not known to the defendants, nor to any agent of theirs, nor to any other person employed by them; neither was it till that time known to them, or to any of the persons employed by them in or about the selecting of the site, or the planning or constructing of the reservoir, that any coal had been worked under the reservoir, or under any of the land of Lord Wilton lying to the north of Hulton's land.

In the course of constructing and excavating for the bed of the reservoir, five old shafts, running vertically downwards, were met with in the portion of land selected for its site; but though the timber sides of three of them remained, the shafts themselves were filled up with soil; and it was not known to or suspected by the defendants, or any of the persons employed by them in making the reservoir, that they led down to old coal workings under its site.

For the selection of the site, and for the planning and construction of the reservoir, it was necessary that the defendants should employ an engineer and contractors; and they did for those purposes employ a competent engineer and competent contractors, by whom the site was selected, and the reservoir planned and constructed. On the part of the defendants themselves there was no personal negligence or default whatever; but, with reference to the shafts met with, reasonable and proper care and skill were not exercised by the persons they employed, to provide for the sufficiency of the reservoir to bear the pressure of water

which, when filled to the height proposed, it would have to bear.

The reservoir was completed about the beginning of December, 1860, and the defendants caused it to be partially filled with water. On the morning of the 11th December, whilst it was thus partially filled, one of the shafts gave way and burst downwards, and the water flowed into the old coal workings beneath, and by means of the underground communications found its way into the coal workings in the Red House Colliery, and flooded the colliery, so that its working was necessarily suspended, and after some unsuccessful attempts to renew it, the colliery was finally abandoned.

The question stated for the opinion of the court was, whether the plaintiff was entitled to recover any, and, if any, what damages from the defendants, by reason of the matters hereinbefore stated (*c*).

Feb. 8, 1866. *Manisty, Q.C.* (*J. A. Russell* with him), for the plaintiff.—First, omitting the consideration that the defendants became tenants of Lord Wilton, the plaintiff's landlord, subsequently to the demise to the plaintiff, and to the making of the works connecting the underground passages, and dealing with the matter as if they were mere strangers, the plaintiff is entitled to recover damages. The principle of law which governs the case is, that he who does upon his own land acts which, though lawful in themselves, may become sources of mischief to his neighbours, is bound to prevent the mischief from occurring, or in the alternative to make compensation to the persons injured. This will be peculiarly the case when the act done consists in the construction and use of artificial works, for the purpose of collecting and impounding in vast quantities an element which will certainly cause mischief if it escapes. The case does not resemble that of a servient and a dominant tenement with acquired rights, as seems to have been thought by Martin, B., in his comment upon *Tenant* v. *Goldwin* (*d*), and the duty is independent of the immediate neighbourhood of the lands. Neither is the circumstance

(*c*) The case contained various statements for the purpose of showing the damage suffered by the plaintiff; but as there was no argument or decision as to the amount of damages, those statements are omitted. See note (*d*), *post*, p. 811.

(*d*) 2 Ld. Raym. 1089; 1 Salk. 21, 360.

material which is relied on by the Chief Baron, that the communication by which the water passed was underground and unseen; for the plaintiff's right of action is founded on his absolute right to enjoy his property undisturbed by the acts of his neighbours, and is independent of the amount of care exercised by them, or of their means of knowledge. This is the effect of *Lambert* v. *Bessey* (*e*), and the opinions there pronounced.

[Blackburn, J.—In the cases put there the things done were all *primâ facie* wrong, but the difficulty here is in saying that what was rightful in the first doing became wrongful in the continuance. The other side will contend that their duty was to take care, but not to take successful care.]

The duty is the same as that of rendering support to neighbouring land, from which the landowner is not excused by his ignorance of the state of adjoining land which may contribute to the injury, or of the position of the strata which he cannot know; he is absolutely bound not to injure his neighbour by the withdrawal of support: *Bonomi* v. *Backhouse* (*f*). Similarly the mine-owner who works to the edge of his land subjects himself to the natural flow of water into his mine, but not to the flow of water artificially brought there by a neighbouring mine-owner; these two propositions are established by *Smith* v. *Kenrick* (*g*) and *Baird* v. *Williamson* (*h*). The case of *Hodgkinson* v. *Ennor* (*i*) is an authority for the plaintiff, resembling the present case in the fact that the communication by which the defendant's dirty water flowed to the plaintiff's premises was underground.

[Blackburn, J., referred to the case of damage done by the bursting of waterworks companies' reservoirs.]

Such cases usually arise under a clause in the special Act of the company, imposing on them a liability to make compensation. *Bagnall* v. *L. & N. W. R. Co.* (*k*), however, though not so simple in its circumstances as the present, is in principle indistinguishable.

[Blackburn, J.—The point in that case was, that, however the water got upon the line, the company were bound by their Act to

(*e*) Sir T. Raym. 421.
(*f*) 9 H. L. C. 503; E. B. & E. 622, 659.
(*g*) 7 C. B. 515.
(*h*) 15 C. B. N. S. 376.
(*i*) 4 B. & S. 229.
(*k*) 7 H. & N. 423, 452.

have their drains in order to carry it off, and that their drains were not in order.

WILLES, J.—That was certainly the ground of the judgment of this court.]

The principle contended for is laid down in *Aldred's Case* (*l*); and in *Williams* v. *Groucott* (*m*) by Blackburn, J., who says, "when a party alters things from their normal condition so as to render them dangerous to already acquired rights, the law casts on him the obligation of fencing the danger, in order that it shall not be injurious to those rights;" and by Gibbs, C.J., in *Sutton* v. *Clarke* (*n*), who, distinguishing the case then before him, says: "This case is perfectly unlike that of an individual, who, for his own benefit, makes an improvement on his own land, according to his best skill and diligence, and not foreseeing it will produce any injury to his neighbour; if he thereby unwittingly injure his neighbour, he is answerable." The question as to the purity or impurity of the water discharged is immaterial, the same principle applies to both cases.

[BLACKBURN, J.—It is a different sort of mischief, but it is equally a mischief.]

Chauntler v. *Robinson* (*o*) is no authority against the plaintiff; for it decides nothing but that the owner of a house is not obliged to repair merely because he is owner. The case, however, mostly relied upon on the other side is *Chadwick* v. *Trower* (*p*); the plaintiff there was held to have no right to support for his vault from the vault of his neighbour, who was ignorant of the existence of the plaintiff's vault, and the judgment proceeded on the ground of the absence of right to such support, and on the fact that no circumstances existed imposing on the defendant the duty of care.

[LUSH, J.—In fact the plaintiff there sought to impose a servitude on the defendant's premises.]

Secondly, the plaintiff was tenant of Lord Wilton, and the communication was effected by workings made with the landlord's consent nine years before the defendants became tenants of the site of the reservoir; the defendants could only take their land subject to the obligation which was imposed upon the landlord by this state of facts.

(*l*) 9 Rep. 57 b.
(*m*) 4 B. & S. 149, 157.
(*n*) 6 Taunt. 29, 44.
(*o*) 4 Exch. 163—170.
(*p*) 6 B. N. C. 1.

Thirdly, the defendants were liable for the negligence of the persons who made the reservoir; for, first, they could not discharge themselves of their duty of care by employing them, and secondly, the knowledge of those persons of the existence of the shafts was notice to the defendants both of the facts and of the danger.

Mellish, Q.C. (*T. Jones* with him), for the defendants.—The question is a novel one, but authority and reason are in favour of the defendants. It is true the defendants have altered the condition of their land, but on the other hand, if the plaintiff had left the intervening land in its natural state, no mischief would have ensued. The mischief was caused by secret acts done partly by strangers, partly by the plaintiff himself, which have broken down the natural partition of the lands, and opened the channels by which the water has come, and it will be strange if those secret acts, not communicated to the defendants, should impose on them a liability. But on broad principles, there is no such obligation as is contended for on the other side. The only obligation on the defendants is to take care, that is, *reasonable care*, not to injure the property of others; and, to establish their liability in this action, it will be necessary to go the length of saying that an owner of real property is liable for all damage resulting to his neighbour's property from anything done upon his own land. It is clear that there is no such obligation with respect to personal property. The right, not to have "foreign water" sent upon one's land, is not a greater or more important right than the right not to have one's person injured, but in the latter case no right of action arises unless the damage is caused by the direct act of the defendant himself, or by his negligence. The same rule applies to real property, and though the cases are fewer they are to this effect. The instances in which the owner of real property has been held liable may be classified thus: first, acts of trespass; second, acts purposely done, and which are calculated to cause the injury complained of, as in *Aldred's Case* (*q*); third, cases where, by reason of the natural relation of the properties, a legal relation has been constituted between them; as in the case of the right to support, or the right to a watercourse, which are natural easements, and as to which the plaintiff need not allege

(*q*) 9 Rep. 57 b.

any special title in himself, nor any negligence in the defendant. Here no right of this latter class is involved, but the right is the same as the right of any subject not to be injured by any other subject: and the fallacy in the judgment of Bramwell, B., in the court below is in assuming that there is any such right as "to be free from foreign water," or "not to have water turned in upon one." There is no such right distinct from the general right of ownership in the soil, and the case stands on the same footing as if the owner had himself been drowned at the bottom of the mine. The second class of cases is illustrated by *Hodgkinson* v. *Ennor* (*r*), for it was there found as a fact that the defendant knew that the channel down which he poured the dirty water would carry it to the plaintiff's premises; he threw it into the swallet meaning that it should be carried away, and it might perhaps be admitted that, having done this intentionally, he would be liable whether he knew where it would go to or not; but the defendants here have tried to keep the water in, but by its own weight it has forced its way through.

[Lush, J.—Suppose the bank of the reservoir had burst, and the water had flowed over the surface and down the pit's mouth.]

The distinction between the surface and underground passages is only material as a circumstance of negligence; with reference to the surface, the facts are known which give rise to the obligation to take care, but the ignorance of the state of things underground takes away the opportunity of exercising care, and therefore the duty to exercise it. It is for this purpose only that the defendants rely on *Chadwick* v. *Trower* (*s*); supposing it made out that there is no liability except where there is carelessness, that case shews that there can be no carelessness where there is no knowledge, nor any circumstances giving the means of obtaining knowledge, with a duty to know; and there is no case where a defendant has been held liable without such knowledge or notice. That being so, it is immaterial whether or not the duty to take care means a duty to insure against all consequences, for the occasion of that duty has never arisen.

Blackburn, J.—The present point may be illustrated thus: suppose a man leans against my cart, if I remove the cart suddenly, and without warning, not knowing he is there, I am not

(*r*) 4 B. & S. 229. (*s*) 6 B. N. C. 1.

liable, but if I do so knowing that he is there, though he has no right to lean against my cart, yet I am liable if my act injures him.

WILLES, J.—Take the case of a continuous nuisance, I mean continuous in its own character; the person who erects it is liable at once, the person who succeeds to it is not liable unless he has notice and continues it, but it is said that as soon as he has notice of it he must abate. Suppose a man to collect a quantity of springs in such a manner as to cause them to pour down his neighbour's mine. Assuming that the person who succeeded to the possession of the land where the springs were so collected would not be liable until notice, yet you would admit that upon receiving notice he would be liable for continuing it. Then is there any case where the same doctrine has been held to apply to the originator of the nuisance?]

It is submitted that the liability would turn on the defendants' knowledge, and that in each case knowledge is the essential condition of liability. In the absence of any authority distinguishing liability in respect of injury to real property from liability in respect of other injuries, the doctrine laid down as to actions of the latter kind applies, and in these it is clear that negligence must be shewn. This is illustrated by *Scott* v. *London Dock Co.* (*t*), where it was never doubted that negligence must be alleged and proved, and the only question was, whether the fact, that the bale which fell was under the management of the defendant's servants, was sufficient *primâ facie* evidence of negligence. A common instance is that of collisions of ships at sea, or accidents caused by driving or riding along the highway, as *Hammack* v. *White* (*u*), in all which cases without negligence there is no liability.

[LUSH, J.—Suppose the case of a gunpowder magazine bursting, what liability do you say its owners would incur?]

None, if there was no negligence as to the place where the powder was kept, or in the manner of keeping it. The liability as to fire, formerly an absolute duty to insure against all mischief caused to your neighbours by fire arising on your own property, is said to have been by the custom of the realm; *Turbervil* v. *Stamp* (*x*); Com. Dig., *Action on the case for negligence* (A 6)

(*t*) 3 H. & C. 596.
(*u*) 11 C. B. N. S. 588.
(*x*) 1 Salk. 13.

and since the passing of 14 Geo. 3, c. 78, and the decision upon s. 86 of that Act in *Filliter* v. *Phippard* (*y*), the liability for injury by fire is restricted to mischief arising from negligence, that is, it is put on the same footing as liability for other injuries. The sum of the argument is, that to make the defendant liable a wrongful act must be shewn, and that to prove the act wrongful you must prove it negligent.

[Willes, J., referred to *Gregory* v. *Piper* (*z*).]

That was a case of trespass, to which this cannot be compared, nor is there any count in trespass here. In *Gregory* v. *Piper* (*z*), it was proved to be impossible that the act of the defendant's servant could be done as the defendant directed without committing a trespass; the act, therefore, became the direct act of the defendant, and that was the ground of the judgment. The distinction is between acts done directly by the defendant, which include all acts which are specifically directed by him, although not done by him physically or in his presence, and things which are only the consequences of what he does or directs to be done; it is in respect of these last that negligence is material.

[Blackburn, J., referred to *Tenant* v. *Goldwin* (*a*).]

That case is open to the same observation; the mischief was the inevitable consequence of the combined facts that the defendant put the filth there, and that he did not repair the wall, which was his own wall. The case may indeed be put as a case of negligence, the negligence consisting in taking no care to prevent the filth from flowing into his neighbour's premises.

With respect to the cases cited upon the other side, they are all distinguishable. *Bonomi* v. *Backhouse* (*b*) belongs to the third class of cases mentioned above, and depended on the right arising by reason of the contiguity of the lands. *Lambert* v. *Bessey* (*c*) was a case of trespass. *Baird* v. *Williamson* (*d*) was a case in which the defendant purposely caused the water to flow into the adjoining mine; no right is contended for here to use the plaintiff's land as an outlet. On the other hand, the language used in *Smith* v. *Kenrick* (*e*) supports the defendants' contention, "it would seem to be the natural right of each of the owners of two

(*y*) 11 Q. B. 347.
(*z*) 9 B. & C. 591.
(*a*) 2 Ld. Raym. 1089; 1 Salk. 21, 360; 6 Mod. 311; Holt, 500.
(*b*) 9 H. L. C. 503.
(*c*) Sir T. Raym. 421.
(*d*) 15 C. B. N. S. 376.
(*e*) 7 C. B. 515, 564

adjoining coal mines—neither being subject to any servitude to the other—to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine, so long as that does not arise from the negligent or malicious conduct of the party." *Aldred's Case* (*f*) was also an instance of an act purposely done, and calculated to cause a nuisance: *Bagnall* v. *L. & N. W. R. Co.* (*g*) turned upon the obligation imposed upon the company by their Act. As to the dictum of Gibbs, C.J., in *Sutton* v. *Clarke* (*h*), it was pronounced *obiter*, the decision in the case being in favour of the defendants on the ground that they were public trustees.

Secondly, the defendant is not liable for the negligence of the contractors employed by him. It was laid down in *Butler* v. *Hunter* (*i*) that, when one gives an order to a skilled person to do a particular thing, he must be taken to mean that it shall be done with the proper precautions. The negligence of the contractor was negligence towards his employer as well as towards third persons, and he, as the wrong doer, is liable to actions by both parties, who have been both in different ways injured by his carelessness; but, the plaintiff having a right of action against him, there is a presumption against the liability of the defendants, for the plaintiff would then have a double remedy.

[Willes, J., referred to *Pickard* v. *Smith* (*k*).]

Manisty, Q.C., in reply.—It seems to be admitted that if a trespass has been committed the defendants are liable; and here the collecting of the water in such a manner as to invade the

(*f*) 9 Rep. 57 b.

(*g*) 7 H. & N. 423.

(*h*) 6 Taunt. 29, 44.

(*i*) 7 H. & N. 826.

(*k*) 10 C. B. N. S. 470. The defendant occupied a refreshment-room and coal cellar at a railway station, the trap of the coal cellar being in the platform of the station. The plaintiff, a passenger by the railway, as he was going along the platform, fell down the opening whilst the trap-door was raised for the purpose of the coal merchant discharging coal into the cellar, and was under the coal merchant's control. It was held that the defendant was liable as the occupier of the cellar; and in delivering the judgment of the court, Williams, J., after referring to the rule which exempts the employer from liability for the negligence of an independent contractor employed by him to do a lawful act, says (p. 480): "The rule, however, is not applicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by parity of reasoning, to cases in which the contractor is entrusted with the performance of a duty incumbent on his employer, and neglects its fulfilment, whereby an injury is occasioned."

premises of the plaintiff was a trespass; as there would have been a trespass in *Bonomi* v. *Backhouse* (*l*) if the consequence of the withdrawal of support had been to let down a house upon the plaintiff's land; and as the flow of the filth is actually described to be in *Tenant* v. *Goldwin* (*m*). He also referred to *Barber* v. *Nottingham & Grantham R. Co.* (*n*).

[*Mellish, Q.C.*—That case turned on the language of the defendants' special Act; I argued the case, and the court refused to give any answer to my question, whether at common law an action would lie.]

Cur. adv. vult.

May 14, 1866. The judgment of the court (Willes, Blackburn, Keating, Mellor, Montague Smith, and Lush, JJ.), was delivered by

Blackburn, J.—This was a special case stated by an arbitrator, under an order of *nisi prius*, in which the question for the court is stated to be, whether the plaintiff is entitled to recover any, and, if any, what damages from the defendants, by reason of the matters thereinbefore stated.

In the Court of Exchequer, the Chief Baron and Martin, B., were of opinion that the plaintiff was not entitled to recover at all, Bramwell, B., being of a different opinion. The judgment in the Exchequer was consequently given for the defendants, in conformity with the opinion of the majority of the court. The only question argued before us was, whether this judgment was right, nothing being said about the measure of damages in case the plaintiff should be held entitled to recover. We have come to the conclusion that the opinion of Bramwell, B., was right, and that the answer to the question should be that the plaintiff was entitled to recover damages from the defendants, by reason of the matters stated in the case, and consequently, that the judgment below should be reversed, but we cannot at present say to what damages the plaintiff is entitled.

It appears from the statement in the case, that the plaintiff was damaged by his property being flooded by water, which, without any fault on his part, broke out of a reservoir con-

(*l*) 9 H. L. C. 503.
(*m*) 2 Ld. Raym. 1089; 1 Salk. 21, 360.
(*n*) 15 C. B. N. S. 726.

structed on the defendants' land by the defendants' orders, and maintained by the defendants.

It appears from the statement in the case [see pp. 791, 792], that the coal under the defendants' land had, at some remote period, been worked out; but this was unknown at the time when the defendants gave directions to erect the reservoir, and the water in the reservoir would not have escaped from the defendants' land and no mischief would have been done to the plaintiff, but for this latent defect in the defendants' subsoil. And it further appears [see pp. 792—3], that the defendants selected competent engineers and contractors to make their reservoir, and themselves personally continued in total ignorance of what we have called the latent defect in the subsoil; but that these persons employed by them in the course of the work became aware of the existence of the ancient shafts filled up with soil, though they did not know or suspect that they were shafts communicating with old workings.

It is found that the defendants, personally, were free from all blame, but that in fact proper care and skill was not used by the persons employed by them to provide for the sufficiency of the reservoir with reference to these shafts. The consequence was, that the reservoir when filled with water burst into the shafts, the water flowed down through them into the old workings, and thence into the plaintiff's mine, and there did the mischief.

The plaintiff, though free from all blame on his part, must bear the loss, unless he can establish that it was the consequence of some default for which the defendants are responsible. The question of law therefore arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land. It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbours, but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions, in order to keep it in, but no more. If the first be the law, the

person who has brought on his land and kept there something dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape. If the second be the limit of his duty, he would not be answerable except on proof of negligence, and consequently would not be answerable for escape arising from any latent defect which ordinary prudence and skill could not detect.

Supposing the second to be the correct view of the law, a further question arises subsidiary to the first, viz., whether the defendants are not so far identified with the contractors whom they employed, as to be responsible for the consequences of their want of care and skill in making the reservoir in fact insufficient with reference to the old shafts, of the existence of which they were aware, though they had not ascertained where the shafts went to.

We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that

he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stenches.

The case that has most commonly occurred, and which is most frequently to be found in the books, is as to the obligation of the owner of cattle which he has brought on his land, to prevent their escaping and doing mischief. The law as to them seems to be perfectly settled from early times; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape; that is, with regard to tame beasts, for the grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore; but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too.

As early as the Year Book, 20 Ed. 4, 11, placitum 10, Brian, C.J., lays down the doctrine in terms very much resembling those used by Lord Holt in *Tenant* v. *Goldwin* (*o*), which will be referred to afterwards. It was trespass with cattle. Plea, that the plaintiff's land adjoined a piece where defendant had common, that the cattle strayed from the common, and defendant drove them back as soon as he could. It was held a bad plea. Brian, C.J., says: "It behoves him to use his common so that he shall do no hurt to another man, and if the land in which he has common be not enclosed, it behoves him to keep the beasts in the common and out of the land of any other." He adds, when it was proposed to amend by pleading that they were driven out of the common by dogs, that, although that might give a right of action against the master of the dogs, it was no defence to the action of trespass by the person on whose land the cattle went. In the recent case of *Cox* v. *Burbidge* (*p*), Williams, J., says, "I apprehend the general rule of law to be perfectly plain. If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour, and I am liable for any trespass it may commit, and for the ordinary conse-

(*o*) 2 Ld. Raym. 1089; 1 Salk. 360. (*p*) 13 C. B. N. S. 430, 438.

quences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial." So in *May* v. *Burdett* (*q*), the court, after an elaborate examination of the old precedents and authorities, came to the conclusion that "a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure *at his peril*." And in 1 Hale's Pleas of the Crown, 430, Lord Hale states that where one keeps a beast, knowing its nature or habits are such that the natural consequence of his being loose is that he will harm men, the owner "must at his peril keep him up safe from doing hurt, for *though he use his diligence* to keep him up, if he escape and do harm, the owner is liable to answer damages"; though, as he proceeds to shew, he will not be liable criminally without proof of want of care. In these latter authorities the point under consideration was damage to the person, and what was decided was, that where it was known that hurt to the person was the natural consequence of the animal being loose, the owner should be responsible in damages for such hurt, though where it was not known to be so, the owner was not responsible for such damages; but where the damage is, like eating grass or other ordinary ingredients in damage feasant, the natural consequence of the escape, the rule as to keeping in the animal is the same. In Com. Dig., *Droit.* (M. 2) it is said that, "if the owner of 200 acres in a common moor enfeoffs B. of 50 acres, B. ought to enclose *at his peril*, to prevent damage by his cattle to the other 150 acres. For if his cattle escape thither they may be distrained damage feasant. So the owner of the 150 acres ought to prevent his cattle from doing damage to the 50 acres *at his peril*." The authority cited is Dyer, 372 b, where the decision was that the cattle might be distrained; the inference from that decision, that the owner was bound to keep in his cattle *at his peril*, is, we think, legitimate, and we have the high authority of Comyns for saying that such is the law. In the note to Fitzherbert Nat. Brevium, 128, which is attributed to Lord Hale, it is said, "If A. and B. have lands adjoining, where there is no enclosure, the one shall have trespass against the other on an escape of their beasts respectively, Dyer, 372, Rastal Ent. 621, 20 Ed. 4. 10, although wild dogs, &c., drive the

(*q*) 9 Q. B. 101, 112 (the case of a monkey).

cattle of the one into the lands of the other." No case is known to us in which in replevin it has ever been attempted to plead in bar to an avowry for distress damage feasant, that the cattle had escaped without any negligence on the part of the plaintiff, and surely if that could have been a good plea in bar, the facts must often have been such as would have supported it. These authorities, and the absence of any authority to the contrary, justify Williams, J., in saying, as he does in *Cox* v. *Burbidge* (*r*), that the law is clear that in actions for damage occasioned by animals that have not been kept in by their owners, it is quite immaterial whether the escape is by negligence or not.

As has been already said, there does not appear to be any difference in principle, between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land, water, filth, or stenches, or any other thing which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbour, and the case of *Tenant* v. *Goldwin* (*s*) is an express authority that the duty is the same, and is, to keep them in at his peril.

As Martin, B., in his judgment below appears not to have understood that case in the same manner as we do, it is proper to examine it in some detail. It was a motion in arrest of judgment after judgment by default, and therefore all that was well pleaded in the declaration was admitted to be true. The declaration is set out at full length in the report in 6 Mod. p. 311. It alleged that the plaintiff had a cellar which lay contiguous to a messuage of the defendant, "and used (*solebat*) to be separated and fenced from a privy house of office, parcel of the said messuage of defendant, by a thick and close wall, which belongs to the said messuage of the defendant, and by the defendant of right ought to have been repaired (*jure debuit reparari*)." Yet he did not repair it, and for want of repair filth flowed into plaintiff's cellar. The case is reported by Salkeld, who argued it, in 6 Mod., and by Lord Raymond, whose report is the fullest. The objection taken was that there was nothing to show that the defendant was under any obligation to repair the wall, that, it was said, being a charge not of common right, and the allegation that the

(*r*) 13 C. B. N. S. 438; 32 L. J. C. P. 89.

(*s*) 1 Salk. 21, 360; 2 Ld. Raym. 1089; 6 Mod. 311.

wall *de jure debuit reparari* by the defendant being an inference of law which did not arise from the facts alleged. Salkeld argued that this general mode of stating the right was sufficient in a declaration, and also that the duty alleged did of common right result from the facts stated. It is not now material to inquire whether he was or was not right on the pleading point. All three reports concur in saying that Lord Holt, during the argument, intimated an opinion against him on that, but that after consideration the court gave judgment for him on the second ground. In the report of 6 Mod. (*t*) it is stated, "And at another day *per totam curiam*: The declaration is good; for there is a sufficient cause of action appearing in it; *but not upon the word solebat*. If the defendant has a house of office inclosed with a wall which is his, he is of common right bound to use it so as not to annoy another. . . . The reason here is, that one must use his own so as thereby not to hurt another, and as of common right one is bound to keep his cattle from trespassing on his neighbour, so he is bound to use anything that is his so as not to hurt another by such user. . . . Suppose one sells a piece of pasture lying open to another piece of pasture which the vendor has, the vendee is bound to keep his cattle from running into the vendor's piece; so of dung or anything else." There is here an evident allusion to the same case in Dyer (*u*) as is referred to in Com. Dig., *Droit*. (M. 2). Lord Raymond in his report (*x*) says: "The last day of term, Holt, C.J., delivered the opinion of the court, that the declaration was sufficient. He said that upon the face of this declaration there appeared a sufficient cause of action to entitle the plaintiff to have his judgment; *that they did not go upon the solebat, or the jure debuit reparari*, as if it were enough to say that the plaintiff had a house, and the defendant had a wall, and he ought to repair the wall; but if the defendant has a house of office, and the wall which separates the house of office from the plaintiff's house is all the defendant's, he is of common right bound to repair it. . . . The reason of this case is upon this account, that every one must so use his own as not to do damage to another; and as every man is bound so to look to his cattle as to keep them out of his neighbour's ground, that so he

(*t*) P. 314.
(*u*) See *ante*, p. 805.
(*x*) 2 Ld. Raym. 1092.

may receive no damage; so he must keep in the filth of his house of office that it may not flow in upon and damnify his neighbour. . . . So if a man has two pieces of pasture which lie open to one another, and sells one piece, the vendee must keep in his cattle so as they shall not trespass upon the vendor. So a man shall not lay his dung so high as to damage his neighbour, and the reason of these cases is because every man must so use his own as not to damnify another." Salkeld, who had been counsel in the case, reports the judgment much more concisely (*y*), but to the same effect; he says: "The reason he gave for his judgment was because it was the defendant's wall, and the defendant's filth, and he was bound of common right to keep his wall so as his filth might not damnify his neighbour, and that it was a trespass on his neighbour, as if his beasts should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbour's, . . . he must repair the wall of his house of office, for he whose dirt it is must keep it that it may not trespass." It is worth noticing how completely the reason of Lord Holt corresponds with that of Brian, C.J., in the cases already cited in 20 Ed. 4. Martin, B., in the court below, says that he thinks this was a case without difficulty, because the defendant had, by letting judgment go by default, admitted his liability to repair the wall, and that he cannot see how it is an authority for any case in which no such liability is admitted. But a perusal of the report will show that it was because Lord Holt and his colleagues thought (no matter for this purpose whether rightly or wrongly) that the liability was *not* admitted, that they took so much trouble to consider what liability the law would raise from the admitted facts, and it does therefore seem to us to be a very weighty authority in support of the position that he who brings and keeps anything, no matter whether beasts, or filth, or clean water, or a heap of earth or dung, on his premises, must at his peril preven it from getting on his neighbour's, or make good all the damage which is the natural consequence of its doing so. No case has been found in which the question as to the liability for noxious vapours escaping from a man's works by inevitable accident has been discussed, but the following case will illustrate

(*y*) 1 Salk. 361.

it. Some years ago several actions were brought against the occupiers of some alkali works at Liverpool for the damage alleged to be caused by the chlorine fumes of their works. The defendants proved that they at great expense erected contrivances by which the fumes of chlorine were condensed, and sold as muriatic acid, and they called a great body of scientific evidence to prove that this apparatus was so perfect that no fumes possibly could escape from the defendants' chimneys. On this evidence it was pressed upon the jury that the plaintiff's damage must have been due to some of the numerous other chimneys in the neighbourhood; the jury, however, being satisfied that the mischief was occasioned by chlorine, drew the conclusion that it had escaped from the defendants' works somehow, and in each case found for the plaintiff. No attempt was made to disturb these verdicts on the ground that the defendants had taken every precaution which prudence or skill could suggest to keep those fumes in, and that they could not be responsible unless negligence were shown; yet, if the law be as laid down by the majority of the Court of Exchequer, it would have been a very obvious defence. If it had been raised, the answer would probably have been that the uniform course of pleading in actions on such nuisances is to say that the defendant caused the noisome vapours to arise on his premises, and suffered them to come on the plaintiff's, without stating there was any want of care or skill in the defendant, and that the case of *Tenant* v. *Goldwin* (*z*) showed that this was founded on the general rule of law, that he whose stuff it is must keep it that it may not trespass. There is no difference in this respect between chlorine and water; both will, if they escape, do damage, the one by scorching, and the other by drowning, and he who brings them there must at his peril see that they do not escape and do that mischief. What is said by Gibbs, C.J., in *Sutton* v. *Clarke* (*a*), though not necessary for the decision of the case, shows that that very learned judge took the same view of the law that was taken by Lord Holt. But it was further said by Martin, B., that when damage is done to personal property, or even to the person, by collision, either upon land or at sea, there must be negligence in the party doing the damage to

(*z*) 1 Salk. 21, 360; 2 Ld. Raym. 1089; 6 Mod. 311.

(*a*) 6 Taunt. 29, 44.

render him legally responsible; and this is no doubt true, and as was pointed out by Mr. Mellish during his argument before us, this is not confined to cases of collision, for there are many cases in which proof of negligence is essential, as for instance, where an unruly horse gets on the footpath of a public street and kills a passenger: *Hammack* v. *White* (*b*); or where a person in a dock is struck by the falling of a bale of cotton which the defendant's servants are lowering, *Scott* v. *London Dock Co.* (*c*); and many other similar cases may be found. But we think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who by the licence of the owner pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what *primâ facie* was a trespass, can be explained on the same principle, viz., that the circumstances were such as to show that the plaintiff had taken that risk upon himself. But there is no ground for saying that the plaintiff here took upon himself any risk arising from the uses to which the defendants should choose to apply their land. He neither knew what these might be, nor could he in any way control the defendants, or hinder their building what reservoirs they liked, and storing up in them what water they pleased, so long as the defendants succeeded in preventing the water which they there brought from interfering with the plaintiff's property.

The view which we take of the first point renders it unnecessary to consider whether the defendants would or would not be responsible for the want of care and skill in the persons employed by them, under the circumstances stated in the case [pp. 792—3].

We are of opinion that the plaintiff is entitled to recover, but

(*b*) 11 C. B. N. S. 588; 31 L. J. C. P. 129.

(*c*) 3 H. & C. 596; 34 L. J. Ex. 17, 220.

as we have not heard any argument as to the amount, we are not able to give judgment for what damages. The parties probably will empower their counsel to agree on the amount of damages: should they differ on the principle, the case may be mentioned again (*d*).

Judgment for the plaintiff.

JOHN RYLANDS AND JEHU HORROCKS *v.* THOMAS FLETCHER IN ERROR.

This was a proceeding in error against a judgment of the Exchequer Chamber, which had reversed a previous judgment of the Court of Exchequer.

In November, 1861, Fletcher brought an action against Ryland & Horrocks, to recover damages for an injury caused to his mines by water overflowing into them from a reservoir which the defendants had constructed. The declaration contained three counts, and each count alleged negligence on the part of the defendants, but in this House the case was ultimately treated upon the principle of determining the relative rights of the parties independently of any question of personal negligence by the defendants in the exercise of them.

The cause came on for trial at the Liverpool Summer Assizes of 1862, when it was referred to an arbitrator, who was afterwards directed, instead of making an award, to prepare a special case for the consideration of the judges. This was done, and the case was argued in the Court of Exchequer in Trinity Term, 1865 (*e*). The Court of Exchequer, Bramwell, B., dissenting, gave judgment for the defendants (*f*). That judgment was afterwards reversed in the Exchequer Chamber (*g*). The case was then brought on error to this House.

Sir *R. Palmer*, *Q.C.*, and Mr. *T. Jones*, *Q.C.*, for the defendants (now plaintiffs in error):—

In considering this case it is important to remember that the communications between the workings of the plaintiff and the

(*d*) On a subsequent day (June 18), Manisty, Q.C., stated to the court that the damages had been agreed at 937*l*.

(*e*) The facts of the case are set out *ante*, pp. 791—3. It has been deemed unnecessary to reprint the epitome of the facts, as given in the original report in the H. L. (L. R. 3 H. L. 330).

(*f*) 3 H. & C. 774.

(*g*) See the report, *supra*.

old shafts and pits were not known to the defendants. The question, therefore, is, whether they can be held responsible for an injury which, as the possible cause of it was unknown to them, they could not by any care on their part prevent. It is submitted that they are not liable. Every man has a right to use his own land for lawful purposes, and if he does so, and does so without knowledge that he will thereby occasion injury to another, he cannot be held responsible should injury occur. For that is a case which comes within the legal description of *damnum absque injuriâ*. The principle adopted by the Exchequer Chamber here, that though a man uses his lawful rights without malice and without knowledge of danger he may still be liable for any mischief occurring from such use, is too wide. It would make every man responsible for every mischief he occasioned, however involuntarily, or even unconsciously. Now knowledge of possible mischief is of the very essence of the liability incurred by occasioning it; *Acton* v. *Blundell* (*h*); *Chasemore* v. *Richards* (*i*). That has always been recognised as one of the principles of our law, and has, as such, been adopted by the courts in America; *Pixley* v. *Clark* (*k*). *Smith* v. *Kenrick* (*l*) showed that where two

(*h*) 12 M. & W. 324.

(*i*) 7 H. L. C. 349.

(*k*) 32 Barbour's Reports (*New York*), 268. The head-note of the case is as follows:—"Individuals owning the bed of a stream, and each bank thereof, have the right to build a dam and embankment, and raise the water of the stream as high as they please, subject only to the restriction resting upon all, so to enjoy their own property as not to injure that of another person, with the qualifications and limitations incident to that right of property.

"And if they, in the exercise of that right, build with due care an embankment to prevent the water, when raised by their dam above the natural banks of the stream, from overflowing the lands of adjacent owners, and in consequence of raising their dam the water finds its way through their own natural soil and below the surface thereof, by filtration, percolation, or otherwise, to the land of an adjacent proprietor, the owners of such dam and embankment are not, in the absence of any unskilfulness, negligence, or malice, liable to such adjacent proprietor for any damage he may sustain thereby; the injury being *damnum absque injuriâ*.

"A party is liable for any defect in his artificial erections which might have been remedied by reasonable care and skill, but not for any defect in the natural banks of a stream.

"Where persons have the right to use the waters of a stream for manufacturing purposes, the right to dam the water and detain it a reasonable time follows as a necessary incident to the right of user; and they cannot be compelled to make an artificial reservoir for that purpose.

"The banks of the stream are theirs for that purpose; and so long as the water is only nominally detained for this lawful, customary, and proper purpose, the adjacent landowners must submit to the indirect and consequential damages resulting to their lands from such use."

(*l*) 7 C. B. 515.

mines lay contiguous to each other, but neither was subject to a servitude to the other, each owner had a right to work his own mine in the best way for his own benefit, and, if he did so without negligence, was not liable to the other for prejudice to his property which might thereby arise. That case is very important, for there knowledge existed which it is not pretended existed here. In the time of Bracton the rule existed that injury created to one man by the lawful act of another, if that act was done without wilfulness or negligence, would not afford a title to a claim of damages (*m*). That must be the rule in the present day, for otherwise no man could use his property, however carefully, without being liable to pay damages for mischief which, without any fault or even any knowledge of his own, might afterwards occur. *Chadwick* v. *Trower* (*n*) gives the answer to that proposition. There it was held that a man who pulled down his own wall was not bound to give notice to his neighbour of his intention to do so, and was not liable to that neighbour in damages merely because, in pulling it down, he damaged an underground wall of his neighbour's, of the existence of which he had no knowledge. That case, so far as principle is concerned, exactly resembles the present. *Tenant* v. *Goldwin* (*o*) does not affect the defendants here, for there all the facts were fully known to both parties, and the court merely decided that, that being so, the defendant was bound to keep his own property in such a state that it should not injure his neighbour. *Bagnall* v. *L. & N. W. R. Co.* (*p*) at first sight appears much nearer the present case; but there all the facts as to the condition of the soil and the parts worked through were known, and in that respect, therefore, the difference between the two cases is complete. The want of knowledge here is an essential ingredient in the case. The principle laid down by Bramwell, B., in this case, that a man in the use of his own property must take care that he does not injure that of his neighbour, is true in itself, but cannot be applied to a case like the present, where the injury which happens is merely consequential, and is the result of circumstances as to which neither knowledge of them, nor negligence in providing against them, can be imputable to the

(*m*) Bract. bk. 4, c. 37, fol. 221.
(*n*) 6 B. N. C. 1.
(*o*) 1 Salk. 360; 2 Ld. Raym. 1089.
(*p*) 7 H. & N. 423; 1 H. & C. 544.

defendants. Indeed, the fault, if any, is with the plaintiff. He began the work in his mines some years ago, and in the progress of it he came to know of these passages. He ought to have communicated his knowledge of them to the defendants, who might then have provided against this mischief, but he did not. The obligation to give notice of the circumstances, if they were to be relied on as creating any liability in another party, was recognised in *Partridge* v. *Scott* (*q*). Here, too, the defendants employed competent persons to do something which was in itself perfectly lawful, and they cannot be held liable in damages without clear evidence of impropriety or negligence on their own part. The person who actually does the work is alone liable; *Butler* v. *Hunter* (*r*); *Richards* v. *Hayward* (*s*); *Peachey* v. *Rowland* (*t*); *Allen* v. *Hayward* (*u*). *Sutton* v. *Clarke* (*x*) is clearly in favour of the defendants. No pretence for setting up this charge of neglect was suggested in this case. On the facts, therefore, as well as on the principles of law, the judgment against the defendants cannot be supported.

Mr. *Manisty*, *Q.C.*, and Mr. *J. A. Russell*, *Q.C.*, for the plaintiff below (now the defendant in error):—

The mines here were worked in the ordinary way, and their owner is entitled to be protected against a flow of water which destroyed his works, and which was occasioned by the act of others. If the water had come into his mine from natural causes alone, he could not have complained; but it came in through the act of the defendants in making their reservoir. They introduced there water which would not have come there in a natural way, and they were therefore bound to see that it did not produce mischief to any one. They brought the mischief on the land, and they were bound to guard against the consequences. *Baird* v. *Williamson* (*y*) really disposes of this case, on the ground of the distinction between water flowing on to land, from natural gravitation, and water brought there through the act of an adjoining landowner. *Smith* v. *Kenrick* (*z*) had established that each of two mine-owners might work his own mine in the ordinary and proper way, and that if, from such working,

(*q*) 3 M. & W. 220.
(*r*) 7 H. & N. 826.
(*s*) 2 M. & Gr. 574.
(*t*) 13 C. B. 182.
(*u*) 7 Q. B. 960.
(*x*) 6 Taunt. 29.
(*y*) 15 C. B. N. S. 376.
(*z*) 7 C. B. 515.

and without negligence on the part of the one, an injury was occasioned to the property of the other, the former was not liable. That proposition is not contested; but that case implied that if the injury was occasioned by something which was not ordinary working, the injury thereby occasioned would be the subject of a claim for damages. Here the construction of the reservoir was not an ordinary working of the property of the defendants. *Baird* v. *Williamson* completed what *Smith* v. *Kenrick* had left deficient, and the two, taken together, established beyond all question the title of the plaintiff here to recover damages. *Sutton* v. *Clarke* (*a*) merely decided that a public functionary acting to the best of his judgment and without malice, and obtaining the best assistance he can, is not liable to a claim for damages if what he does operates to the prejudice of an individual. That case does not affect the present, except that it indirectly confirms the doctrine now contended for, namely, that though the act was in itself lawful, yet if the doing of it occasions an injury to any one, the person injured has a right of action. The principle that an injury, though only consequent on an act, and not developing itself till some years after the act done, may still be the subject of a claim for damages, was settled in *Backhouse* v. *Bonomi* (*b*), and there the act which occasioned the injury was in itself a lawful act, and there had been nothing but the mere ordinary working of the mines; yet, as it resulted in a mischief to the property of other people, it was held to be a subject for compensation. In *Hodgkinson* v. *Ennor* (*c*) the defendant had polluted a stream by works on his own land, which works were not in themselves illegal, but they were not the natural mode of working the property, and they produced a mischief to his neighbour; he was therefore held responsible in damages. Cockburn, L.C.J., there said that it was a case in which the maxim "*Sic utere tuo ut alienum non lædas*" applied; and Blackburn, J., declared "the law to be as in *Tenant* v. *Goldwin* (*d*), that you must not injure the property of your neighbour, and, consequently, if filth is created on any man's land, 'he whose dirt it is must keep it that it may not trespass.'" Making a shaft to a mine is, no doubt, a part of the proper and ordinary

(*a*) 6 Taunt. 29.
(*b*) E. B. & E. 622; 9 H. L. C. 503.
(*c*) 4 B. & S. 229.
(*d*) 2 Ld. Raym. 1089; Salk. 360.

way of working mining property, but the shaft must be so made and fenced that it shall not occasion injury to the property of others, and if not so made and kept, any injury thereby occasioned must be compensated. *Williams* v. *Groucott* (*e*), and *Imperial Gas Co.* v. *Broadbent* (*f*), went altogether on that principle; so did *Bamford* v. *Turnley* (*g*), and *Tipping* v. *St. Helen's Smelting Co.* (*h*).

As was said in *Lambert* v. *Bessey* (*i*), "if a man doeth a lawful act, yet if injury to another ariseth from it, the man who does the act shall be answerable;" and many illustrations of the principle are there given. Every one of them justifies the argument which seeks to fix liability on these defendants.

The millowners are liable here, though they employed a competent engineer and contractor, and were not themselves guilty of any personal negligence. The principle, *qui facit per alium facit per se*, applies here, and the principal is liable for the negligence of his agent: Paley (*k*); *Pickard* v. *Smith* (*l*).

Mr. *T. Jones* replied.

The Lord Chancellor (Lord Cairns).—My lords, in this case the plaintiff (I may use the description of the parties in the action) is the occupier of a mine and works under a close of land. The defendants are the owners of a mill in his neighbourhood, and they proposed to make a reservoir for the purpose of keeping and storing water to be used about their mill upon another close of land, which, for the purposes of this case, may be taken as being adjoining to the close of the plaintiff, although, in point of fact, some intervening land lay between the two. Underneath the close of land of the defendants on which they proposed to construct their reservoir there were certain old and disused mining passages and works. There were five vertical shafts, and some horizontal shafts communicating with them. The vertical shafts had been filled up with soil and rubbish, and it does not appear that any person was aware of the existence either of the vertical shafts or of the horizontal works communicating with them. In the course of the working by the plaintiff of his mine, he had gradually worked through the

(*e*) 4 B. & S. 149.
(*f*) 7 H. L. C. 600.
(*g*) 3 B. & S. 62.
(*h*) 4 B. & S. 608; 11 H. L. C. 642.
(*i*) Sir T. Raym. 421.
(*k*) Pr. & Ag. 262.
(*l*) 10 C. B. N. S. 470.

seams of coal underneath the close, and had come into contact with the old and disused works underneath the close of the defendants.

In that state of things the reservoir of the defendants was constructed. It was constructed by them through the agency and inspection of an engineer and contractor. Personally, the defendants appear to have taken no part in the works, or to have been aware of any want of security connected with them. As regards the engineer and the contractor, we must take it from the case that they did not exercise, as far as they were concerned, that reasonable care and caution which they might have exercised, taking notice, as they appear to have taken notice, of the vertical shafts filled up in the manner which I have mentioned. However, my lords, when the reservoir was constructed, and filled, or partly filled, with water, the weight of the water bearing upon the disused and imperfectly filled-up vertical shafts, broke through those shafts. The water passed down them and into the horizontal workings, and from the horizontal workings under the close of the defendants it passed on into the workings under the close of the plaintiff, and flooded his mine, causing considerable damage, for which this action was brought.

The Court of Exchequer, when the special case stating the facts to which I have referred, was argued, was of opinion that the plaintiff had established no cause of action. The Court of Exchequer Chamber, before which an appeal from this judgment was argued, was of a contrary opinion, and the judges there unanimously arrived at the conclusion that there was a cause of action, and that the plaintiff was entitled to damages.

My lords, the principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If

(Lord CAIRNS.)

he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature.

As an illustration of that principle, I may refer to a case which was cited in the argument before your lordships, the case of *Smith* v. *Kenrick* in the Court of Common Pleas (*m*).

On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land,—and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the plaintiff and injuring the plaintiff, then for the consequence of that, in my opinion, the defendants would be liable. As the case of *Smith* v. *Kenrick* is an illustration of the first principle to which I have referred, so also the second principle to which I have referred is well illustrated by another case in the same Court, the case of *Baird* v. *Williamson* (*n*), which was also cited in the argument at the bar.

My lords, these simple principles, if they are well founded, as it appears to me they are, really dispose of this case.

The same result is arrived at on the principles, referred to by Mr. Justice Blackburn, in his judgment in the Court of Exchequer Chamber, where he states the opinion of that Court as to the law in these words (*o*): "We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it

(*m*) 7 C. B. 515.
(*n*) 15 C. B. N. S. 376.
(*o*) Ante, p. 803.

escapes, must keep it in at his peril; and if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts, or water, or filth or stenches."

My lords, in that opinion I must say I entirely concur. Therefore, I have to move your lordships that the judgment of the Court of Exchequer Chamber be affirmed, and that the present appeal be dismissed with costs.

Lord CRANWORTH.—My lords, I concur with my noble and learned friend in thinking that the rule of law was correctly stated by Mr. Justice Blackburn in delivering the opinion of the Exchequer Chamber. If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.

(Lord Cranworth.)

In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of *Lambert* v. *Bessey*, reported by Sir Thomas Raymond (*p*). And the doctrine is founded on good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non lædat alienum*. This is the principle of law applicable to cases like the present, and I do not discover in the authorities which were cited anything conflicting with it.

The doctrine appears to me to be well illustrated by the two modern cases in the Court of Common Pleas referred to by my noble and learned friend. I allude to the two cases of *Smith* v. *Kenrick* (*q*), and *Baird* v. *Williamson* (*r*). In the former the owner of a coal mine on the higher level worked out the whole of his coal, leaving no barrier between his mine and the mine on the lower level, so that the water percolating through the upper mine flowed into the lower mine, and obstructed the owner of it in getting his coal. It was held that the owner of the lower mine had no ground of complaint. The defendant, the owner of the upper mine, had a right to remove all his coal. The damage sustained by the plaintiff was occasioned by the natural flow or percolation of water from the upper strata. There was no obligation on the defendant to protect the plaintiff against this. It was his business to erect or leave a sufficient barrier to keep out the water, or to adopt proper means for so conducting the water as that it should not impede him in his workings. The water, in that case, was only left by the defendant to flow in its natural course.

But in the later case of *Baird* v. *Williamson* the defendant, the owner of the upper mine, did not merely suffer the water to flow through his mine without leaving a barrier between it and the mine below, but in order to work his own mine beneficially he pumped up quantities of water which passed into the plaintiff's

(*p*) Sir T. Raym. 421.
(*q*) 7 C. B. 515.
(*r*) 15 C. B. N. S. 376.

mine in addition to that which would have naturally reached it, and so occasioned him damage. Though this was done without negligence, and in the due working of his own mine, yet he was held to be responsible for the damage so occasioned. It was in consequence of his act, whether skilfully or unskilfully performed, that the plaintiff had been damaged, and he was therefore held liable for the consequences. The damage in the former case may be treated as having arisen from the act of God; in the latter, from the act of the defendant.

Applying the principle of these decisions to the case now before the House, I come without hesitation to the conclusion that the judgment of the Exchequer Chamber was right. The plaintiff had a right to work his coal through the lands of Mr. Whitehead, and up to the old workings. If water naturally rising in the defendants' land (we may treat the land as the land of the defendants for the purpose of this case) had by percolation found its way down to the plaintiff's mine through the old workings, and so had impeded his operations, that would not have afforded him any ground of complaint. Even if all the old workings had been made by the plaintiff, he would have done no more than he was entitled to do; for, according to the principle acted upon in *Smith* v. *Kenrick*, the person working the mine, under the close in which the reservoir was made, had a right to win and carry away all the coal without leaving any wall or barrier against Whitehead's land. But that is not the real state of the case. The defendants, in order to effect an object of their own, brought on to their land, or on to land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the plaintiff, and for that damage, however skilfully and carefully the accumulation was made, the defendants, according to the principles and authorities to which I have adverted, were certainly responsible.

I concur, therefore, with my noble and learned friend in thinking that the judgment below must be affirmed, and that there must be judgment for the defendant in error.

Judgment of the Court of Exchequer Chamber affirmed.

Lords' Journal, 17th July, 1868.

Sic utere tuo ut alienum non lædas.

This is a leading case upon the maxim, *sic utere tuo ut alienum non lædas*. The rule laid down in the judgment of the Exch. Cham., delivered by Blackburn, J., and approved in the H. L., is as follows:—"We think that the true rule of law is, that the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there—harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's—should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches;" *ante*, p. 803.

Natural and ordinary user of land.

A person is not liable for damage done to his neighbour's land, if he has merely used his land for any purpose for which, *in the ordinary course of the enjoyment of land*, it might be used; see *per* Lord Cairns, *ante*, p. 817. Thus if, as the result of ordinary mining operations, water percolates into the mine of a neighbour, there is no liability; *Smith* v. *Kenrick*, 7 C. B. 515, 564; *Wilson* v. *Waddell*, 2 App. Cas. 95; but if a person, for the convenience of working his own mine, pumps up water, and so causes a flow of water into his neighbour's mine which would not have naturally reached it, he is liable for any damage occasioned thereby; *Baird* v.

Williamson, 15 C. B. N. S. 376; and so also if he diverts the course of a stream and does not make the new channel sufficient to convey all water which might reasonably be expected to flow into it, and the water consequently escapes; *Fletcher* v. *Smith*, 2 App. Cas. 781; or if he taps a river running over his land so that the water flows therefrom into his neighbour's mine; *Crompton* v. *Lea*, 19 Eq. 115. In *Snow* v. *Whitehead*, 27 Ch. D. 588, the defendant was held liable for damage by water which he had allowed to collect in his cellar, and which had percolated thence into his neighbour's cellar.

Artificial raising of land.

If a man by artificially raising the surface of his land, or by artificial erections thereon, not in the natural user of his land, causes water to flow into his neighbour's land in a manner in which it would not otherwise have done, he is answerable for the damage caused thereby; *Hurdman* v. *N. E. R. Co.*, 3 C. P. D. 168; see *Broder* v. *Saillard*, 2 Ch. D. 692, 700.

In *West Cumberland Co.* v. *Kenyon*, 11 Ch. D. 782, the defendants in sinking a shaft tapped water, which had formerly found its way into their old workings and had thence percolated into the plaintiffs' mine. By a bore-hole at the bottom of the shaft which the defendants made for that purpose, the water was carried off into the same old workings, and thence it again percolated, as before, into the plaintiffs' mine. The C. A. held that the defendants had not appropriated the water so as to impose upon them the obligation of keeping it, and that, by what they had done, they had not thrown any greater or other burden upon the plaintiffs' land than it had previously borne, and that the plaintiffs had, therefore, no cause of action.

Floods.

In *Whalley* v. *L. & Y. R. Co.*, 13 Q. B. D. 131, an unusual rainfall caused water to accumulate against the defendants' railway embankment so as to endanger its safety. To get rid of the water they cut trenches through the embankment, with the necessary effect that the water flowed through the trenches on to the plaintiff's land on the other side of the embankment. If the trenches had not been cut the water would probably have percolated through the embankment and so reached the plaintiff's land, but the damage done by the water coming through the trenches was much greater than the damage would have been had it been left to percolate, and the defendants were therefore held liable.

In the last case, the C. A. drew a distinction between

Distinction between keeping out, and getting rid of, floods.

cases where a person takes steps to prevent a flood from coming on to his land, and cases where he takes steps to get rid of the flood after it has come there. A flood is a common enemy, and before it has come into his land a person may erect barriers to keep it off, and he is *primâ facie* not responsible because the effect of his action is that the flood goes on to another's land instead of his own; *R.* v. *Pagham Commissioners*, 8 B. & C. 355; *Nield* v. *L. & N. W. R. Co.*, L. R. 10 Ex. 4; but he must not, in erecting his barriers, interfere with a right of the other landowner; *e.g.*, he must not obstruct the flow of water down a river or other natural watercourse to which that landowner is entitled; see the same cases, and *R.* v. *Trafford*, 8 Bing. 204. As to barriers against inroads of the sea, see *A.-G.* v. *Tomline*, 12 Ch. D. 214, 14 Id. 58.

Water accumulated for common benefit of plaintiff and defendant.

The principle laid down in *Fletcher* v. *Rylands* is confined to cases where the defendant collects the water on his lands *for his own purposes*; and it does not apply to cases where he collects it for the plaintiff's purposes as well as for his own. If two persons dwell under one roof, it is for the benefit of both that the roof be drained. Accordingly in *Carstairs* v. *Taylor*, L. R. 6 Ex. 217, where the defendant occupied the upper floor of a warehouse, and let the lower floor to the plaintiff, and a rat gnawed a hole in the box into which the rainwater from the roof was collected by gutters, in order to be carried by a pipe into the drains, it was held that the defendant, who had been guilty of no negligence, was not liable for the consequent escape of the water and the damage thereby done to the plaintiff's goods on the lower floor. See also *Gill* v. *Edouin*, 71 L. T. 762. Similarly, where several persons occupy separate parts of one house, which is supplied with water by one common system, the occupier of one part is not liable to the occupier of another for an escape of the water from his part into the other's, in the absence of negligence; *Ross* v. *Fedden*, L. R. 7 Q. B. 661; *Anderson* v. *Oppenheimer*, 5 Q. B. D. 602: see *Stevens* v. *Woodward*, 6 Id. 318; and *Ruddiman* v. *Smith*, 60 L. T. 708.

Poisonous trees.

In *Crowhurst* v. *Amersham*, 4 Ex. D. 5, a yew tree which had been planted by the defendants upon their land grew so as to project over an adjoining close occupied by the plaintiff. The plaintiff's horse, while feeding in the close, ate of that part of the tree which projected over the close, and was killed by the poison. The defendants were

held liable in damages for the value of the horse. They had brought upon their land something dangerous, and had, so to speak, allowed it to escape on to their neighbour's land. But if the yew tree, though growing close to his boundary fence, is wholly upon his own land, and does not project over his neighbour's land, the occupier is not liable for the death of his neighbour's horse which, by reaching over the fence, has eaten of the tree and died; *Ponting* v. *Noakes*, (1894) 2 Q. B. 281; nor is the occupier liable if clippings from his yew tree have been placed upon his neighbour's land without his knowledge; *Wilson* v. *Newberry*, L. R. 7 Q. B. 31 (*post*, p. 829). Where the seeds of thistles, growing naturally upon the land, were blown on to the neighbour's land and did damage, the occupier was held not to be liable; *Giles* v. *Walker*, 24 Q. B. D. 656.

Decayed wire fence.

In *Firth* v. *Bowling Iron Co.*, 3 C. P. D. 254, the defendant's land was fenced with wire rope, the strands of which decayed through exposure; pieces of this rope fell upon the plaintiff's adjoining land and, being hidden by the grass, were eaten by the plaintiff's cow, which died therefrom. The defendants were held to be liable.

Fire.

An occupier is not liable for damage done to his neighbour by a fire which has originated upon his land, unless it has been caused wilfully or negligently; but if it has been caused wilfully or negligently, he is liable; *Vaughan* v. *Menlove*, 3 B. N. C. 468; *Filliter* v. *Phippard*, 11 Q. B. 347; 6 Anne, c. 31; 14 Geo. 3, c. 78; see *Turbervil* v. *Stamp*, 1 Salk. 13, decided before those statutes, and *Black* v. *Christchurch Co.*, (1894) A. C. 48.

Sparks from railway engines.

In the case of fires caused by sparks escaping from railway engines, the rule is that the railway company are not liable for damage caused thereby, if they have statutory powers to use locomotive engines, and if there has been no negligence on their part; *R.* v. *Pease*, 4 B. & Ad. 30; *Vaughan* v. *Taff Vale R. Co.*, 5 H. & N. 679; *Hammersmith R. Co.* v. *Brand*, L. R. 4 H. L. 171, in which the two last cases were approved; *Piggot* v. *Eastern Counties R. Co.*, 3 C. B. 229; *Aldridge* v. *G. W. R. Co.*, 3 M. & Gr. 515; *Smith* v. *L. & S. W. R. Co.*, L. R. 6 C. P. 14; *Fremantle* v. *L. & N. W. R. Co.*, 10 C. B. N. S. 89. But if the company have no express statutory powers making the use of such engines lawful, they are liable for the consequences of the escape of sparks, though there is no negligence on their part; *Jones* v. *Festiniog R. Co.*, L. R. 3 Q. B. 733.

And the rule is the same in the case of traction engines used upon a public highway; *Powell* v. *Fall*, 5 Q. B. D. 597; see also *Metr. Asylum* v. *Hill*, 6 App. Cas. 193; and *post*, p. 828.

Filth.

In an old case it was held by Lord Holt that a man was liable for allowing the filth to escape from his privy on to his neighbour's land; as "he was bound of common right to keep his wall so as his filth might not damnify his neighbour; and it was a trespass on his neighbour, as if his beasts should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbour's;" *Tenant* v. *Goldwin*, 1 Salk. 360; see *ante*, pp. 806—808. In *Humphries* v. *Cousins*, 2 C. P. D. 239, the occupier of a house was held liable for damage done to his neighbour by sewage which escaped from a defective drain under his house, though he was ignorant of the existence of the drain, and there was no negligence on his part. And he is liable though the sewage has escaped only by polluting the water which percolated underground from his land to his neighbour's well, from which the water was drawn by a pump; *Ballard* v. *Tomlinson*, 29 Ch. D. 115. See also *Russell* v. *Shenton*, 3 Q. B. 449; *Womersley* v. *Church*, 17 L. T. 190.

Noxious vapours.

An occupier is also liable for creating on his own land, and allowing to escape on to his neighbour's land, noxious gases or fumes which injure trees or plants; *Broadbent* v. *Imperial Gas Co.*, 7 De G. M. & G. 436, 7 H. L. C. 600; *Beardmore* v. *Tredwell*, 3 Giff. 683; *Walter* v. *Selfe*, 4 De G. & S. 315; *Shotts Iron Co.* v. *Inglis*, 7 App. Cas. 518; or smoke or vapour; *Smith* v. *Mid. R. Co.*, 37 L. T. 224; or smells; *Rapier* v. *London Tramways Co.*, (1893) 2 Ch. 588; see *ante*, p. 268.

Animals.

The rule as to animals is well stated by Williams, J., in *Cox* v. *Burbidge*, 13 C. B. N. S. 430, 438, where he says: "I apprehend the general rule of law to be perfectly plain.

General rule.

If I am the owner of an animal, in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour, and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial." This statement of the law was approved of in the principal case, *ante*, p. 806. In *Boulston's Case*, 5 Co. Rep. 104a, it was adjudged that "if a man makes coney-burrows in his own

Animals *feræ naturæ*.

land, which increase in so great number that they destroy his neighbour's land," no action will lie, "for they are *feræ naturæ*, and he who makes the coney-burrows has no property in them." See *Farrer* v. *Nelson*, 15 Q. B. D. 258.

Prescriptive rights.

The occupier of land may, by prescription, be bound to fence his land so as to prevent his neighbour's animals coming upon it; in such case he cannot complain of a trespass by his neighbour's animals which has arisen through his own neglect to fence; *Bailey* v. *Appleyard*, 8 A. & E. 161; *Singleton* v. *Williamson*, 7 H. & N. 410.

Animal lawfully upon highway;

While cattle or other animals *domitæ naturæ* are lawfully passing along a highway, their owner is not liable for any injury they may do upon the highway, or upon land or other premises adjoining the highway, unless there is negligence on his part. While they are lawfully upon the highway they are not trespassing, and, in the case of property adjoining the highway, the occupier must be taken to hold it subject to the risk of such inevitable injury; *Tillett* v. *Ward*, 10 Q. B. D. 17; *Goodwyn* v. *Cheveley*, 28 L. J. Ex. 298; *Holmes* v. *Mather*, L. R. 10 Ex. 261; see also the principal case, *ante*, p. 810.

trespassing upon highway.

If, however, an animal is not lawfully upon a highway, but is trespassing, as when it has merely strayed upon the highway, the owner is liable for the ordinary consequences of such a trespass, *e.g.*, in a case of a horse, for its eating the herbage; *Cox* v. *Burbidge*, *supra*.

Owner liable for ordinary consequences of trespass.

The owner of an animal which is trespassing is liable only for the ordinary consequences of such trespass; that is, for such damage as the animal may, from its nature, be expected to do; and he is not liable for the vicious acts of an animal of an ordinarily quiet nature unless he knew that it was vicious; *Cox* v. *Burbidge*, *supra*; *Read* v. *Edwards*, 34 L. J. C. P. 31; *Lee* v. *Riley*, Id. 212; *Ellis* v. *Loftus Iron Co.*, L. R. 10 C. P. 10; see also *ante*, p. 804; and the notes to *Vicars* v. *Wilcocks*, *post*, vol. ii., p. 521.

Animals of vicious nature, or known to be vicious.

Apart from any question of trespass upon his neighbour's land, the owner of an animal which is not harmless in its nature, or which he knows to be vicious or dangerous, keeps it at his peril, and is liable for any injury which it may do; *Filburn* v. *People's Palace Co.*, 25 Q. B. D. 258. The law of England recognizes two distinct classes of animals. The first class consists of such animals as sheep, horses, oxen, and dogs, which the law assumes not to be of a dangerous

nature; and a person who keeps an animal of this class is not liable for any damage it may do, when not trespassing, unless he knew that it was in fact dangerous. The other class consists of animals which have not been shown by experience to be harmless by nature; and one who keeps animals of this class must prevent them from doing injury under any circumstances, unless the person to whom the injury is done brings it upon himself; see *per* Lord Esher, *Filburn* v. *People's Palace Co.*, *supra*.

Electricity.

In *Nat. Telephone Co.* v. *Baker*, (1893) 2 Ch. 186, Kekewich, J., was of opinion that a person who creates electric currents upon his own property for his own purposes, and discharges them into the earth, is liable for any damage done by the current on his neighbour's land, because he is using his land for a non-natural or extraordinary purpose. The defendant in that case, however, was held not liable in the action, because he was acting under statutory powers, and was not guilty of negligence.

Where defendant has statutory power to use dangerous thing, negligence must be shown.

In some cases the defendants may be authorized by statute to have the mischievous thing upon their lands. In such cases the general rule is that "where the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence, that, if damage results from the use of such thing independently of negligence, the party using it is not responsible:" *per* Cockburn, C.J., *Vaughan* v. *Taff Vale R. Co.*, 5 H. & N. 679, 685; approved in *Hammersmith R. Co.* v. *Brand*, L. R. 4 H. L. 171, and *L. B. & S. C. R. Co.* v. *Truman*, 11 App. Cas. 45; and the other cases where damage has been caused by sparks from engines, *ante*, p. 825; see also *Powell* v. *Fall*, 5 Q. B. D. 597; *Metr. Asylum* v. *Hill*, 6 App. Cas. 193; *Hammond* v. *St. Pancras Vestry*, L. R. 9 C. P. 316, where damage was caused by sewage from a sewer; *Dunn* v. *Birmingham Canal Co.*, L. R. 8 Q. B. 42, and *Evans* v. *M. S. & L. R. Co.*, 36 Ch. D. 626, cases where water escaped from a canal; *Blyth* v. *Birmingham Waterworks Co.*, 11 Exch. 781, where water escaped from a main; *Dixon* v. *Metr. B. W.*, 7 Q. B. D. 418, where damage was caused by a heavy flow of water from the outlet of a sewer; *Stretton* v. *Derby*, (1894) 1 Ch. 431; *Rapier* v. *London Tramways Co.*, (1893) 2 Ch. 588; *Meux* v. *City of London Electric Co.*, 42 W. R. 644, 43 Id. 238; *Green*

v. *Chelsea Waterworks Co.*, 70 L. T. 547; *A.-G.* v. *Metr. R. Co.*, (1894) 1 Q. B. 384.

Duty imposed by custom to store water.

In *Madras R. Co.* v. *Zemindar of Carvatenagaram*, L. R. 1 Ind. App. 364, the defendant was sued for damage caused by an escape of water from an ancient tank on his lands, but he was held not liable in the absence of negligence, because he did not keep the tank for his own purposes, but as Zemindar and in pursuance of a duty, imposed by custom and recognized by law, to keep it for the benefit of agriculture in his district. This case is akin to the cases referred to above, where powers and duties have been imposed by statute.

Escape caused by act of God or *vis major*;

In *Fletcher* v. *Rylands*, Blackburn, J., said (*ante*, p. 803): "He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God." This exception was adopted by the Exch. Cham., in *Nichols* v. *Marsland*, L. R. 10 Ex. 255, 2 Ex. D. 1, where it was held that the defendant, who had collected water in a reservoir upon his land, and used all reasonable care to keep it there, was not liable for damage done by an escape of the water, caused by the act of God or by *vis major*. In that case the bursting of the reservoir was caused by an extraordinary rainfall which could not reasonably have been anticipated; see *Nitrophosphate Co.* v. *L. & St. K. Dock Co.*, 9 Ch. D. 503, 516, as to an extraordinary flood being an act of God; see also *Turbervil* v. *Stamp*, 1 Salk. 13.

or by wrongful act of stranger.

Upon the same principle it has been held that one who has collected water upon his land, and has used all reasonable means to keep it from escaping, is not liable for damage done by an escape caused by the acts of a stranger over whom he has no control, and which he could not reasonably have anticipated; *Box* v. *Jubb*, 4 Ex. D. 76; *Nichols* v. *Marsland*, L. R. 10 Ex. 255, 259, *per* Bramwell, B. In *Wilson* v. *Newberry*, L. R. 7 Q. B. 31, a declaration that the defendant was possessed of yew trees, the clippings of which he knew to be poisonous, that it was his duty to prevent the clippings being placed on his neighbour's land, and that he took so little care that the same were placed upon his neighbour's land, whereby the plaintiff's horses were poisoned, was held bad upon demurrer; Mellor, J., saying: "It is quite consistent with the averments of this declaration that the cutting may have been done by a stranger

without the defendant's knowledge." If a man keeps cattle on unfenced land, it seems that he ought to anticipate their being driven by dogs on to his neighbour's land; see *ante*, p. 804.

Employment of competent contractor.

An owner or occupier cannot escape responsibility by delegating even to competent agents the duty of precaution. "A person causing something to be done, the doing of which casts upon him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor;" *Dalton* v. *Angus*, 6 App. Cas. 740, 829, *per* Lord Blackburn; see *Bower* v. *Peate*, 1 Q. B. D. 321; *Tarry* v. *Ashton*, Id. 314, 319; *Hughes* v. *Percival*, 8 App. Cas. 443; *Black* v. *Christchurch Co.*, (1894) A. C. 48.

INDEX TO VOLUME I.

ABANDONMENT, of action, *prima facie*, a good consideration, 332.

"ABOUT," meaning of, 547.

ACCIDENT,
- Bailee when liable for damage by, 169, 170. See *Bailments.*
- Action of trespass for assault by, 442, 444.
- When, an excuse for trespass, 810.
- Plea of deed lost by time and, 753, 778.

ACCORD AND SATISFACTION,
- Plea of, when good, 325 *et seq.*
  - Of acceptance of less than due, when bad, 325—330, 335, 339.
    - Good, if payment made before the day, 328, 337.
    - Or at place other than where debt payable, 328.
    - Or if claim unliquidated, 330, 331, 337.
    - Or amount uncertain and disputed, 331, 337.
    - Or if stranger pays with debtor's assent, 338.
      - *Quære*, whether assent presumed, Id.
    - Or if composition accepted by several creditors, 334, 338.
    - Or if any possible benefit to creditor thrown in, 335.
    - Effect of stranger's act creating new consideration, 338.
    - Effect of acquittance under seal, 327.
  - Of acceptance of *negotiable security* for less, good, 332, 337.
    - Evidence of acceptance in satisfaction, 332, 335.
  - Of acceptance of different thing, good, 332, 337.
    - Reasonableness of satisfaction not generally considered, 332, 336.
  - Of acceptance of several for joint liability, good, 333, 337.
    - In cases upon dissolution of firm, 332, 333.
  - Of acceptance of new contract, when good, 336, 337, 339.
- Accord, to avail, must be executed, 336, 337.
  - Unless promise itself accepted in satisfaction, Id.
  - Executory accord generally revocable, 339.
    - Whether an equitable defence, Id.; see 341, 342.
- Effect of contract to suspend right of action, 339, 340.
    - When pleadable in bar to action, Id.
  - Of release with conditions subsequent, 340.
  - Of absolute covenant not to sue, Id.
- None, at law, of covenant under seal, 341; see 325, 326.
- None, at law, of covenant to pay sum certain, Id.
- Effect of payment being avoided in bankruptcy, 326.

ACCORD AND SATISFACTION—*continued.*
Rules as to satisfaction, exoneration, or discharge of liabilities, 336 *et seq.* See *Exoneration.*

ACCOUNT,
Payment on, effect of, *quâ* St. of Limitations, 563 *et seq.*
Effect of striking balance, 566.
Stated, effect of, 332, 384.

ACCUMULATIONS,
Of income, common law rule against, 419.
Statutes against, 419, 420.

ACKNOWLEDGMENT,
Of debt, effect of, *quâ* St. of Limitations, 563, 569—571.
Of payment, effect of, 568, 569.

ACQUITTANCE, on payment of less than debt, when good, 327, 328.

"ACROSS COUNTRY," meaning of, 551.

ACT OF BANKRUPTCY, transfer fraudulent under 13 Eliz. is, 19.

ACT OF GOD, 169, 178, 205, 218, 220, 829. See *Bailments, Carrier.*
What is, 205.

ACTION. See *Case, Trespass, Trover.*
Agreement to abandon, *primâ facie*, a good consideration, 332.
So agreement to suspend, Id.
For matters arising abroad, see *Foreign Cause of Action, Jurisdiction.*
Pendency of foreign suit, when a ground for stay of, 623.
Agreement to refer, when a ground for stay of, 341.
Distinction between *local* and *transitory*, 597. See *Venue.*
Transferable right of action on contract, party cannot create, 464.
Novelty of, unless on principle, no objection to, 258; see 242.
Ubi jus ibi remedium, 251, 257.
No right of, where no *injuria*, 259 *et seq.*
Test of injury, 259, 273.
Lies for every infringement of a right, 251, 257, 273.
Not for *damnum absque injuria;* instances, 259 *et seq.*, 266 *et seq.*
For groundless legal proceedings, when not, 260, 261.
For maliciously procuring adjudication in bankruptcy, 262.
Not for privileged statements, 262—266. See *Privileged Statements.*
Not against witness for perjury, 265.
Not for acts of self-defence against common enemy, 266.
For seduction of daughter, when not, 266, 267.
For negligence causing relative's death, when, 267.
Not for causing servant's death, 267.
Not for setting up rival school, or trade, 267.
For setting up new market near ancient, 244.
For setting up an offensive trade, when, 268, 269.
For removal of support to house, when, when not, 269—272.
For removal of support to soil, 270—272, 273.
For damage to house consequent thereon, 270.

ACTION—*continued.*
For damage to neighbour by negligent fire, 272.
When not, for draining neighbour's well, 273.
Or diverting underground stream, 273.
For projection over another's land, before pecuniary damage, 273.
For an escape of debtor taken in execution, 273.
For false return, against sheriff, when not, 274.
For excessive distress, when not, 274.
Distinction between qualified and absolute rights, 274.
Not for public nuisance, without special damage, 274.
Not, where contributory negligence, 275—278.
For damaging a nuisance, 276.
For tort, where a felony, 278—290.
Where special damage too remote, none, 280, 281.
As illness caused by slander, 280.
Quære, where damage the illegal act of third party, 280.
For inducing another to break his contract, 281.
Against returning officer, for rejecting vote, 231 *et seq.*
Against magistrate, 632 *et seq.*
"The law is not apt to catch at actions," 239.
"When the law will not multiply actions," 253, 274.
"Terror of suit a damnification," 158.

ACTUS CURIÆ NEMINI FACIT INJURIAM, a maxim, instance, 342.

ADEQUACY,
Of consideration, not generally considered, 141, 336, 404—407.
Except as test of *bona fides*, 10, 26, 29, 30.

ADMINISTRATOR. See *Executor.*
Of assignee is an assignee, 56.
Part payment to person acting as, 567, 568.

ADOPTION. See *Ratification.*
Of benefit, promise implied from, when, 142.

ADVOWSON, proceedings for disturbing right of, 243, 244, 251, 255.

AFFIDAVIT,
Conviction may be quashed on, when, 660 *et seq.*
To show want of jurisdiction to convict, 662 *et seq.*
Perjury in, no cause of action, 265.

AGENT. See *Principal and Agent, Ratification.*

AGISTMENT,
Agisted live stock, how far privileged from distress, 433.
Liability of agister for negligence, 198.

AGREEMENT. See *Contract, Consideration, Illegality, Promise, Request.*
To refer to arbitration, 340, 341. See *Arbitration.*
To suspend action, 339, 340. See *Suspension.*
Meaning of, in Statute of Frauds, s. 4; 291, 310 *et seq.*
Guarantee, 287 *et seq.*, 310 *et seq.*
Not to be performed within a year, 303 *et seq.*

AGREEMENT—*continued.*
Written, incidents annexed to, by custom, 535 *et seq.* See *Custom.*
Previous usage between parties to, effect of, 559.
When equivalent to act, in equity and in mercantile matters, 771.

ALIEN,
Actions by, and against, 602 *et seq.* See *Jurisdiction.*
Action against, for injury on high seas, 605, 619.
Plea to debt, that plaintiff alien and infidel, held bad, 579.

ALIENATION,
Condition against, without licence, 31 *et seq.* See *Condition.*
General restraint upon, void, 416 *et seq.*
Restraint upon, during coverture, equitable doctrine as to, 417.

ALTERATION,
Of contract in writing within St. of Frauds, after signature, 299, 300.
Of bill, by filling up blanks in bill, estoppel, 473.
Of date of bill after acceptance, 747 *et seq.*
Of bill or note, material and unexplained, avoids, 780.
Except as against parties consenting, Id.
Case of holder in due course, where alteration not apparent, Id.
Duty of taker to inquire as to apparent, 759.
Effect of, on debt for which bill given as security, 781.
What are material alterations, what not, 780 *et seq.*
To be material, need not alter contract, 782.
If material, fatal, though beneficial to maker of note, Id.
Though made by consent, new stamp required, 783.
Unless merely a correction of mistake, Id.
Or made before issue, 783, 784.
Effect of adding new parties, 783.
Immaterial alterations, 783, 784.
Holder must explain apparent alteration, 784.
Cancellation by mistake, 785.
Of deed, when it avoids it, 749, 775, 784, 785.
Burden of proof as to interlineation, 784.
Cancellation by mistake, 785.
Case where seal torn off by infant, 758, 768.
What instruments avoided by alterations, 782, 785.
Bought and sold notes, 785.
Guarantee, Id.
Charter-party, 786.
Building contract, 786.
Instrument not containing contract, 782.
Alterations in fraud of holder, and against his will, 786.
Altered instrument good for some purposes, 786—788.
Pleadings in actions on altered instruments, 788.
Of deed, presumably before execution, 784.
Of will, presumably after execution, Id.

AMBASSADOR,
Goods of, privileged from distress, 436.
Exempt from suit, 630.

AMBASSADOR—*continued.*
So is every *bonâ fide* member of embassy, 630.
During exemption, Statute of Limitations does not run, 631.
Registration of servants of, Id.

AMENDMENT, of orders, &c., by magistrates, 645, 646.

ANIMAL. See *Beasts of Plough, Distress, Live Stock.*
Liability of owner of, for its escape, 804—806, 826—828.
Question of negligence immaterial, 805, 806, 826.
Liable for ordinary consequences of its trespass, Id.
Effect of prescriptive rights on liability, 827.
Liability for animal lawfully on highway, what, 808, 827.
For animal trespassing on highway, 827.
For animal *domitæ naturæ*, not known to be vicious, Id.
For animal of vicious nature, or known to be vicious, 805, 827, 828.
Owner keeping, on unfenced land, should anticipate escape, 830.
Animals *ferœ naturæ*, not distrainable, 430.
What are, what are not, 430—432.

ANNUITY, promise to pay, to female seduced, when invalid, 144, 368.

ANTICIPATION, of separate estate, by *feme covert*, restraint upon, 417.

APPEAL,
A creature of statute, 657.
Against magistrate's conviction, &c., to quarter sessions, 656.
By special case under Sum. Jurisd. Act, 1857; 670—672.
Under Sum. Jurisd. Act, 1879; 672, 673.

APPEARANCE,
Dispenses with summons, 652.
Cures defects in summons, Id.
Warrant to compel, Id.
Conviction on non-appearance, 653.

APPORTIONMENT,
Of conditions in leases, 31 *et seq.* See *Condition.*
Upon severance, 49, 63, 64.

APPRAISEMENT,
Still necessary, where growing corn, &c., distrained under 11 G. 2, c. 19; 426.

APPROPRIATION,
Of payments, 38, 39, 162.
To item barred by Statute of Limitations, 565.
Of charges in account, when a payment, 566.

ARBITRATION,
Condition against action before award, valid, 340, 341.
Agreement to refer, action to enforce, 341.
When a ground for staying proceedings, Id.
Arbitrator's right to be paid for services, 146.

ARREST. See *Sheriff*, *Trespass*.
When sheriff may break doors to arrest. See *Sheriff*.
Of debtor already in custody under invalid writ, 114.
By touching through broken pane, 109, 110.
By unlawfully breaking house, *semble*, void, 112, 113.
Whether operates as extinguishment of debt, 113, 114.
Act abolishing arrest for debt, Id.
Of privileged person, when not actionable, 260.
Bond to secure payment for discharge from unlawful, void, 367.

ASSAULT,
Common, may be compromised, 364.
Abroad, action for here, 572, 605.
Where damages not recoverable abroad, 620.
In colony, by governor of, action for here, 572. See *Governor*.
By accident, action for, 442, 444.
Action for cuff, though it cost not so much as a little diachylon, 253.

ASSEMBLY,
To safeguard person out of doors, unlawful, 100.
To defend house, lawful, Id.

ASSENT, to act for one's benefit, presumption of, 338.

ASSIGNEES, ASSIGNS,
Bill of lading not mentioning, 460, 461.
Of bill of lading, may sue and be sued, 739.
Of leases, &c., who are, 49, 60, 61.
Rights and liabilities of, on covenants, 52 *et seq.* See *Covenants*.
Implied contract between, and lessee, 70, 166. See *Condition*, *Administrator*, *Executor*.

ASSIGNMENT. See *Fraudulent Conveyance*.
Condition against, in lease, 31 *et seq.* See *Condition*.
What is a breach of such condition, 45 *et seq.*
Of term, whether assignee can be tenant under, 96—98.
Void, remedy for use and occupation, 98.
Of chose in action, under Judicature Act, 466.
Of life policy, assigned abroad, 614.

ASSUMPSIT, 136 *et seq.*, 169, 181.

ATTORNEY,
Summary jurisdiction of courts over, 301.
May not allege that retainer illegal, when, 371.
Statements by, when privileged, 264, 265.
His privilege to lay venue in Middlesex, 600.

ATTORNMENT,
To landlord's assignee, principle on which it was required, 501.
Had relation back to grant, 499, 501.
Unnecessary, since 4 Ann. c. 16, 501—503.
Attornment clauses in mortgages, 516—524. See *Mortgagor*.

AUCTIONEER,
Signature by, effect of, 321.
Goods for sale on premises of, when not distrainable, 427, 428.

AUTHORITY. See *Per Proc.*, *Principal and Agent*, *Ratification*.
Given by *law*, abuse of, creates trespass *ab initio*, 127 *et seq.*
Exceptions, 132.
Nonfeasance not such an abuse of, 127, 133.
Given by *party*, abuse of, does not, 128.
Replication of abuse of authority, 127, 131.
Public Authorities Protection Act, 645.

AWARD. See *Arbitration*.
Before performance, when a bar to action, 324.
Condition against action before award, valid, 340, 341.

AWAY GOING CROP, right to, though not mentioned in lease, 528 *et seq.*

BAIL, in criminal case, contract to indemnify, illegal, 365.

BAILEE. See *Bailments*.

BAILIFF. See *Distress*, *Sheriff*.
Mortgagor's authority to act as, for mortgagee, 504.

BAILMENTS,
Our law of, said to be taken from the Roman law, 229.
To carry gratuitously, liability of bailee, 167 *et seq.*
Division of, by Lord Holt, 172, 187.
By Sir W. Jones, 187, 188.
Lord Holt's, the more correct, 188.
Kinds of—
1. *Deposit*, 172 *et seq.*, 189.
Definition of, 172, 189.
No reward to bailee for, 173.
Liability of bailee, 172 *et seq.*, 189.
For gross negligence, 173—175, 189.
Though he keep the goods as he keeps his own, 189.
Meaning of "gross negligence," 183—187.
On undertaking to keep goods safely, 167 *et seq.*, 175, 189.
Bailee may not use deposit, 190.
Finder of goods a depositary, Id.
Larceny by appropriation, Id.
Delivery of goods without request, Id.
2. *Loan*, or *Commodatum*,
Definition of, 172, 190.
Borrower liable for slight negligence, 175, 190.
Must observe conditions of loan, Id.
Not liable for *vis major*, 176.
When liable, where goods stolen, Id.
Implied promise by borrower as to his skill, 190.
Of horse, who may ride, Id.
Duty of lender, 228—230.
3. *Locatio rei*,
Definition of, 172, 176.

BAILMENTS—*continued.*
3. *Locatio rei*—continued.
Duty to return thing hired, 176.
Lord Holt's *dictum* that hirer bound to utmost diligence, 177, 190.
Explained by Sir W. Jones, 191.
Ordinary diligence required from hirer, Id.
When not liable if goods stolen, 177.
Trover against purchaser from hirer, 191.
Hirer's liability for servant's acts, Id.
Duty of letter, 230.
Hire of goods let for immoral purposes not recoverable, 368.
4. *Pawn, Vadium,*
Definition of, 172.
Special property of pawnee, 177, 193.
When pawnee may use the pawn, Id.
Ordinary diligence required of pawnee, 178, 191.
Loss without default does not discharge debt, Id.
Liability after tender of debt, 178, 195.
Pawnee's right to sell on default, 191, 192, 194.
Or to sue, retaining the pawn, 192.
Pawnor's right to surplus on sale, 192, 193.
Liability for deficiency, 192, 197.
Difference between pawn and lien, 192, 193, 195.
Between pawn and mortgage, Id.
Case of *Clarke* v. *Gilbert* explained, 193, 194.
If lease be pledged, *semble*, pawnee may not sell, Id.
The general property assignable by pawnor, 194.
Duty to return pawn, 178, 194.
When pawnee may set up *jus tertii*, 195.
Effect of pawnee parting with possession, 195, 196.
Damages for conversion by pawnee, 195.
Pawnbrokers, statutory duties of, 197.
Redemption of pledges, Id.
Liability for fire, Id.
Powers of courts of summary jurisdiction, Id.
5. *Locatio operis faciendi,*
Definition of, 172, 198.
(1) Bailee, if employment *public*, liable for any loss, 178.
Except by act of God, or Queen's enemies, Id.
Liability of common carriers, 178, 199 *et seq.* See *Carrier.*
Of innkeepers, 199. See *Innkeepers.*
Reason for such liability, 179.
(2) Bailee, if a *private* person, only bound to do his best, 179.
Liability of factor, 179.
Of wharfinger, agister of cattle, &c., 198, 199.
Ordinary diligence required, 198.
Extra exertions to be made, when danger arises, Id.
Onus on, to show loss not by default, 199.
6. *Mandatum,*
Definition of, 172, 227.

BAILMENTS—*continued.*
6. *Mandatum*—continued.
Bailee liable only for gross negligence, 227.
Liability same as that of depositee, Id.
Reason for such liability, 180.
Trusting with goods a sufficient consideration, 180, 181.
Must use skill possessed or professed, 227.
Higher division of bailments, 228.
Bailee, when liable in conversion, Id.
When liable criminally, 190, 230.
His right of action against third persons, Id.

BAILOR. See *Bailments.*
When replevin will not lie for, 228.

"BALE," meaning of, 547.

BANKER,
Draft on, negotiable, 455.
Statutory protection of, in respect of cheques, 458.
Keeping customer's securities, liability of, 183, 187.

BANK NOTE,
Passes like cash by delivery, 447 *et seq.*
Not considered security for money, but money itself, 452, 454.
Passes under a will as money, 452.
Lost, action against finder, 453.
Payment of, upon indemnity, 454.
Stolen, action against thief or person colluding with him, 453.
No action against *bonâ fide* holder for value, 447, 453—455.

BANKRUPT. See *Bankruptcy.*
Action for maliciously causing person to be adjudicated, 262.
When a foreigner may be made so, in England, 607.
Promise by, to pay debts from which he is discharged, 144.
His qualified right to after-acquired property, 344.
Goods of, how far distrainable, 433, 434.

BANKRUPTCY. See *Bankrupt.*
Transfer fraudulent under 13 Eliz., an act of, 19.
Effect of a foreign bankruptcy, 618, 619.
Contracts against policy of Bankruptcy Acts, held void, 370.
Recovery by his trustee of money paid by bankrupt under illegal contract, 386.
When no breach of a condition against enjoyment, 46, 47.
How far covenant for assigns binds trustee in bankruptcy, 47, 48.

BARGAIN, property in goods, when passes by, 148.

BARGE,
Sent to another place, how far distrainable, 428.
Liability of owner of, as common carrier, 199, 218.

BARN,
May be broken open, to levy execution, 106, and *Addenda.*
Not so, to levy distress, 106.

BARRISTER,
Services of, no consideration for promise to remunerate, 145, 146.
Promise to pay, not implied, Id.
Statements by, when privileged, 264, 265.

BASTARD,
Mother of, bound to maintain, when, 145.
Her representatives not bound to maintain, Id.
Agreement by father to pay mother for maintaining, good, Id.
Enforcement of bastardy orders, 655.

BEAST. See *Animal.*

BEASTS OF THE PLOUGH,
Privilege of, against distress, 423, 434.
Distrainable for poor rates, 434.

BEDDING, when exempt from distress, 435.

BILL OF EXCHANGE AND PROMISSORY NOTE. See *Negotiable Instrument.*
When corporation may accept, 467.
Parol acceptance of, insufficient, 450.
Negotiable, if payable to bearer, 457.
Or payable to order and endorsed in blank, 457.
Not negotiable, while specially indorsed, 457.
Restrictive indorsement of, 457, 458.
Under seal of corporation, whether negotiable, 467.
Promissory note with coupons, 455.
Pass by delivery to *bonâ fide* holder for value, 468—472.
Definition of "good faith," 472.
Effect of agent signing "*per pro*," 471.
Law as to inchoate instruments, 472, 473.
Indorsement for purposes of action, 473.
Oral waiver of claim on overdue, 337, 338.
Effect of conflict of laws, as to, 609 *et seq.*
French law as to effect of indorsement in blank, 610.
Liability here of maker of note made and indorsed in blank in France, Id.
Of English acceptor to indorsee of bill:
When drawn, accepted, and payable in England, indorsed in blank in France, 610.
When drawn in France, accepted in England, indorsed in blank in France, 611.
Title of holder depends on law where title acquired, Id.
Foreign rate of interest, 611, 612.
Liability of drawer, how determined, 612.
Liability created by English indorsement, 613.
Provisions of Bills of Exchange Act, 1882; 614, 615.
Payable abroad, custom as to, rejected, 555, 556.
Alteration in, effect of, to avoid, 747 *et seq.* See *Alteration.*
Consideration for, as between drawer and indorser, when not gone into, 683.
Blank note, indorsement of, a letter of credit for indefinite sum, 703.

BILL OF EXCHANGE AND PROMISSORY NOTE—*continued.*
When issued, 784.
Special acceptance of, how to be made, 782.
Indorsement, &c., of payment on, does not save Stat. of Lim., 569.

BILL OF LADING. See *Stoppage in Transitu.*
Nature of, 674 *et seq.*, 691 *et seq.*
Effect of indorsement in blank, 674, 685, 702.
Without "assigns," not negotiable, 460, 461.
When party receiving goods under, liable for freight, 461.
Assign of, to whom property shall pass, may sue or be sued on, 739.
Could not formerly, 687, 739.
Can now, under Bills of Lading Act, 739.
Original consignor may be sued on, 739, 740.
Indorsement of, by way of pledge, does not pass property, 739.
Effect of pledgee taking delivery under, 740.
Delivery of, to third person, a delivery of the goods, 682.
Holder of, when not liable to stoppage *in transitu*, 674, 719, 733 *et seq.*
Liable to, if not *bonâ fide* holder for value, 734—737.
Pledged, stoppage *in transitu* subject to pledge, 734, 737—739.
Custom of merchants as to transfer of, set forth, 702.
Transfer of, where bill contains conditions, 737.
Effect of making goods deliverable to shipper's order, Id.
A factor could not bind principal by *pledge* of, 693, 741.
His powers under Factors Acts, 741 *et seq.* See *Factor.*
Disposition of, by vendor or vendee, in possession of, 745, 746.
Is the evidence of a contract of bailment, 691.
Effect when goods not shipped, 740, 741.
Delivery under one of several, discharges master, 697, 705.
Unless with notice of another indorsement, Id.
Distinguished from bill of exchange, 692 *et seq.*, 740.
Consignee's right to sue upon, 739, 740.
Consignee's rights, &c., pass by indorsement, 740.
Transfer of, after landing of cargo, 741.
Terms of, restricting carrier's liability, 218, 220.

BILL OF SALE,
Of personal chattels, when void, 15.
Instrument giving power of distress, 523, 524.
Erroneous registration of document as, not actionable, 260.

BISHOP, action against, for receiving wrong clerk, 243, 244, 255.

BLANKS, in negotiable instruments, 472, 473.

BLASPHEMY, contract to let room for blasphemous purpose void, 368.

BOARDING-HOUSE, not an inn, 125.

BONA FIDE. See *Bill of Exchange, Fraudulent Conveyance.*
Purchasers under 13 Eliz. c. 5, and 27 Eliz. c. 14; 27 *et seq.*
Statutory definition of "good faith," 472, 734.

BOND,
Another bond not pleadable in satisfaction of, when, 326.
For payment of certain sum, when payment of less a satisfaction, 327 *et seq.*

BOND—*continued.*
Good on face, illegality of, pleadable, 355 *et seq.*
When void for illegality, Id. See *Illegality.*
In restraint of trade, when void, 391 *et seq.*
Against alienation, when void, 419.
To create a perpetuity, void, 419.
Foreign government bonds or scrip, when negotiable, 455, 462.

BOUGHT AND SOLD NOTES, effect of alteration of, 785.

BRACTON, cited by Lord Holt, 174 *et seq.*

BREWER'S CASKS, left on publican's premises, distrainable, 428.

BRITISH SUBJECT,
Born abroad, rights of, 579, 584.
Alien may become, by conquest, 579.

BROKER,
Opinion of policy broker, when admissible in evidence, 486 *et seq.*
Usage amongst brokers, 542 *et seq.*
Usage to charge broker as party to contract, 543 *et seq.*
His right to be indemnified by principal, 546, 548—550.
Customs as between broker and principal, 557, 558.
Contracts by person acting as, in London, without licence, 374.

BUILDING TRADE, usage of, as to payment of quantity surveyor, 546.

BULL. See *Animal, Cattle, Live Stock.*
"Our ancestors settled that it is not nature of, to gore," 804.

BUTCHER,
Carcase of beast on his premises, when not distrainable, 428.
His meat, not distrainable, 429.

BY-LAW,
In restraint of trade, when valid, 393, 395, 415.
A by-law against Sunday traffic, held void, 415.
When actual notice of, required to bind, 205, 208.

CAB OWNER,
Not a common carrier of luggage, 200.
In London, his liability for driver's acts, 353.

CANAL. See *Carrier.*

CANCELLATION, of instrument by mistake, inoperative, 785.

CAPTAIN, of ship, liability for loss of goods, 178, 218—220.

CARMAN. See *Carrier.*
Liability of, for loss, 199, 200.

CARRIER. See *Railway Company.*
Liability of a gratuitous carrier, not being a *common*, 167 *et seq.*
Where he undertakes to carry *safely*, 182.
Where he insures safety, Id.

CARRIER—*continued.*
Common, definition of, 199.
Carrier to place out of realm may be, Id.
Carrier with unfixed termini may be, Id.
Carrier of passengers only, not, 200.
Carman when not, 199, 200.
Cab-owner not, as to passengers' luggage, 200.
Railway company when a, 200 *et seq.*
Not of passengers, 200.
Of what goods, 200, 217.
Passenger's personal luggage, 201.
Personal luggage, what, 202.
Liable to servant for his luggage, though master paid fare, Id.
Held not liable to master for injuries to servant whereby services lost, Id.
Held not liable to infant *en ventre sa mère*, Id.
Extraordinary liabilities of, Id.
Must charge only reasonable hire, 203.
Railway companies bound by "equality clauses," Id.
Duty of carrier to ask questions, 203, 204.
No general right to refuse goods for want of information, 204.
Liable for loss or damage by any means, 178, 204.
Except by act of God or Queen's enemies, Id.
Or natural deterioration or inherent vice, 204, 205.
(1) History and effect of "carriers' notices," 205, 206.
Customer without knowledge of, not bound by, 205.
Carrier not protected if grossly negligent, 205, 206, 209.
(2) Liability limited by Carriers Act, 1830; 206—210.
In respect of what articles, 206.
Meaning of loss, Id.
Customer to declare their value and nature, Id.
Carrier's right to increased charge, 207.
His liability not to be limited by public notice, Id.
Special contracts not prohibited by Act, Id.
Effect of Act upon special contracts, 207, 208.
When such may be inferred, 208, 209.
When customer bound by special conditions, Id.
Act leaves carrier liable for his servant's felony, 209.
Who are his servants, Id.
What is evidence of such felony, 210.
Act protects carrier from servant's gross negligence, Id.
(3) Circumstances which led to Rail. & Canal Traffic Act, Id.
Effect of that Act, 211—218.
Meaning of "traffic," 211.
Company to be liable notwithstanding notices, Id.
Limitation of liability for certain animals, 211, 212, 217.
Special contracts must be both signed and reasonable, 213—215.
What contracts reasonable, what not, 215—218.
Effect of reasonable alternative rate, 217.
Signature by agent sufficient, 218.

CARRIER—*continued.*
Common—continued.
Signature only needed where company claims exemption, 218.
Special contract against loss by theft without negligence, 212.
Rights under Carriers Act preserved, Id.
"Articles" includes passenger's luggage, 213.
By water, 218—220.
Common law liability of, 199.
Exemption from liability always stipulated for, 218.
Limitations of liability by statute, 218, 219.
Conditions not extending to gross negligence, 219, 220.
But shifting onus of proof, 220.
Implied warranty of seaworthiness, 220.
His duties as to delivery, 226, 227.
By land and water, 210, 220, 221.
Railway Regulations Act, 220, 221.
Who should sue carrier, 221, 222.
Buyer cannot sue, if sale invalid by Statute of Frauds, 301.
What is *primâ facie* evidence of negligence, 222.
Pleadings in actions against, 222, 223.
Action whether in "contract" or "tort," 223.
Carrier's duty as to delivery, Id.
Duration of his liability as carrier, 223, 224.
Railway Coy., when liable for goods beyond their own line, 224.
or for passengers, Id.
Carrier's duty at end of transit, 224, 225.
His duty on consignee's refusal to receive, 225.
His liability as to goods warehoused by him, 225, 226.

CASE,
Action on the, invention of, 257, 258.
To support, both damage and injury must concur, 236, 242, 252.
Distinction between *case* and *trespass*, 438 *et seq.* See *Trespass.*

CASH,
Property in, passes by delivery, 447.
Bank-notes are, 447 *et seq.* See *Bank Note.*

CATTLE. See *Animal.*
Agister of, his liability, 198.
When not distrainable, 423, 429, 434, 435.

CERTIORARI, lies unless taken away by statute, 657.
Privilege of Crown as to, 658.
Writ of, described, Id.
Only mode of removing conviction into Q. B. D. to reverse it, Id.
Not granted as a matter of course, 659.
Where applicant a party aggrieved, Id.
When not granted in cases of defect of jurisdiction, 668.
Lies, unless special clause prohibits, 667.
Lies, though special clause, where no jurisdiction, Id.
But not where only irreg. exercise of jurisdiction, 667, 668.

CERTIORARI—*continued.*
To remove convictions or orders, 659.
Motion for within six months, Id.
After six days' notice in writing, Id.
Proceedings to obtain the writ, 659, 660.
Proceedings on the writ, Id.
No appeal to C. A. in criminal cases, 660.
Convictions and order may be quashed on, when, 662 *et seq.*
Though good on the face of them, 662, 663.
On affidavits of want of jurisdiction, 662 *et seq.*
That not by a *court*, 664.
Not by *magistrates*, 663, 664.
By interested magistrates, 663.
Sitting out of jurisdiction, 664.
Preliminaries to jurisdiction wanted, Id.
No evidence of some essential facts, 664, 665.
Secus, where evidence conflicting, 665.
Ouster of jurisdiction, 665—667.
Misdecision of question on which jurisdiction turns, 666.
On affidavit of fraud, 669.
Not on merits of decision, 660, 670.
Effect of clause in statute taking away certiorari, 667.
Distinction between want of jurisdiction and irregularity in exercising it, 667, 668.
Court not bound to entertain objection to jurisdiction, 668.
Not required, to remove case stated by quarter sessions, 661.
Not granted where other tribunal of appeal, 669.

CHAMPERTY. See *Maintenance.*
Cases as to, 371.

CHANCERY, cause of growth of jurisdiction of, 360.

CHARITY, voluntary endowment of, not within 27 Eliz. c. 4; 30.

CHARTER-PARTY,
Terms of, limiting liability, 218.
Terms of, explained by usage, instances, 547, 554.
Avoidance of, by alteration, 786.

CHATTELS,
Parol gift of, without delivery, passes no property, 148.
On transfer of, condition against alienation void, 417.
Covenant will not run with, 54, 89.
Reception of, 135.
Mortgage of, by parol, 194.

CHEQUE. See *Bill of Exchange, Negotiable Instrument.*
A negotiable instrument, 455, 457.
Effect of crossing, 457, 458.
Statutory protection of bankers as to, 458.

CHILD,
Contributory negligence by, 275.
Contributory negligence by its attendant, 278.
Maintenance of, 144, 145.

CHOSE IN ACTION. See *Bill of Lading, Negotiable Instrument.*
Fraudulent transfer of, when within 13 Eliz. c. 5; 23.
Former rule against assignment of, 769, 770.
Assignment of, always a good consideration, 770.
Assignment of, under Judicature Act, 140, 141, 466.
Assignment abroad of, 614.

CHURCH, no damages at common law for value of, 244.

CHURCHWARDEN, action against, for maliciously rejecting vote for vestryman, 284.

CLAIM. See *Accord and Satisfaction, Exoneration.*
Settlement of supposed, when a consideration, 331.

CLERGYMAN, action against, for not performing marriage service, 231.

CLERK OF THE PEACE, no mandamus to, to correct minutes, 662.

CLOAK-ROOM. See *Railway Company.*

CLOTHES,
Wearing apparel, when exempt from distress, 435.
Pawnee of, must not wear, 177.

COFFEE HOUSE, not an inn, 125.

COLLATERAL,
Covenant, when does not run with land, 54, 60. See *Covenants.*
Agreement, instance of, 287.
1st branch of s. 4 of Statute of Frauds only relates to, 287, 291.
Agreement to refer, when, 341.
Security, a pawn is a, 192.

COLLISION, on highway, or sea, negligence is gist of action, 809, 810.

COLONIAL LEGISLATURE, rights claimed by, analogous to those of House of Commons, 286.

COLONY,
Action here against governor of, for injury there, 572 *et seq.*
Effect of Act of indemnity there, 605, 606.
Action against him in colony, 623, 624.

COMITAS GENTIUM. See *Foreign Cause of Action.*
Transitory causes of action arising abroad triable here, 572, 602 *et seq.*
Cause of action governed by lex loci, 609.
Procedure governed by lex fori, 609, 619.
Limitation of time for suit, a matter of procedure, 615—618.
Distinction where right extinguished, 616, 617.
Rules of evidence go only to procedure, 621, 622.
Statute of Frauds goes only to procedure, 622.
Locus regit actum, a canon of jurisprudence, 608.
Illustrations of maxim, 608 *et seq.*
Enforcement of foreign judgments, 608, 620.

COMMAND,
Doctrine that ratification equivalent to, 347 *et seq.*
When traversable, 344, 347.

COMMERCE. See *Trade.*

COMMON CARRIER. See *Carrier.*

COMMON COUNTS. See *Money Paid.*
Money lent, allegation of request unnecessary, 141.
Secus, as to money paid, Id.
Instance of demand *primâ facie* liquidated, 331.
Account stated, effect of, 332.

COMMON ENEMY,
Act of self-defence against, when not actionable, 266, 443, 445, 446, 824.
Inroads of sea may be repelled as, though damage result to others, 266.
A flood is a, 824.

COMMON HOYMAN. See *Carrier.*
His liability, 178.

COMMON LAW, the, is "statutes worn out by time" (Wilmot, C.J.), 857.

COMMONER, remedies of, for obstruction to his right, 134.

COMPANY. See *Corporation, Illegality, Railway Company.*
Goods of company in liquidation, how far distrainable, 433.

COMPETITION, no action between traders for damage by, 267.

COMPLAINT. See *Information, Justice of Peace.*

COMPOSITION,
With creditors, when binding, 334, 335, 338.
Held to be no satisfaction of debt, 327.

COMPOUNDING FELONY. See *Illegality.*
Illegality of bond for indemnity for, 355.

COMPROMISE,
Of criminal proceedings, illegal, 364.
Exception in case of common assault, Id.
Of election petitions, illegal, 365.
So, of proceedings against solicitors, Id.
Payment by way of, by party not legally liable, 331.
By surety, 149.

CONCEALMENT. See *Insurance.*
Cicero's definition of, 478.
Of nature of goods delivered to carrier, 201, 203, 204, 205, 206.
By sender of dangerous article, 229, 230.

CONCESSI. See *Grant.*

CONDITION,
In lease, against assignment without licence, 31 *et seq.*
Formerly determined by one licence, 32, 36.
Though licence particular, 32, 34.
Or lease to two, and licence to one, 32.
Or licence only as to part of the land, 32, 33.
Entire, formerly not apportionable by act of parties, 33.
Now, so apportionable, by statute, 33, 49.
By statute, a licence operates only *pro hac vice*, 35.
Given to one of several lessees, affects only his interest, 35.
In respect of part of the land, does not affect residue, 35.
By statute, a waiver operates only *pro hac vice*, 35.
At common law, parol licence ineffectual, if condition requires writing, 35, 36.
Forfeiture for, waived by acceptance of rent, when, 36—39, 44.
What forfeitures thereby waived, what not, 39.
Acceptance of rent evidence of election to continue lease, 38.
Election once made, cannot be retracted, 38.
Inference of election, how rebuttable, 38.
Not by showing that rent was accepted under protest, 38, 39.
Question is whether rent was accepted as rent due under lease, 39.
What other acts waive forfeitures, 37.
Waiver by distress for rent, 40.
Enforcement of forfeiture, no waiver of rent due before forfeiture, 40.
Old distinction as to waivers between leases *void* on breach, and leases *voidable*, 40, 41.
Now unimportant, owing to construction put on forfeiture clauses, 41—43.
Entry for breach of, what sufficient, 43.
Action to recover possession, now equivalent to entry, 44.
After election to treat lease as determined, receipt of rent no waiver, 44.
But may be evidence of *new* tenancy, 44.
Old distinction between waiver of forfeiture for underletting and for assigning, 44.
Continuing breaches, not waived by receipt of rent, 45.
What are, what are not, 45.
When licence to commit may be presumed, 45.
Against alienation, what is a breach of, 45, 46.
Assignment by operation of law, not, 46.
As, by bankruptcy, or seizure in execution, 46, 47.
Unless expressly made a breach, 47.
Or by marriage, 47.
Quære, whether a devise is a breach, 47.
Who are bound, if the condition names "assigns," 47.
Executors and administrators, 47.
Position of trustees in bankruptcy, 47, 48.
Condition not to assign, in lease to a man *and his assigns*, 48.
Not to assign without consent, consent not to be unreasonably withheld, 48.
Condition against assignment not inserted without express stipulation, 49.

CONDITION—*continued.*
Condition for re-entry on breach, not implied, 49.
May be reserved for breach of *negative* covenants, 49.
Meaning of "perform," 49.
Assignee of reversion, right to enforce forfeiture, 49, 50.
Severance of reversion, apportionment of condition, 49, 50.
Notice before enforcement of forfeiture, how far necessary, 50.
Relief against forfeiture, in equity, 51.
Under statutes, 51.
Apportionment of, on severance, 63, 64.

CONDITION PRECEDENT, to action, reference to arbitration may be, 340, 341.

CONFESSION, on information, dispenses with proof, 653.

CONFLICT OF LAWS. See *Bill of Exchange, Foreign Cause of Action.*

CONSENT, whether implied, to act done for one's benefit, 338.

CONSIDERATION,
Only a *valuable* a *good*, within 13 Eliz. c. 5; 3, 8, 9.
Of *nature*, or of *blood*, not good, Id.
A past debt is a good, within the Act, 2, 16.
Inadequacy of, how far a test of *bona fides*, 10, 26, 29, 30.
Otherwise immaterial, 141, 336, 404—407.
May be proved, though at variance with deed, 29.
Exaggeration of, in bill of sale, was not necessarily fatal, 13.
Executed or *executory*, distinction, 137.
Executory, involves request, 139.
Must move from plaintiff, Id.
His intervention in agreement sufficient, Id.
Intervention by trustee for him, 139, 140.
Money paid by A. to B. for C., when recoverable by C., 140.
Executed, if at previous request, supports promise, 137, 141.
Voluntary courtesy not a sufficient, Id.
Promise after service at request, when a, Id.
Labour, or endeavour, at request, though fruitless, a, 136.
When request may be implied, 141 *et seq.* See *Request.*
Mere moral obligation, however sacred, not a, 143.
Debt barred by Statute of Limitations, a, Id.
Debt barred by bankruptcy, no longer a, 144.
Past cohabitation, not a good, Id.
Past gratuitous services and mere hope of future, not a, Id.
Maintenance of deserted child, not a, unless at request, 144, 145.
Future maintenance of children, a good, 145.
When exhausted by implied promise, 147.
Debt payable now not a, for promise to pay *in futuro*, Id.
But debt payable *in futuro* held a, for appropriation of funds to secure debt, 148.
Distinction between executed transfer and executory promise, Id.
Parol gift of chattels without delivery void for want of, Id.
Doing under compulsion what another bound to do, when a, 142, 149 *et seq.*

CONSIDERATION—*continued.*
Forbearance to sue, a, 295, 332, 334.
Withdrawal of plea, a, 332, 337.
Settlement of disputed claims, a, 331.
Substitution of several for joint liability, a, 333.
Not required for discharge from parol contract, 336, 337.
For guarantee, need not be in writing, 292, 318.
Intrusting with goods may be a, 180, 181, 182.
Undertaking gratuitous service, when a, 181, 182.
Partial illegality of, avoids all the promises, 372.
Secus, if one of several considerations merely void, 373.
Distinction between void and illegal, 376.
Service under void deed of apprenticeship held a, 375.
Not required for deed, 376, 406.
Except where deed imposes restraint of trade, 391, 394, 406.
See *Contribution*, *Indemnity*, *Landlord and Tenant*, *Principal and Agent*, *Partners*, *Surety*, *Wrong-doers.*

CONSIGNOR AND CONSIGNEE. See *Bill of Lading*, *Carrier*, *Sale*, *Stoppage in Transitu.*
Consignee's lien in respect of advances, 745.

CONSTRUCTION,
Of written judgment, question for judge, 560.
According to *lex loci contractus*, when, 608, 609.

CONTRA PACEM, allegation of, in action of trespass, 589, 590.

CONTRABAND GOODS,
Seizure of, after demand, 109.

CONTRACT. See *Agreement*, *Custom*, *Statute of Frauds.*
Tendency should be to uphold and effectuate, 336.
Under seal. See *Deed.*
Consideration for. See *Consideration.*
Exoneration from parol, without consideration, 336, 337.
In restraint of trade. See *Restraint of Trade.*
Illegal, 355 *et seq.* See *Illegality.*
Action for inducing party to break, 281.
Involving breach of contract with when binding, 375.
Of sale, property in goods when passes by, 148.
When payment of price a condition precedent to delivery, 695, 708.
Implied, of indemnity, between lessee and assignee, 70.
Between buyer and seller of shares, Id. See *Indemnity.*
Foreign, construed by law of country where made, 608, 609, 615.
Case of bills of exchange, 609—615. See *Bills of Exchange.*
Procedure on, according to *lex fori*, 615 *et seq.*
Limitation of time for suit, *lex fori*, 615—618.
Statute of Frauds, *lex fori*, 622.

CONTRACTOR,
Employment of competent, no defence, when, 789 *et seq.*, 800, 830.

CONTRIBUTION. See *Indemnity.*
Inter se between co-sureties, or joint-contractors, 151 *et seq.*
Right to, when it accrues, 151.

CONTRIBUTION—*continued*.
Right to, under 19 & 20 Vict. c. 97; 153, 154.
In equity, *solvent* sureties contribute to whole extent, 151.
Actual payment unnecessary, 152.
Right to securities taken by co-surety, Id.
When recoverable from *representatives* of co-contractor, Id.
From co-partner, only recoverable in Chancery, 153.
None between joint wrong-doers, 154, 382 *et seq.* See *Illegality*.
Qualifications of rule, 154—156, 390.
Amongst persons employing agent for common benefit, 152.
None between sub-lessees, by separate demises, of different parcels, 158.

CONTRIBUTORY NEGLIGENCE,
Doctrine of, 275—278. See *Negligence*.

CONVERSION,
Liability of bailee for, 228.
By pawnee, measure of damages, 195.
By vendor, 191, 695.

CONVEYANCE. See *Alienation*, *Fraudulent Conveyance*.
When void against creditors, by 13 Eliz. c. 5; 1 *et seq.*
When void against purchasers, by 27 Eliz. c. 4; 24 *et seq.*
Lessor prepares, lessee pays for, 551.
Generally purchaser prepares and pays for, Id.

CONVICTION OR ORDER OF JUSTICE OF PEACE. See *Information*.
Summary, only under statute, 646, 654, 657.
Summary, when bad, 632 *et seq.*
Quashed when other convictions for same offence, 632.
Quashed when on face for offence not within jurisdiction, 640.
Or when facts on face defective, Id.
Or defectively stated, Id.
Of two persons jointly, for several offences, quashed, 641.
Single, for two distinct offences, quashed, Id.
Generally, conclusive as to facts stated therein, 641.
Qualification of this rule, 663 *et seq.*
When must be quashed, before suing justices, 642.
Time for drawing up, 645, 646.
Amendment of, 646.
Forms of, now prescribed by statute, 646, 647, 648.
Proceedings to, simplified by statutes, 646 *et seq.*
Summary of provisions of Acts, Id.
Defects and variances in proceedings, when not fatal, 647.
What formerly had to be recorded in, 649—654.
1. The information, 649—652.
2. The summons, 652.
3. The defendant's appearance or non-appearance, 653.
4. The defendant's confession, Id.
Or 5, The evidence, Id.
6. The judgment and adjudication of forfeiture, 653, 654.
7. Conviction to be subscribed, dated, and sealed, 654.

CONVICTION OR ORDER OF JUSTICE OF PEACE—*continued.*
Must be under hand and seal of justice, 654.
Offence may be stated in words of Act creating it, 650, 651. See *Offence.*
Void on face, no justification, 657.
May protect justices, if not quashed, when, 637, 642.
When quashed, though good on face of it, 662 *et seq.*
May be good in part, if good part severable, 653.
Application of penalty, when part of judgment, 654.
Amount of costs, when to be stated in, Id.
Error does not lie on a, 658.
Impeachment of, (1) by appeal, 656, 657.
Only by statute, 657. See *Appeal.*
(2) By *certiorari*, 657 *et seq.* See *Certiorari, Fraud, Mandamus.*
May be quashed for want of jurisdiction, 661 *et seq.*
Although good on face of it, Id. See *Certiorari.*
No mandamus to set forth facts showing want of, 661, 662.
Effect of two convictions for same offence, 640.
One conviction for several curses on same day upheld, Id.
Several convictions for sale of bad meat on same day and place, Id.
Stating offence in alternative, bad, 651.
Proceedings to summary, under Summary Jurisdiction Acts, 647 *et seq.*

COPARCENERS,
The Coparceners' Case, 56, 57, 72, 73. See *Covenants.*
When one not liable to indemnify another, 145.

COPYHOLDS,
Grantee of reversion in, an assign within 32 H. 8, c. 34; 60.
Mandamus to admit to, when granted, 242, 243. See *Mandamus.*
Remedy against lord for refusing to hold court to admit to, 242, 243.
Customs as to, 531, 532, 533.
Are now within 13 Eliz. c. 5; 23.
Within 27 Eliz. c. 4; 30.

CORN. See *Crops.*

CORPORATION (AND INCORPORATED COMPANY),
When may accept bills, 467.
Notes of, under seal, 467.
Franchise, when may vest in, for benefit of individuals, 248—250.
Action for maliciously presenting petition to wind up, 262.
Ultra vires doctrine, 378 *et seq.*
Bound by deed, unless *prohibited* from making it, 378.
Prohibition implied, where contract necessarily unconnected with purposes of incorporation, Id.
Power to apply to Parliament for extension of powers, 379.
Power to compromise disputes, Id.
Where particular act a condition precedent to validity of contract by, Id.
E.g., where statute requires contract under seal, Id.

CORPORATION (AND INCORPORATED COMPANY)—*continued.*
Contract of, executed by interested director, held void, 379.
Contracts of, upheld, though provisions violated, when, 380, 389.
Notice of statutes and deeds of settlement of, when presumed, 380.
Compliance with, when to be presumed, Id.
Acts *ultra vires qua* company and *qua* directors distinguished, 380, 381.
Memorandum and articles of association distinguished, 381.
By-laws by, when void, 393, 395, 415. See *Restraint of Trade.*

COSTS,
Surety defending action, when entitled to recover, from principal, 149, 150.
In actions against carriers, 223.
In action against justices, 645.
Of conviction, effect of leaving blank for, 643.
Amount of, to be stated on conviction, 654.
Under Summary Jurisdiction Acts, 654, 655, 671.
Of conveyance, who pays, 551.

CO-SURETY. See *Contribution.*

COUPONS, promissory note with, whether negotiable, 455.

COVENANTS,
1. *Running with the land,* described, 58.
2. *With reversion,* described, Id.
1. By lessee, without mention of assign, to build wall on demised land, not binding on assign, 52.
As to thing *in esse,* parcel of demise, bind assign, *though not mentioned,* 52, 53.
As to thing *to be newly done* on land demised, bind assign, *if mentioned,* 53.
Collateral, do not bind assign, though mentioned, 54.
Do not run with chattels, Id.
Assign of lessee takes benefit of implied, 54, 55.
Assign by act of law takes benefit of running, 55.
To repair, runs with the land, Id.
Assign of assign may bring covenant, 56.
So may assign of executor or administrator of assign, Id.
So heir of assign, Id.
By prior to sing in A.'s chapel, A.'s assign may sue for breach of, 56.
Co-parceners, on partition between, with covenants, when assign may sue on, 56, 57.
For divine service in another's chapel, will not lie for assigns of, 57.
As between lessor and lessee, 59 *et seq.*
Run with *land,* at common law, Id.
With *reversion,* by 32 Hen. 8, c. 34, Id.
Effect of that Act, Id.
Leases not under seal, not within it, 59, 60.
What covenants within it, 60.

COVENANTS—*continued.*
As between lessor and lessee—continued.
Covenants, collateral to land, not within it, 160.
Who are assigns within it, 60, 61.
Assign of part of reversion is, 60.
Of reversion in part of land is, Id.
Of term in part of land is, Id.
Grantee of reversion in copyholds is, Id.
Devisee in remainder is, 61.
Reversion of tenant from year to year, 61.
Covenants now run with reversion as with land, Id.
Reversion must continue the same, Id.
Demise by tenants in common and joint covenant with both, 62.
Effect of merger of reversion, 61, 62.
Now met by statute, 62.
Merger does not now extinguish covenants, when, Id.
Effect of Conveyancing Act, 1881; 63, 64.
Notwithstanding severance, covenants run with reversion, 63.
Apportionment of conditions, 63, 64.
What covenants *touch and concern land* so as to run, 64 *et seq.*
All implied covenants, 64.
What express ones, 65, 66.
As to things not *in esse* at time of demise, assigns, unless named, not bound by, 66.
This resolution impugned in *Minshall* v. *Oakes*, 66, 67.
Moore, 159, there supposed to be *Spencer's Case*, 67.
And to reverse rule laid down in Co. Rep., Id.
But *quære*, Moore, 159, a different case, 67, 68.
Bally v. *Wells*, cited against, confirms *Spencer's Case*, 68.
Quære, as to soundness of distinction between assign named and not named, Id.
Ground of decision in *Minshall* v. *Oakes*, 68, 69.
Quære, as to *dictum* in *West* v. *Dobb*, 69.
Lessee liable on express, after assignment over, Id.
Quære, whether liable after, on implied, 70.
Assignee not liable for breaches after assignment by him, Id.
Implied contract by successive assignees to indemnify lessee, Id.
Quære, as to lessor's right for breach after assignment by him, Id.
With reversioner and stranger jointly, held to run with land, 70, 71.
Comments on *Wakefield* v. *Brown*, Id.
Covenants not between landlord and tenant, 72 *et seq.*
(1) Covenants *with* owner of land, 72—75.
Benefit of, runs with land, 72.
Covenantor may be a stranger, 72, 73.
Raymond v. *Fitch* considered, 73, 74.
Covenantee must have land to which covenant relates, 74.
Assignee must have covenantee's estate, Id.
Case of conveyance to uses to bar dower, 74, 75.
Lessee of covenantee can enforce restrictive covenant, 75.

COVENANTS—*continued.*
Covenants not between landlord and tenant—continued.
(2) Covenants *by* owner of land, 75 *et seq.*
Whether they run with the land, 75—85
Explanation of the authorities, Id.
Result: *semble*, burden of covenants does not run except between landlord and tenant, 85.
Covenants imposing restriction on enjoyment of land in favour of a stranger, 81 *et seq.*
Equitable doctrine of notice independent, 85, 86.
Who are affected by it, 86.
What is notice, 86, 87.
Only extends to restrictive covenants, 87.
Equitable doctrine as to running of benefit, 87, 88.
There must be an intention to pass the benefit, 88.
Equitable assignee, 88, 89.
Distinction where covenant enures as a grant, 89.
Subject-matter with which covenant may run, 89 *et seq.*
Not with personalty, 89.
Nor with rent, 89, 90.
With tithes, 90.
With tolls of market, Id.
With right to take minerals, Id.
With incorporeal hereditaments, 91.
With estates by estoppel, 91 *et seq.* See *Estoppel.*
Assignee of life-tenant since dead, when may sue, 96.
When implied, 64, 65.
Illegal, 355. See *Illegality.*
In restraint of trade. See *Restraint of Trade.*
Not to sue, pleadable as release, 340.
Liability on, how extinguished, 341, 342.

COW. See *Animal, Cattle, Live Stock.*
Pawnee feeding, may milk, 177.

CRANE, liability of warehouseman for damage by defective, 810.

CREDIT,
To whom given, question for jury, 287.
Effect of having debited another in books, 287.

CREDITOR. See *Accord and Satisfaction, Debt, Execution, Fraudulent Conveyance.*
Agreement to take composition, when binds, 334, 335.
To give time, when binds, 334.
Right of appropriation, 565.
Foreign, bound by *lex fori*, 621.
Conveyances, when void against, 1 *et seq.* See *Fraudulent Conveyance.*
Assignments in trust for, 17.
Debtor's right to prefer a particular, Id.
Recovery from, of money secretly paid to, to induce him to accept composition, 385.

CRIME, only punishable in country where committed, 575.

CROPS,
Growing corn, grass or other product, distrainable by statute, 426.
If distrained, must be appraised, 426.
Growing crops, how far distrainable, after sale by sheriff, 432.
Loose corn and hay, distrainable by statute, 423, 429, 430.
Not distrainable, after sale by sheriff, if consumable on premises, 432.

CROWN,
Forfeiture to, for felony, abolished, 18.
Assignments before conviction, when void against, 6, 18.
Charter from, in restraint of trade. See *Monopoly, Restraint of Trade.*
Position of, towards subjects, 625.
Limits of jurisdiction of, 607.
Liability of officers of, 629, 630.
Prerogative of, in cases of *certiorari*, 658.
Not bound by statute, unless named, Id.
If lord of manor, no mandamus against, 243.
Right of, at law, to assign *chose in action*, 770.

CUMULATIVE,
penalty, when, 640.
remedy, when, 285, 286.

CUPBOARDS may be broken open, to levy execution, 106, 109.

CUR. ADV. VULT., party dying during, judgment *nunc pro tunc*, 326, 342.

CUSTODIA LEGIS, goods in, not distrainable, 432.

CUSTOM AND USAGE,
When valid, though begun since Rich. 1; 534.
Instance, where day of month part of custom, Id.
Of market, 147, 518. See *Principal and Agent.*
General, of merchants, part of the law, 539, 540.
Growth of the law merchant, Id.
Particular, evidence of, when admissible, 541.
To explain written contracts, 528 *et seq.*
To annex incidents thereto, Id.
Though under seal, 528, 536, 552.
Principle, 535, 544.
Custom must be consistent with contract, 538, 544.
Test whether so, Id.
What not an incident, 558.
When so admissible:
(1) In case of landlord and tenant, 528, 538, 552, 556.
Away-going crop, 528, 536.
Foldage, 537.
Seed and labour, 537.
Straw, &c., on quitting, 538, 556.
Flints, 538.
Holding over, 533, 534.

CUSTOM AND USAGE—*continued.*
When so admissible—*continued.*
Custom must be *of the country*, 538.
Between incoming and outgoing tenant, 538, 539.
(2) In case of *commercial* contracts, 539 *et seq.*
Usage of trade when incorporated into, 538.
Though contract within Statute of Frauds, 539.
To engraft terms, 541 *et seq.*
To explain terms, 546 *et seq.*
To show authority or liability of agent, 543 *et seq.*
Of market, 147. See *Principal and Agent.*
(3) In other cases, 550 *et seq.*
Between manager and actress, 550.
Between master and servant, Id.
Between members of turf, 551.
Between lessor and lessee, Id.
Between vendor and purchaser, Id.
As to costs of marriage settlement, Id.
Between carrier and customer, Id.
Of hotel keepers hiring furniture, Id., 540.
Statutory construction of terms not varied by, 551—553.
Words of weight, measure, or number, 552.
Of time, 552, 553.
Cannot alter or control the law, 553.
Cannot make instrument, on face whereof right to sue limited, negotiable, 459, 464.
Cannot annex incidents which parties cannot expressly introduce, 464, 465.
In restraint of trade. See *Restraint of Trade.*
Custom to disregard Leeman's Act, 554.
Evidence of, not admissible to contradict written instrument, 554.
Instances of usages held inadmissible, 552 *et seq.*
What is a contradiction, 556.
Rejected, to construe vague terms of general import, 560.
Custom to dry nets on another's land, 530.
To turn plough on another's land, Id.
A custom is *lex loci*, 395.
Of realm, need not be alleged in pleading, 222.
Case of party added to contract by, 543.
Whether usage must be known to party to be charged, 547.
Persons deemed to deal according to custom of market, 548.
Term may be explained by, though not ambiguous, 560.
Terms not incidental cannot be annexed, 558.
Custom must be reasonable, 549, 559.
Evidence admissible to show that custom unreasonable, Id.
Effect of previous usage between parties, Id.
Of usage as evidence of what is reasonable, Id.
Parol evidence to exclude custom from written contract, inadmissible, Id.
Evidence of, 559, 560.
Tendency of courts, 560.
When jury decides meaning of terms, court construes contract, Id.

CUSTOMS, officer of, liability of, for refusing to sign bill of entry, 231.

DAMAGE (AND DAMAGES),
Injury imports a damage, when, 252, 253, 273.
Damage without injury not actionable, 259.
Instances of such damage, 259 *et seq.*
1. By groundless legal proceedings, 260.
When such proceedings actionable, 260—262.
2. By privileged statements, 262—266.
What are such, Id.
3. By acts of self-defence against common enemy, 266.
4. By seduction of daughter, when, 266.
5. By negligence causing death, before Lord Campbell's Act, 267.
6. From mere exercise of another's right, 267 *et seq.*
E.g. Competition, 267.
Removal of support to house, when, 267—272. See *Support.*
Draining of well, when, 273.
Test of injury, 273.
If injury, damage presumed, 273, 274.
Why actual damage sometimes necessary to support action, 274.
Special damage necessary, where injury a public grievance, 274.
Damage must not be caused by contributory negligence, 275—278.
Damage from felony, whether private remedy suspended, 278—280.
Express exception under Lord Campbell's Act, 280.
Damage must not be too remote, 280.
e.g. Sickness from slander, 280.
Quære, where damage the illegal act of third person, 280, 281.
Possibility of, may sometimes be sufficient, 244, 273.
Direct and consequential, importance of distinction between, 445, 446.
Measure of, where landlord trespasser *ab initio*, 132.
In action for irregularity in distress, actual must be proved, 132.
In trover for goods sold, price unpaid to be deducted, 695.
For conversion of pawn, 195.
In action by bailee for injury to goods, 230.

DAMAGE FEASANT, things taken, not distrainable, 432.

DANBY, C.J.,
After removal from bench, practised at bar, 174.
Restored to bench, Id.

DANGER,
Damage by incurring, with notice, when actionable, 275, 276.
Liability of owner for damage done by dangerous goods, 204, 229.
Liability for escape of dangerous thing, 789 *et seq.*

DATE,
Presumption as to, of letter not produced, 354.
Impossible date, when rejected, 654.

DEATH, action for causing, by negligence, 267.

DEBENTURE, under seal of company, whether negotiable, 463—465.

DEBT. See *Accord and Satisfaction, Creditor.*
Payable now, no consideration for promise to pay *in futuro*, 147.
Discharge from, 337 *et seq.*
When not extinguished by loss of pledge, 191.
Whether extinguished by seizure under *fi. fa.*, 113.
Effect of seizure for, under *ca. sa.*, Id.
Abolition of imprisonment for, 114.
May be assigned, 769. See *Chose in Action.*

DECEIT, effect of deceiving sheriff, 107.

DECISION, dismissal of appeal for want of jurisdiction, held to be, 644.

DEED. See *Fraudulent Conveyance.*
Liability under, how discharged, 341, 342.
At law, parol licence, no defence, 341.
Accord and satisfaction before breach no defence, Id.
Payment after breach, no plea to debt on, Id.
Effect of 4 Ann. c. 16, Id.
Parol extension of time for performance, 342.
Equitable defences to action on, 341, 342.
Illegality of, pleadable in action on, 355, 363. See *Illegality.*
Effect of, passing estate for illegal purpose, 389.
Of corporation, when *ultra vires*, 378 *et seq.* See *Corporation.*
Effect of statutory disability on one grantor of a joint deed, 382.
Was the usual form of agreement, 757.
Lost or burnt by accident, evidence of contents of, 753, 778.
Alteration of, 749, 775, 784, 785. See *Alteration.*
Presumably before execution, 784.
Not affected by Statute of Frauds, s. 4; 299.

DEER,
When distrainable, 430.
Action of waste for feeding, 430.

DEFAMATION. See *Privileged Statements.*
Damage, when too remote, 280.
By "riding Skimmington," 256.

DELAY of Court, Court does not suffer parties to be injured by, 326, 342.

DELIVERY,
Of negotiable instrument, or cash, when passes property, 447 *et seq.*
Gift without, void, 148.
When property in goods passes on sale without, Id.
Without request, raises no duty, 190.

DELIVERY ORDER, a document of title, 742.

DEPOSIT. See *Bailments.*

DEVISE,
Quære, whether a breach of condition against assignment, 47.
Devise in remainder an assign, 61.

DILIGENCE. See *Negligence.*
Different degrees of, required from bailees. See *Bailments.*

DISCHARGE. See *Exoneration.*
From liability, modes of, 336 *et seq.*
From liability, oral without value, 336, 337.

DISSOLUTION, of partnership, deed of, when void against creditors, 19.

DISTANCE, mode of measuring, 404.

DISTRESS. See *Landlord and Tenant, Rent.*
Distress in effect a pledge, 177.
Abuse of right of, made it a trespass *ab initio*, 131, 132.
Damages, value of goods without deducting rent, 132.
When it does not, 132.
In case of landlord, relief by 11 Geo. 2, c. 19; 132.
On distress for poor rates, by 17 Geo. 2, c. 38; 132.
Tender before distress, makes distress tortious, 130.
Tender after distress, but before impounding, makes only detainer tortious, 130.
Tender after impounding, bad at common law, 130.
Tender within five days of taking now makes detainer tortious, 131.
Tender without expenses, after warrant issued, but before its execution, good, 131.
How to recover goods after return irreplevisable, 131, 133.
In action for irregularity in, actual damage must be proved, 132.
No action for excessive, when, 274.
Landlord may enter house to distrain, 102.
But may not break outer door of any building, 106.
If forcibly ejected after entry, may break in, 106, 109.
What is an entry without breaking, 108, 109.
Tenant, threatened with, by superior landlord, may pay the rent, 156 *et seq.*
Demand of rent, a threat of, when, 157.
Rent paid under, when recoverable from party primarily liable, 156 *et seq.*
Effect of holding distress, on right of action for rent, 340.
Things privileged *at common law*—
Things *absolutely* privileged—
1. Things annexed to freehold, 423, 426.
Growing corn, &c., distrainable by statute, 426.
Fixed machinery, when distrainable, 426, 427.
2. Things delivered in way of trade, 423, 427—429.
Instances within rule, 427, 428.
Instances not within it, 428, 429.
Machinery delivered to work with, how far privileged, 429.
3. Things which cannot be restored in same plight, 423, 424, 429, 430.
Sheaves of corn, &c., distrainable by statute, 423, 429, 430.
Money, 430.
4. Things in actual use, 424, 430.
5. Animals *ferœ naturæ*, 430—432.
Deer, when distrainable, 430.
Dogs, whether distrainable, 430—432.

DISTRESS—*continued.*
Things privileged at *common law—continued.*
Things *absolutely* privileged—*continued.*
6. Things in custody of law, 432—434.
Things taken *damage feasant*, or in execution, 432.
Statutory rights of buyer from sheriff of produce to be consumed on premises, 432.
Landlord's statutory rights where goods seized in execution, 432.
Receiver, goods in hands of, 432, 433.
Insolvent companies, statutory protection for goods of, 433.
Bankrupt, statutory protection for goods of, 433, 434.
Things *conditionally* privileged—
1. Beasts of plough, beasts which improve land, 423, 434.
2. Implements of husbandry, tools of trade, 423, 424, 434.
Not privileged, if there be no other sufficient distress, 434.
Or where there are only things distrainable by statute, 434.
Privilege by agreement with landlord, 434.
Cattle, straying, when privileged, 435.
On way to market, privileged, 429.
Goods of tenants in common under separate demises, 437.
Things privileged *by statute*—
Wearing apparel, bedding, tools, up to 5*l.*, 435.
In case of agricultural holdings—
Machinery hired for tenant's business, 435.
Live stock hired for breeding purposes, 435.
Agisted live stock, partially privileged, 435, 436.
Lodger's goods, when protected, 436.
Foreign ambassadors, &c., goods of, 436.
Hired railway rolling stock, 437.
Gas, water, and electric meters, &c., 437.
Machinery delivered to work with, how far protected, 429.
Produce consumable on premises, after execution, 432.
Insolvent company, goods of, how far protected, 433.
Bankrupt, goods of, how far protected, 433, 434.
Notice of distress, effect of, 427.
Notice of, landlord not bound by his, 497.
Must be in writing, 497, n.
Need not state when rent fell due, 499.
By receiver under mortgage deed, 522, 523.

DIVIDEND WARRANT, whether negotiable, 459.

DIVISIBILITY,
Of contract partially illegal, 371, 372, 413.
One illegal consideration avoids whole contract, 372.
Of conviction, when part bad, 653.

DOCK, liability of owner of, for damage to ship, 198.

DOCK WARRANT,
A document of title, 742.
Whether negotiable, 455.

DOCTOR, right of, to recover fees, 146.

DOCUMENT OF TITLE,
What is, 742.
How transferable, Id.
Dispositions of, by mercantile agent, 741—745.
By vendor or vendee, 745, 746.

DOG. See *Animal.*
Whether distrainable, 430—432.
Trespass or trover for, 430.
Not a subject of tithes, 431.
Battery in defence of, justifiable, 431.
Not a subject of larceny, at common law, 431.
Theft of, punishable by statute, 431.
How far "goods" or "chattels," 431.

DOMESTIC ANIMALS. See *Animal.*
Instances of animals not, 432.

DONKEY, on highway, the case of, 275, 276.

DOORS, breaking doors. See *Sheriff, Distress.*

DORMANT PARTNER, right of, to indemnity, 156.

DRAFT ON BANKER, negotiability of, 455.

DUPLICATE of pawnbroker's ticket, larceny of, 197.

DWELLING-HOUSE. See *House.*

EJECTMENT, ACTION OF,
Sheriff may break house, to deliver possession in, 100.
Plaintiff must recover by strength of his own title, 345.
By grantee of conveyance, grantor cannot plead his own fraud, 389.
By mortgagee. See *Mortgagor and Mortgagee.*
Right to possession the only question in, 513.
Venue formerly local in, why, 589.
When entry may be made without bringing, 133.

ELECTION,
Once made and expressed, cannot be retracted, 38.
To treat as tort-feasor or tenant, 509.
By tenant to deduct land-tax from rent, 164.

ELECTOR. See *Returning Officer, Voter.*

ELECTRICITY, liability for escape of electric current, 828.

EMBLEMENTS,
Occupation in lieu of, 534.
Tenant for fixed term generally not entitled to, Id.
Mortgagor and his tenants, not entitled to, 495, 502, 526.

ENTIRETY. See *Divisibility.*

ENTRY,
For a forfeiture, what sufficient, 43.
Estate which began by livery determinable only by entry, 41.

ENTRY—*continued.*
Lessee for years cannot bring *trespass*, before, 513.
By right, and holding over without right, creates tenancy at sufferance, 526.
Right of, may be enforced by peaceable, 133.
Without ejectment, 133.
Liability for assaults, &c., in making forcible, 133, 134.
To take goods, when justifiable, 135.
On taking from Old Lady-day, by custom, 535.

EQUITABLE DEFENCE,
Now available in all branches of High Court, 339, 342.
Agreement to suspend right of action, whether an, 339.

EQUITABLE DOCTRINE OF NOTICE, 85 *et seq.*

EQUITY,
Rules of, to prevail, if in conflict with law, 152.
Equitable jurisdiction *in personam*, 603.
Relief in, against forfeitures, 51.
Notice taken of an, at law, 771.
"The law merchant a system of," Id.

ERROR,
A writ of right, 281.
Except in treason and felony, 281.
Does not lie on a conviction by magistrate, 658.

ESCAPE, retaking on, 106, 109, 110.

ESTOPPEL.
Nature of an estoppel, 91.
Estate by, fed by an interest, becomes one in interest, 92, 93.
Where truth appears by same instrument, 93—95.
Where pleadings disclose the truth, 95.
None, against denying *particular* estate laid in lessor, Id.
Unless, according to terms of lease, he has that estate, Id.
Against lessee, though lessor's title does not appear, 95, 96.
Assignee of reversion by, may sue on covenants, 91, 92.
Though assignment discloses want of title, 92.
Covenants will run with an estate by, 91 *et seq.*
Tenant estopped from disputing landlord's title, 503, 505, 507.
Receipt does not work an, 328.
Instrument negotiable by, when, 465, 466.
By signing negotiable instrument in blank, 473.

EVIDENCE,
Of custom, to explain, &c., written instrument, 528 *et seq.*
Parol, inadmissible to vary written instrument, 292, 535 *et seq.*
Exception, to rebut fraud, 13, 29.
Inadmissible to explain word defined by statute, 551, 552.
Opinion, when admitted as, 486, 487 *et seq.* See *Witness.*
Governed by *lex fori*, 621, 622.
Indian registration law not mere law of, 621.
Judgment conclusive in, of facts stated therein, 641.
So conviction, Id. See *Conviction.*

EVIDENCE—*continued.*
Conviction when bad for want of, 664, 665.
Presumption against party withholding, 342, 353.
Of request, what sufficient, 147.
Of loss by carrier, 222.

EXCEPTION, in Act creating offence, whether to be negatived, 651.

EXCHEQUER BILL, negotiability of, 455.

EXECUTED AND EXECUTORY. See *Consideration.*

EXECUTION. See *Fi. fa., Sheriff.*
When good, though by trespass, 111 *et seq.*
When dwelling-house may be broken to levy, 99 *et seq.*
Barn or outhouse may be broken to levy, 106, and *Addenda.*
Liability of sheriff, when execution set aside for illegality, 113.
To defraud creditors, void within 13 Eliz. c. 5; 19.
Sale to defeat *expected*, when good, 18.
Seizure of lease, whether breach of condition against assignment, 46, 47.
Distress of things taken in, 432. See *Distress.*

EXECUTOR AND ADMINISTRATOR,
Conveyance by, when void against creditors, 22.
Whether bound by conditions against assignment, 47.
Are assigns, 47, 56.
Executor *de son tort*, an assign, 47.
Ratification by, 350.
Part payment or acknowledgment by co-executor, 563.
Debt on simple contract maintainable against, 414.

EXETER, custom of, as to horse at livery, 119.

EXONERATION AND DISCHARGE. See *Accord and Satisfaction.*
1. *From claims not under seal*, 336 *et seq.*
By oral waiver before breach of contract, 336, 337.
Without consideration, Id.
For less than agreed, 337.
Of unliquidated overdue claim, by payment of less, Id.
So, of uncertain and disputed overdue claim, Id.
Of liquidated overdue claim, by payment of different thing, Id.
By negotiable instrument, Id.
By substitution of several for joint liability, Id.
Of bill of exchange or note, before due, by waiver, 337, 338.
By act of third party, though claim liquidated, when, 338.
By payment by third party, with debtor's assent, Id.
By composition with creditors, Id.
By promise accepted in satisfaction, 339.
Distinction, Id.
By executory accord, whether, 336, 339.
By covenant not to sue, 339, 340.
2. *From claims on instruments under seal*, 325, 326, 341, 342.
Could not be by accord and satisfaction before breach, 341.
Nor after, unless sounding in damages, Id.
Payment on day and acquittance, when required, Id.
Effect of Judicature Acts, as to equitable defences, 342.

EXPERT. See *Witness.*

EXTINGUISHMENT,
Of debt by seizure under *fi. fa.*, 113.
By alteration of instrument, 781.
Of right of action once suspended, 339, 340.
Of liability on contract, 336 *et seq.* See *Exoneration.*
Of liability on covenant, 341. See *Deed.*

FACTOR,
His liability to his principal, 179.
Usage to sell in his own name, 542.
Principal bound by sale by, 741.
Formerly not by pledge by, 693, 741.
Effect of Factors Acts, 741—745.

FALSE IMPRISONMENT, in colony, action against governor of, 572 *et seq.*

FATHER,
Promise by, to pay for support of deserted child, not implied, 144, 145.
Express promise by, to pay for support of child, good, 145.
Not liable in law for child's debts, Id.
Action for daughter's seduction, when maintainable by, 266.

FELONY,
Conveyance after felony, when void, 6, 18.
Breaking into house to arrest for, 111.
By carrier's servants, 209, 212.
Compounding felony, illegality of, 355, 364 *et seq.*
When cause of action, a, 278—280.

FERRY,
Carriers by, liability of, 169, 204, 224.
Damage to, by opening of bridge, not actionable, 267.

FICTION OF LAW,
In laying venue, 591.
In dating writs, Id.
When it may be contradicted, when not, Id.

FI. FA. See *Execution, Sheriff.*
Seizure under, effect of, on debt, 113.

FILTH,
Liability for escape of, on to neighbour's land, 803, 806—808, 826.
For sewage escaping from unknown drain, 826.
For sewage polluting water percolating to neighbour's well, Id.

FINDER,
His rights against third parties, 343.
His liability to true owner, 178, 190, 453.
Of bank-note, action against, 453.
When guilty of larceny, 190.

FIRE. See *Sparks*.
Pawnbroker's liability for loss by, 197.
Carrier by sea not liable for loss by, 218.
Liability of bailee for loss by, 169.
Damage to neighbour by, when actionable, 272, 825.
Deed burnt with house, parol evidence of contents, 778.

FIXTURES,
Not distrainable, 423, 426, 427.
What, may be taken in execution, 426.

FLOODS,
A common enemy, 824.
Distinction between keeping out and getting rid of, 823, 824.
Extraordinary, may be "act of God," 829.

FORCIBLE ENTRY, to what civil actions it may give rise, 133, 134.

FOREIGN ATTACHMENT, against buyer, does not defeat stoppage *in transitu*, 733.

FOREIGN BANKRUPTCY, effect of, 618, 619.

FOREIGN CAUSE OF ACTION,
Local, excluded, 602, 603.
Notwithstanding abolition of local venues, 602.
Actions, where title to foreign land in dispute, not entertained, Id.
Except sometimes in equity, through jurisdiction *in personam*, 603.
Transitory actions generally entertained, Id.
Possible exception where parties aliens not domiciled here, 604.
Contracts must not violate English law, 605.
Torts must be actionable in both countries, 605—607.
Necessity for service of process, 607.
Locus regit actum, a canon of jurisprudence, 608.
Foreign judgments, 608, 620.
Maritime contracts, 608, 609.
Cause of action governed by *lex loci*, procedure by *lex fori*, 609, 615.
Instances of rule as to *lex fori*, 619 *et seq.*
Effect of conflict of laws as to bills of exchange, 609 *et seq.* See *Bill of Exchange*.
Effect of Statutes of Limitations, 615 *et seq.*
Story's rule considered, 616, 617.
What a discharge of a foreign cause of action, 618.
Evidence governed by *lex fori*, 621, 622.
Indian registration law not mere law of evidence, 621.
Statute of Frauds affects procedure only, 622.
Foreign law, how ascertained, 622, 623.
In absence of proof, presumed identical with English, 623.
Pendency of foreign action, when ground for stay, Id.
Contracts made abroad, if sued on here, affected by s. 4 of Statute of Frauds, 297, 622.

FOREIGN INSTRUMENT,
When negotiable in this country, 462, 463.
Effect of negotiability on probate duty, 468.

FOREIGN LAW. See *Foreign Cause of Action.*
How proved, 622, 623.
Presumption of identity with English, 463, 623.

FOREIGN OFFICIALS, actions between, here, 629.

FORFEITURE. See *Condition.*
Not favoured in law, 37.
Meaning of, in 13 Eliz. c. 5; 6.

FORGERY,
A misdemeanour at common law, 757.
Of bond in another's name, not actionable before bond put in suit, 236.

FORNICATION,
Bond for payment for future, void, 368.
In consideration of past, good, Id.

FRANCHISE,
Action for invasion of, though no pecuniary loss, 253, 257; see 244, 245.
In corporation, for benefit of individuals, 248—250.

FRAUD,,
Fraudulent conveyance "clad with a trust," 2.
"Badges of," on assignment, Id.
The common law "abhors all," 5.
Statutes against, liberally construed to defeat, 5.
Estate obtained by, when not avoided, 8, 9.
Intent to defraud, what such under 27 Eliz. c. 4; 24.
Generally, a question of fact, 13.
Effect of notice of, to person taking negotiable instrument, 469—473.
By previous holder of negotiable instrument, effect of, 472.
Distinction between "fraud" and "gross negligence," 469.
Master's liability for servant's, 353.
Conviction obtained by, to be quashed, 669, 670.
Judgment obtained by, may be impugned in collateral proceedings, 669.
Avoids all judicial acts, ecclesiastical and temporal, Id.
"Fraud or Felony is not to be presumed," 761.
"Fraud vitiates everything," 766.
Statute of Frauds, not to be made means of, 487.

FRAUDS, STATUTE OF. See *Statute of Frauds.*

FRAUDULENT CONVEYANCE, TRANSFER, OR GIFT.
1. Void as against creditors and others, 13 Eliz. c. 5; 1—24.
Assignment in consideration of debt without change of possession, void, when, 1 *et seq.*
Assignment void if not both *bonâ fide* and for good consideration, 2—4.
Not *bonâ fide* if subject to trust for assignor, 2.
Trust implied where consideration only *of nature*, 3, 4.
Consideration of nature insufficient, Id.

FRAUDULENT CONVEYANCE, TRANSFER, OR GIFT—*continued.*
Assignment after indictment, to defeat crown was void, 5, 18.
Secus, where *bonâ fide* and for good consideration, 18.
"Badges of Fraud," what are, 2.
How to make a valid assignment in satisfaction of a debt, 3.
Good consideration, what, 3, 4.
Fraud, a question of fact for jury, 11, 12, 13.
Presumption of, from continuance in possession, 2, 11.
From joint possession of assignor and assignee, 12.
May be rebutted, how, 12, 13.
By notoriety of transfer, 13.
Where continuance in possession consistent with deed, 13, 14.
By impossibility of transfer of possession, 15.
Transfer not necessarily void under 13 Eliz., for secrecy, 14.
Effect of Bankruptcy Acts, Id.
Of Bills of Sale Acts, 15.
Of Merchant Shipping Acts, Id.
Good as against maker, 15.
Exceptions to this rule, 16.
And good against all but creditors or *bonâ fide* purchasers, 15, 16.
Protection given to purchasers for value without notice, Id., 10.
Ground of decision in *Twyne's Case*, *mala fides*, 16, 17.
A debt a good consideration within 13 Eliz., 16.
Transfer to prefer particular creditors not void under 13 Eliz., 17.
Effect of Bankruptcy Act, Id.
Trust deeds for creditors, if *bonâ fide*, not void under 13 Eliz., Id.
Bonâ fide sale for value which defeats execution, when valid, 18.
Separation deeds, when valid, Id.
Marriage settlements, when void under 13 Eliz., 18, 19.
Dissolutions of partnership, &c., when void, 19.
Judgments and executions "contrived of malice," Id.
Transfers fraudulent under 13 Eliz., are acts of bankruptcy, Id.
Voluntary conveyances, when void under 13 Eliz., 19—22.
Rule laid down by Kindersley, V.-C., 20.
Right of *subsequent* creditors to impeach conveyance, 20, 21.
Conveyance before entering trade, Id.
Lord Westbury's *dicta* in *Spirett* v. *Willows*, 21.
Inference of intent to defeat creditors, when drawn, 22.
Rule derivable from cases, 22.
Effect of Bankruptcy Act, Id.
Where debts incurred by ancestor of heir, Id.
Fraudulent conveyance by heir or executor, Id.
By testator, when property conveyed assets, Id.
Penalties under 13 Eliz., recoverable by whom, 22, 23.
Upon what property 13 Eliz. operates, 23.
Conveyance of *Copyholds* now within Act, Id.
Of *choses in action*, how far within Act, Id.

FRAUDULENT CONVEYANCE, TRANSFER, OR GIFT—*continued.*
Effect of 13 Eliz. upon duty of sheriff, 23, 24.
Creditor's rights under 13 Eliz. not barred by *laches*, 24.
2. Void as against subsequent purchasers, 27 Eliz. c. 4; 6, 24—30.
Effect of Act on voluntary conveyances, 8, 24.
Remedied by Voluntary Conveyances Act, 1893; 24.
Conveyance good as against grantor, 25.
Conveyances with power of revocation, when void, 6, 7, 25.
Who are purchasers within 27 Eliz.; 8—10, 25—27.
Only purchasers for money or other valuable consideration, 8.
Mortgagee is, 25.
Lessee at rack rent is, Id.
Lessee without fine or rent, not, 8, 26.
Judgment creditor is not, 26.
A will is a voluntary conveyance, Id.
Not so, an assignment of leaseholds, if responsibility attached, Id.
Conveyance for inadequate consideration, when voluntary, Id.
Only purchaser from grantor himself can impeach, Id.
Purchaser from grantor's heir or devisee cannot, Id.
Nor person claiming under 2nd voluntary conveyance, Id.
Nor husband taking by operation of law, Id.
Rule in *Burrel's Case* explained, 27.
Proviso in 27 Eliz., in favour of *bonâ fide* purchasers, 27.
Who are such, 27—29.
How far consideration of marriage extends, 28, 29.
Actual consideration may be proved, to rebut fraud, 29.
Adequacy of consideration how far material, 29, 30.
27 Eliz. more beneficial than 13 Eliz.; 30.
Copyholds are within 27 Eliz.; Id.
Equitable interests are, Id.
Personalty, not, Id.
Endowment of charity, not, Id.

"FREE ON BOARD," effect of, 728.

FREEHOLD,
Things annexed to, not distrainable, 423, 426.
When liable to execution, 426.

FREIGHT,
Party receiving cargo, when liable for, 460, 461.
Liability for, of indorsee of bill of lading, 739, 740.

FURNITURE,
Custom of hotel-keepers to hire, 540, 551.
In warehouse, not distrainable, 427, 428.

GABBERTS, liability of owners of, 219.

GAMING,
Bonds contravening statutes against, void, 369.
Money lent for purpose of illegal, irrecoverable, 384.

GAMING—*continued.*
Money paid by loser to winner of illegal game, irrecoverable, 384, 386.
Paid to stakeholder, when recoverable, 386, 387.
Received by winner's agent, recoverable by winner, Id.

GAS meters, &c., not distrainable, by statute, 437.

GAZETTE, publication of dismissal in, 630.

GENERAL AVERAGE, usage not to pay, on deck cargo, 541.

GEOGRAPHY, meaning of geographical terms, by custom, 546.

GIFT. See *Fraudulent Conveyance.*
Of chattels, by parol without delivery, void, 148.

GOODS. See *Chattels.*
Bills of sale of, 15.
Mortgage of, may be without deed, 194.

GOVERNMENT, officer of, doing wrong under order of, liable to action, 629, 630.

GOVERNOR,
Of colony, extent of his exemption from liability, 584 *et seq.*, 605, 623, 624.
Actions against, in colonial courts, 623, 624.
Actions against here, 572 *et seq.*, 588, 589, 606.
Must plead his justification, if any, 585, 586.
Criminally liable by statute, 581.
Of fort, when he may insure, 480.

GRANT,
Implied a covenant, 54, 57, 58, 64, 158.
Quære, whether it does so now, 158.
Does not, in case of freehold, 57, 58.
Covenant may enure as a grant, 89.

GRATUITOUS
Service, 136. See *Consideration.*
Agent or bailee, his liability, 167 *et seq.* See *Bailments.*

GUARANTEE must be in writing and signed. See *Statute of Frauds.*

HARDWICKE, LORD, decisions of, ill-reported, 711.

HEIR,
Conveyance by, when void against ancestor's creditors, 22.
Not bound by ancestor's conveyance to evade Mortmain Acts, 389.
Of assignee may bring covenant, 56.
To mortgagor, not tenant to mortgagee, by paying interest, 519.

HIGH SEAS,
Action for collision on, negligence essential to, 809, 810.
Action against alien for injury on, 605, 619.

HIGHWAY,
Liability for animal straying on, 827.
Risk of accident undertaken by persons using, 808, 827.
And by persons whose property adjoins, Id.

HIRE-PURCHASE AGREEMENT, possession under, whether affected by Factors Acts, 746.

HIRING. See *Bailments*.

HOMICIDE,
In defence of house, 100.
In self-defence, or by misfortune, Id.
Negligent, action for, under Lord Campbell's Act, 267.

HORSE. See *Animal*.
Pawnee of, feeding, may use reasonably, 177.
Lender of, duty to disclose vices of, 229.
Borrower of, his liability for, 175, 176.
Hirer of, his liability for, 191.
Liability of carrier of, 205, 211, 213.
At livery, eating more than worth, may not be sold, 119.
Except by custom of London and of Exeter, 119.
In Lincoln's Inn Fields, the case of, 444.
"Our ancestors settled it is not nature of, to kick," 804.

HOTEL. See *Innkeeper*.
Custom of hotel-keepers to hire furniture, 540, 551.

HOUSE,
Every man's dwelling-house is his castle, 99 *et seq.*
Only a castle for himself and his family, 104, 110.
Rules as to sheriff breaking, or entering. See *Sheriff* (and *Addenda*).
As to landlord doing so to distrain. See *Distress*.
Killing in defence of, when justifiable, 100.
Assemblage in defence of, lawful, Id.
Occupied, when may be pulled down, 134.
Offensive trade near, 268, 269. See *Nuisance*.
Right of support for, 269. See *Support*.
Damage to, by letting down the soil, 270, 271. See *Support*.

HUNDREDERS, formerly necessary on jury, 596, 599.

HUSBAND AND WIFE. See *Marriage*.
Sale by husband to wife upheld against creditors, 13.
Action for enticing wife away, 258.
Agreements for separation, when void, when valid, 366, 367.

IDEM SONANS. See *Name*.

IDENTIFICATION,
Of passengers with driver, *qua* latter's negligence, 277.
This doctrine now over-ruled, Id.
Of child with attendant, *qua* latter's negligence, 278.

ILLEGALITY,
By statute or by common law, *semble* no distinction between, 357, 361, 371.
Of promise of reward for attempt to obtain pardon, 136.
Of contract to pay for not committing a crime, 359.
Of contract to tempt a man to transgress the law, 359, 360.
Of consideration pleadable to action on deed, 360 *et seq.*, 363.
Though deed good on the face of it, 356.
Though plea inconsistent with terms of deed, 363, 364.
Court will not enforce illegal contracts if illegality appears, 364.
Examples of deeds and contracts illegal at common law, 364—368.
Contracts against public policy, 364.
Contract to compromise pending criminal proceedings, 364, 365.
Contract not to prosecute, 365.
Contract to pay for withdrawal of election petition, Id.
Or of proceedings against solicitor, Id.
Or of opposition to bankrupt's discharge, Id.
Or of divorce suit, Id.
Contract to indemnify bail, Id.
Deed for *future* separation of husband and wife, 366.
Separation deed, when lawful, 366, 367.
Covenant by husband to give up control of child, 367.
Covenant to let wife live as if unmarried, Id.
Covenant to pay annuity without *dum casta* clause, Id.
Covenants and conditions against marriage, Id.
Marriage brocage bonds and contracts, Id.
Grant conferring judicial office on interested party, 368.
Bonds given for immoral considerations, Id.
In consideration of past seduction, valid, Id.
Contract of hire for immoral purpose, Id.
Examples of bonds and contracts illegal by statute, 368 *et seq.*
Gaming: Sale of offices: Simony: Usury: 369.
Other instances, 369, 370.
Contracts contravening policy of Bankruptcy Acts, 370.
Policy on illegal voyage, Id.
Illegalities under Companies Acts, Id.
Trades unions, Id.
Deeds contravening the Mortmain Acts, 370, 389.
Maintenance and champerty, 371.
Contracts capable of being legally performed, Id.
One void condition in bond does not avoid the rest, Id.
Unless by terms of statute, 371.
The good and bad parts must be separable, 372.
One illegal *consideration* avoids whole contract, Id.
Secus, where one consideration merely void, 373.
Covenants in lease granted for illegal purpose, not enforceable, Id.
Imposition of penalty implies prohibition, Id.
Contracts with persons incurring penalties, when illegal, 374.
Contracts, not enforceable while executory, sometimes available when executed, 375.
Contracts not illegal because involving breach of private duty, Id.
But action lies for inducing person to break contract, 281.

ILLEGALITY—*continued.*
Contracts, when vitiated by past illegality, 375—377.
Fisher v. *Bridges* considered, 377.
Contracts held void for constructive illegality, Id.
Dictum of Cave, J., as to "public policy," Id.
Doctrine of *Ultra vires* explained, 378 *et seq.* See *Corporation.*
Statute, whether imperative or directory, 381, 382.
Contribution between wrong-doers, not allowed, 383, 384, 389, 390.
Rule inapplicable to tort-feasor by inference of law, 390.
Nor where act not clearly illegal in itself, Id.
Money paid under illegal contract not recoverable, 384 *et seq.*
Money lent for express purpose of illegal gaming, 384.
Money paid by loser to winner of illegal wager, Id.
Premiums paid on illegal insurance, 385.
Exceptions to rule, 385 *et seq.*
Where money obtained by oppression, 385.
Rights of trustee in bankruptcy, 386.
Money paid to stakeholder, 386, 387.
Money received by agent of winner, 386.
Test of plaintiff's right to recover, 387.
Whether recoverable where illegal purpose not executed, 387, 388.
Taylor v. *Bowers* doubted, 388.
Conveyance of estate for illegal purpose held good against grantor, 389.
To evade Mortmain Act held bad against grantor's heir, Id.
Corporation, when estopped from pleading illegality of its debentures, Id.

INADEQUACY. See *Adequacy, Consideration.*

INCORPOREAL HEREDITAMENT, covenant running with, 91.

INDEMNITY. See *Contribution.*
To agent, 147.
To surety from principal, 149 *et seq.*
For compulsory payments, 149.
When for payment of costs of defence, Id.
Not for costs of improperly defending action, Id.
Question for jury whether costs properly incurred, 149, 150.
Effect of giving notice to principal, 150.
For amount of compromise, when, 149.
When costs of defence not recoverable from sub-lessee, 150, 151.
Remedies of sureties under 19 & 20 Vict. c. 97; 154, 155.
No indemnity to wrong-doers, 154, 155, 383 *et seq.*
Qualifications of rule, 154, 155, 390.
Case of newspaper proprietor and editor, 155.
Case of dormant partner, 156.
By landlord to tenant, 156 *et seq.* See *Landlord and Tenant.*
Implied, when excluded by express covenant, 158.
Between lessee and assignees, 70, 166.
Between buyer and seller of shares, 70, 166.
Custom of Stock Exchange, where vendor of shares entitled to, 545, 546.

INDEMNITY—*continued.*
To broker employed to sell on Stock Exchange, 546, 548—550.
Of bail in criminal case, illegal, 365.
Contracts to indemnify, not within Statute of Frauds, 289.

INDIA BOND, not negotiable, 456.

INDICTMENT, proper remedy for grievance to community, 253, 274.

INFANT. See *Child.*
En ventre sa mère, injury to, held not actionable, 202.

INFORMATION OR COMPLAINT,
The foundation of jurisdiction for summary conviction, 649.
Except where power to convict on view, Id.
Generally sufficient if in words of Act creating the offence, 650, 651.
Defects in, or variance, when immaterial, 647, 649.
When a ground for adjourning case, 647.
What should be stated in, 650.
When need or need not be on oath, 649, 652.
When justice may proceed *ex parte* on, 653.
When warrant for non-appearance to summons on, 652.
When complainant need not prove negative stated in, 651.
Nor state exceptions of Act in, Id.
Evidence not to be stated in, 649, 653.
When warrant may be issued on, 649.
Proceedings on, 652 *et seq.*

INJUNCTION,
Remedy by, for infringement of statute, 285.
For breach of express negative promise, 339.
To enforce restraint of trade, 401.

INJURY. See *Action, Damage.*
Test of, 259, 273.
Damage presumed from, 273.

INN. See *Innkeeper.*
Definition of common inn, 124; see 116.

INNKEEPER,
His liability for loss of guest's goods, 115 *et seq.*
Old form of writ, 115.
Liable only for goods within his inn, 116, 118.
Unless he himself put them outside, 117, 122.
Liable as innkeeper only for goods received by him as such, 124.
Liable for his own servants, and for strangers, 117, 118.
Not liable for guest's companion or servant, 117.
Liable for guest's deeds, &c., 118; and money, 122.
Not liable for act of God, or Queen's enemies, 123.
Nor where loss due to guest's negligence, 117, 120—123.
Guest's omission to lock door, 117, 120, 123.
Evidence, burden of proof, 121, 123.
May limit his liability by special contract, 124.

INNKEEPER—*continued.*
Liability limited by 26 & 27 Vict. c. 41 ; 119.
Who is a guest, who not, 116, 122, 124.
His duty to receive guests, 125.
His lien on guests' goods, 125, and *Addenda.*
His power of sale under Innkeepers Act, 1878 ; 126.
Custom of London, and Exeter, as to horses at livery, 119.
Not entitled to detain guest, 126.
Not liable for battery of guest, 118.

INQUISITION, quashed for error not apparent on face of, 663.

INSOLVENCY,
Definition of, in Sale of Goods Act, 719.
What is the state of, 21.

INSTRUMENTS,
Of man's trade, when privileged from distress, 423, 424, 434, 435.
Of husbandry, their privilege from distress, 423, 434.

INSURANCE,
Nature of contract, 477.
Why concealment avoids policy, 477, 486.
Concealment by underwriter may vitiate, 477, 478.
Cicero's definition of concealment, 478.
What information to underwriter superfluous, 478, 479.
What waived, 479.
Concealment of matter within private knowledge, 483.
Opinion of broker as to materiality of facts, 486, 487 *et seq.*
Warranty of seaworthiness, when implied, 484 ; see 220.
Of fort, by governor, when valid, 480.
Of wages by seamen, whether void, Id.
Wagering, when void, 474.
Where property has not passed under St. of Frauds, 301.
Payment of premiums by one beneficiary, 142.
Policy of, on illegal voyage, void, 370.
Premiums paid on illegal, irrecoverable, 385.
Contract of sea, without stamped policy, how far a good consideration, 374.
Usage as to duration of underwriter's liability, 541.
Marine insurance, rules imported into contract of, Id. See 554, 555.
Assignment of life policy, assigned abroad, 614.

INTENTION,
Of buyer, not to take possession, 727.
As to delivery of whole, where part delivered to buyer, 730—732.
Property passes on sale without delivery if so intended, 148.

INTEREST,
Mere receipt of, by mortgagee, no recognition of tenancy, 509.
Heir to mortgagor, not tenant to mortgagee, by paying, 519.

INTERLINEATION, effect of, 784.

INVOICE, effect of, 705.

IRELAND, position of Lord Lieutenant of, 624.

IRON SCRIP NOTE, whether negotiable, 455.

IRON TRADE, custom of, as to warrants, 542.

IRON WARRANT,
Whether negotiable, 455, 542.
Custom as to, 542.

ISLE OF MAN, question of seignory in, triable here, 586.

JEOFAILS, Statute of, curing wrong venue, 598, 599.

JEWELS,
Pawnee of, may use at his peril, 177.
Liability of goldsmith employed to set, 198.

JOINT CONTRACTOR. See *Contribution*, *Statute of Limitations*.

JONES, SIR W., on Bailments, a great authority, 188, 227.

JUDGE,
Exempt from civil liability for judicial acts, 283, 284, 631, 642; see also 235—237.
Must plead his justification, 584.
Words spoken by, privileged, 265.
Grant of judicial office to interested party void, 368.

JUDGMENT,
When void, against creditors, 19.
Presumption arising from unreversed, 261.
Of competent tribunal, conclusive as to facts stated in it, 641.
But fraud avoids all judicial acts, 669.
When entered *nunc pro tunc*, 326, 342.

JURISDICTION,
When our courts undertake, as to foreign matters, 572, 602 *et seq.*
Not, when title to foreign land in dispute, 602, 603.
Exceptions in equity, through jurisdiction *in personam*, 603.
Otherwise, generally undertaken, though parties aliens, 603 *et seq.*
Possible exception, where matter of contract abroad, 604.
Case of ship brought to this country, Id.
Contract must not violate our law, 605.
Tort must be actionable both here and abroad, 605—607.
Case where tort on high seas, 605, 619.
Effect of *ex post facto* legislation abroad, 606.
Necessity for service of process, 603, 607.
Not extended by abolition of local venues, 602. See *Venue*.
When specially undertaken at request of foreign state, 607.
Crimes only punishable in country where committed, 575.
Effect of submission to, 578.
Plea to, when necessary, 584.

JURISDICTION—*continued.*
Of court, not ousted by mere agreement of parties, 340.
Condition against action before award, valid, 340, 341.
Liability of justices acting without, 632 *et seq.*
Conviction good on face may be quashed for want of, 661 *et seq.*
Defect of, in conviction, mandamus to show, will not issue, 661, 662.
Whether should appear affirmatively on conviction, 646.
To convict, when ousted by claim of right, 665—667.
Not acquired by erroneous decision on collateral point on which jurisdiction depends, 666.
"Declining jurisdiction," what is, 644.
See also *Certiorari, Crown, Foreign Cause of Action, Governor, Judge, Justice of Peace, Parliament, Sovereign Prince.*

JURY,
Fraud now question of fact for, 13.
Evidence in mercantile cases formerly left to, generally, 539, 685.
Construction of contract not left to, 560.
Trial by magistrate without, a statutory proceeding, 646.
Right to claim trial by jury, when, 656.
Formerly of the hundred, 599.
Now summoned *de corpore comitatus*, Id.

JUSTICE OF PEACE,
Trial by, without jury, a statutory proceeding, 646.
When liable to action for conviction or order, 632 *et seq.*
Not liable for erroneous decision on question of fact, 641, 657.
Liable for mistake of law, if conviction enforced, Id.
For enforcement of several convictions for one offence, 632.
Of conviction void for want of jurisdiction, 640.
Of joint or single conviction for several offences, 641.
Protection given to, by Justices Protection Act, 1848; 642—645.
Sect. 1. Acting *within jurisdiction*, 642.
Not liable, unless he acted maliciously and without probable cause, Id.
Semble, action lies, though conviction not quashed, Id.
Quære, within general protection of judge, Id.
Sect. 2. Acting *without* or *in excess of jurisdiction*, 642, 643.
Not liable for conviction, unless it be quashed, 642.
Nor for warrant, if summons previously disobeyed, Id.
Excess and erroneous exercise of jurisdiction distinguished, 643.
Not liable if jurisdiction to order act complained of, Id.
Sect. 3. Not liable for warrant granted on conviction by other justice, Id.
Sect. 4. Nor for warrant for poor rates against parties rated, Id.
Sect. 5. Nor for acts done under order of Q. B., 643, 644.
What acts the Q. B. will order, Id.
Sect. 6. Protected by confirmation of conviction on appeal, 645.
Sect. 7. Action against, when set aside, Id.
Sect. 10. Exemption from county court, Id.
Sect. 13. 2*d.* damages, if plaintiff guilty and duly punished, Id.

JUSTICE OF PEACE—*continued.*
Effect of Public Authorities Protection Act, 1893; 645.
Action must be brought within six months, Id.
Plea of tender of amends: Costs: Id.
Information against, not before conviction quashed, 637.
When may draw up, or amend, conviction, 645, 646.
Provisions of Summary Jurisdiction Acts, 646—649, 654—656, 670—673.
May compel attendance of witness, when, 648.
Former requisites of conviction by, 649—654. See *Conviction.*
Jurisdiction of, as to indictable offences, 656.
No appeal from conviction of, unless given by statute, 657.
Remedy against conviction by *certiorari*, 657 *et seq.* See *Certiorari.*
Conviction by, when quashed for want of jurisdiction, 661 *et seq.* See *Certiorari.*
Interested, conviction by, void, 663, 664.
Corruption of, conviction by, may be quashed, 669.
Though conviction quashed, no action lies, when, 657.
Jurisdiction of, when ousted by *bonâ fide* claim of title, 665—667.
Special case stated by, under Summary Jurisdiction Act, 1857; 670—672.
High Court can compel, to state, 671.
Powers of High Court on, 671, 672.
Costs of, Id.
Protection to justices acting on affirmed conviction, 672.
Right to, not excluded by statute giving another appeal, Id.
Special case, under Summary Jurisdiction Act, 1879; 672, 673.

KING. See *Crown, Sovereign Prince.*

KNOWLEDGE,
Meaning of, 470.
When presumed, where there were reasonable means of, 208.

LACHES,
Equitable doctrine of, does not bar legal rights, 24.

LADY DAY,
When "old" may be shown to have been intended, 552, 553.
Taking from old, custom justifying entry before, 535.

LAND,
Covenants run with, when, 52 *et seq.* See *Covenants.*
Natural and ordinary user of, no cause of action, 817, 822.

LANDLORD AND TENANT. See *Condition, Covenant, Distress, Indemnity, Lease, Rent, Tenant.*
Can assignor and assignee be? 96—98.
Right of re-entry for condition broken, 31 *et seq.* See *Condition.*
Indemnity to tenant for charges, 156 *et seq.*
For charges on land or on landlord, 157.
When such payments compulsory, 157, 158.

LANDLORD AND TENANT—*continued.*
Tenant's right to appropriate payment of charges to rent, 157.
May plead payment, as *payment* of rent, when, 157, 162.
May deduct amount from rent, Id.
And sue for excess, if any, 157.
Within what period may deduct for taxes paid, 163.
Right to deduct for ground rent, when, 164, 165.
Construction of lease by custom of country, 528, 538, 552, 556.
Rights between, by custom, Id. See *Custom.*
When tenant may hold over in lieu of emblements, 534.
Relation of, between mortgagee and mortgagor. See *Mortgagor.*
Between mortgagee and mortgagor's tenant, Id.
Tenant cannot dispute title of landlord under whom he entered, 503.
May show that his title has determined, 503, 507.

LAND TAX,
Tenant's right to repayment of, 163, 164.

LARCENY,
Of dogs, none at common law, 431.
Of written instrument, 119.
By finder of goods, 190.

LAW, foreign. See *Foreign Law.*

LEASE,
Condition in, not to alien without licence, 31 *et seq.* See *Condition.*
When covenants in, run, 52 *et seq.* See *Covenants.*
Granted for illegal purpose, covenants in, not enforceable, 573.
Custom of country, when may explain or add to, 538, 552, 556.
Who pays for, 551.
Parol, of shooting over Scotch moor, 622
Pledged, held not saleable on default, 193, 194.

LEEMAN'S ACT (30 & 31 Vict. c. 29), usage to disregard, 554.

LENDER, his duty to disclose defects, 228—230.

LESSEE. See *Covenant, Estoppel, Landlord and Tenant.*
When a purchaser within 27 Eliz. c. 4; 25, 26.
Sublessee, when not liable to indemnify lessee, for costs of action for breach of covenant, 150.

LETTER,
Not produced, presumption as to sale or contents, 354.
Written without prejudice, 571.

LIBEL. See *Privileged Statement.*
In newspaper, criminal liability of proprietor, 155.
No indemnity from editor, Id.
Reports of public meetings, &c., 264.
Damage, when too remote, 280, 281.

LICENCE,
To assign lease, 31 *et seq.* See *Condition.*
To break covenant, when presumed, 45.
To enjoy easement, whether title against wrong-doer, 345 *et seq.*
To use way, action against stranger for obstructing, 347.

LICENCE—*continued.*
Enuring as a lease, 515.
Parol, no *legal* defence to deed, 341.

LIEN,
Confers no right to sell, 192.
Difference between, and pawn, Id.
Relinquishment of, a good consideration, 461.
Consignee's lien in respect of advances, 745.
Innkeeper's, 125, and *Addenda.*

LIGHTERMAN,
Liability of, as carrier, 199.
For fire (*Morewood* v. *Pollock*), 218.
For robbery, 219.

LIMITATIONS, STATUTE OF. See *Statute of Limitations.*

LIQUIDATED: Instance of claim *primâ facie* such, 331.

LIVE STOCK. See *Animal.*
Covenant as to, does not run with land, 54, 89.
Bailed for breeding purposes, not distrainable, 435.
Agisted, how far distrainable, 435.

LIVERY STABLE,
Carriage of another in, whether distrainable, 436.
Horse at livery, eating more than he is worth, 119.

LLOYD'S COFFEE HOUSE, usage of, how far binding, 548, 549.

LOAN, 175, 190, 228. See *Bailments.*

LOCAL ACTION. See *Venue.*
Distinguished from transitory, 597.
Arising abroad, not entertained by our courts, 602, 603.

LODGER,
Goods of, protected from distress, when, 436.
Who is, 436.
Letting to, when not a breach of condition, 46.
Duty of landlord to, 125.

LONDON,
Meaning of, in contracts, 412, 413.
Custom of, as to horse at livery, 119.

LORD LIEUTENANT OF IRELAND, his position, 624.

LOSS,
Of deed by time and accident, plea of, 753, 778.
Meaning of loss, in Carriers Act, 206.

LUGGAGE,
Liability of carrier for loss of, 200—202, 213, 216, 225.
Of cab proprietor for loss of, 200, 353.
Of railway company, for loss of, 201, 202, 208, 213, 216, 225.
When placed in passenger's carriage, 201.
For refusing to carry, except at passenger's risk, Id.

MACHINERY,
Affixed to freehold, when distrainable, 426, 427.
Lent to workman, when distrainable, 429.
Hired by tenant, for agricultural purposes, not distrainable, 435.

MAGISTRATE. See *Justice of Peace.*

MAINTENANCE,
Illegality of contracts by way of, 371.
Old doctrine of, qualified, 769, 770.
Doctrine misapplied to case of assignment of *chose in action*, 769.

MALICE,
Action for malicious legal proceedings, when it lies, 260—262.
Burden of proof; question for jury, 261, 262.
Action for malicious arrest, 260.
For maliciously procuring adjudication of bankruptcy, 262.
By company, for malicious petition to wind up, 263.
For maliciously inducing person to break contract, 281. See 301.
Against officer, for maliciously rejecting vote, 282—285.
Breach of plain duty, whether evidence of, 285.
Justice of peace acting without, when not liable, 642, 657.

MANDAMUS,
To justices to hear and determine, 644, 662.
To enter continuances and hear, 662.
To supply clear omission in statement, when, 661, 662.
To insert particular statement, not, 662.
To do a particular thing, not, Id.
To officer to make up record, Id.
To clerk of peace to correct minutes, not, Id.
To admit to copyhold, lies for surrenderee, or heir, 242.
And for surrenderee of heir, Id.
Not, if barred by lapse of time, Id.
Nor, if question of equity involved, Id.
Nor, when copyhold held of crown, 243.

MANDATUM, 179, 227. See *Bailments.*

MANSFIELD, LORD,
The founder of our commercial law, 685.
His papers burnt in 1780; 703.

MANSLAUGHTER, action for, before indictment, 280.

MARKET,
Sale in overt, without title, passes property, 8, 455.
Covenant running with demise of tolls of, 90.
Assembly in, to safeguard person, unlawful, 100.
Customs of, agents dealing in, authorised to follow, 147, 548—550.
Action for setting up new, near ancient, 244.
Contract for purpose of "rigging the market," illegal, 368.
Validity of by-laws regulating, 393, 415.
Cattle on way to, not distrainable, 429.

MARRIAGE. See *Husband and Wife.*
A valuable consideration, 25, 26, 27.
But husband taking by operation of law, no purchaser for value, 26.
How far marriage consideration extends, 28, 29.
Marriage settlements when void against creditors, 18, 19.
Not a forfeiture of lease, 47.
General covenant or condition against, void, 367.
Condition in restraint of second, good, Id.
Marriage brocage contracts, illegal, Id.
Action against clergyman for refusing to solemnize, 231.

"MARTINMAS," Cannot be shown to mean *old*, when, 652, 653.

MASTER. See *Principal and Agent, Ratification, Servant.*
His liability for act or default of his servant, 351 *et seq.*
Test is whether act within scope of servant's employment, 352.
The relation of master and servant must exist, 353.
His remedy when servant seduced, or enticed away, 266, 281. See 301.
Paying servant's fare, action against carrier for negligence, 202.
His remedy for injuries to servant, 202.
Carrier's servant injured by destructive goods, action, 204.
Who are servants of carrier, 209.
Servant's right to customary holidays and notices, 550, 551.
Position of servant when no better than that of, 278.

MASTER OF SHIP,
Discharged by delivery under one of several bills of lading, 697, 705.
Unless with notice of another indorsement, Id.
Liability of, for signature to bill of lading, 741.
Liability of, for loss of goods, 178, 218—220.
May insure his wages, 480.

MATERIALITY,
Of facts undisclosed, broker's opinion, 486, 487 *et seq.*
Of alterations in bills or notes, 780 *et seq.* See *Alteration.*

MAXIMS, PRINCIPLES, AND DICTA,
A fiction of law valid only to effect its object, 591.
Acta exteriora indicant interiora secreta, 128.
Actus curiæ nemini facit injuriam, 342.
All statutes made against fraud should be liberally and beneficially expounded to suppress the fraud, 5.
All things not prohibited by law, may be restrained by condition, 397.
Assent presumed to act done for one's benefit, 338.
An injury imports a damage when a man is hindered of his right, 252.
A particular inconvenience to be permitted, rather than a general inconvenience incurred, 450.
Boni judicis est ampliare jurisdictionem, 360, 773.
Cessante ratione cessat et ipsa lex, 431.
Circuity of action to be avoided, 340.

MAXIMS, PRINCIPLES, AND DICTA—*continued.*

Clausulæ inconsuetæ semper inducunt suspicionem, 2.

Contemporanea expositio fortissima est in lege, 255, note.

Custom of particular place may rectify what otherwise would be imprudence or folly, 534.

Jurisdiction of court not ousted by agreement of parties, 340.

De minimis non curat lex, 250.

Dolosus versatur in generalibus, 2.

Domus sua cuique est tutissimum refugium, 100, 104, 110.

Dona clandestina sunt semper suspiciosa, 2.

Estate beginning with livery, only determined by entry, 41.

Every man's house his castle, 100 *et seq.*

Ex turpi causâ, non oritur actio, 384.

Expressio eorum quæ tacite insunt nihil operatur, 141.

Expressions used in particular cases are to be understood with relation to the subject-matter then before the court, 502.

Extra imperii fines leges imponenti impune non paretur, 626.

Fraud avoids all, 669, 766.

He who seeks equity must first do equity, 679, 684, 711.

He who sows ought to reap, 534.

In contractibus semper insunt ea quæ moris sunt et consuetudinis, 609.

In jure, non remota sed proxima spectantur, 280.

Judges can only look to former decisions, 764.

Locus regit actum, 608.

Mere possession is sufficient title against a wrong-doer, 344.

"*Money has no earmark*," not a maxim of law, 452.

No man shall be permitted to take the chance of committing a fraud without losing by the event, when it is detected, 757.

Non quod dictum sed quod factum est in jure inspicitur, 38.

Nova constitutio futuris formam imponere debet, non præteritis.

Nullus commodum capere potest de injuriâ suâ propriâ, 313, 112.

Observe, reader, your old books, 56.

Omnia præsumuntur contra spoliatorem, 343, 353.

Omnis coactio a legato abesse debet, 630.

Omnis innovatio plus novitate perturbat quam utilitate prodest, 242.

Omnis ratihibitio retrotrahitur et mandato æquiparatur, 142, 347.

Party in custody of original instrument made for his benefit, bound to preserve it in its original state, 749, 786.

Præcipitatio est noverca justitiæ (3 Inst., 186).

Proxima causa non remota spectatur, 280.

Qui dolo desierit possidere, pro possidente damnatur (Civ. L.).

Qui facit per alium facit per se, 351, 439, 816.

Qui prior est tempore potior est jure, 496.

Quod fieri non debuit factum valet, 384, 389.

Quod semel placuit in electionibus amplius displicere non potest, 38.

Quodcunque prohibetur fieri ex directo prohibetur et per obliquum, 417.

Respondeat superior, 351, 629.

Scientia utrinque par pares contrahentes facit, 478.

Semper præsumitur pro negante (3 E. & B. 722).

Sic utere tuo ut alienum non lædas, 272, 806, 807, 820, 822.

Solvitur in modo solventis, 38, 39.

Spondes peritiam artis, 185, 186, 227.

MAXIMS, PRINCIPLES, AND DICTA—*continued.*
"Statute law like a tyrant," &c., 362, 766.
The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it, 182.
The law best applied when subservient to the honesty of the case, 763.
The law is not apt to catch at actions, 239.
The law will not multiply actions, 253.
The course of all courts to be considered, for that is the law of the court (2 Rep. 16).
There is no magic in parchment or wax, 759.
The plaintiff in ejectment must recover by the strength of his own title, not the weakness of his antagonist's, 345.
Ubi eadem ratio ibi idem jus, 255.
Ubi jus ibi remedium, 251, 257 *et seq.*
Ut res magis valeat (Rule of construction), 296.
Volenti non fit injuria, 276, 394.
You shall not stipulate for iniquity, 360.
Whenever one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must suffer by it, 682; see 496.

MEAT, not distrainable, 429.

MEDICAL MEN,
Right of, to recover fees, 146.
Opinion of, evidence, 491.

MERCANTILE AGENT, dispositions by, under Factors' Acts, 741 *et seq.*

MERCHANTS,
Custom of, part of the law of the realm, 539, 540.
"The law merchant a system of equity," 771.

MERGER,
Effect of, on covenants running with reversion, 61—63.
On underlease where lease renewed, 62.

MESNE PROFITS,
Reduction of damages for payment of prior charges, 165.
Mortgagee's rights as regards, 496, 508.

"MICHAELMAS," cannot be shown to mean *old*, when, 652, 653.

MINE OWNER. See *Support, Water.*

MISTAKE, cancellation of instrument by, inoperative, 785.

MODERN REPORTS, Vol. VI., inaccuracy in, 591, 592.

MONEY,
Action for recovery of identical coin, 452, 468.
Not after it has passed in currency, 452, 468.
Bank note is considered, 452, 454. See *Bank note.*

MONEY PAID,
Lies for compulsory payment for another, when, 142, 149 *et seq.*, 156 *et seq.*
For another's use, when recoverable, 141 *et seq.*
By agent, when recoverable, 147.
By tenant when recoverable from landlord, 156 *et seq.*
For payment of annuity charge, 156.
Of interest on landlord's mortgage, 157.
By occupier, when recoverable from owner, Id.
Mode of remedy, 158 *et seq.*
Case of payment under distress by stranger, 158—160.
Count for, when liability only by special agreement, 160.
Count for, against party ultimately liable, 160, 161.
Paid under illegal contract not recoverable, 384 *et seq.* See *Illegality.*

MONOPOLY. See *Restraint of Trade.*
Grant of, void, 392, 395.
Except for use of new invented art, 392.

MORTGAGE. See *Mortgagor and Mortgagee.*
Distinguished from pawn, 192, 196.
Vests legal estate, 192, 196.
Equitable by pledge of title deed, 194.

MORTGAGOR AND MORTGAGEE,
Mortgagees are purchasers within 27 Eliz. c. 4; 25.
Tenant of mortgagor let in before mortgage.
Upon mortgage becomes tenant of mortgagee, 501, 502.
Attornment now unnecessary, 501, 503.
Payment of rent to mortgagor before notice of mortgage, when good, 503.
After notice, not good, 497 *et seq.*
Even as regards rent due before notice, Id.
After mortgage, mortgagor could not eject, 503.
Can now eject or recover rent, until mortgagee gives notice, 503, 504.
Mortgagor's authority to receive rent as mortgagee's bailiff, 501, 502, 504.
And to distrain in mortgagee's name, 504.
Determinable by mortgagee's notice, 502, 504.
Case where terms of lease altered after mortgage, 506, 507.
Mortgagor's powers under Judicature Act, 1873; 503, 504.
Tenant of mortgagor let in after mortgage.
(1) *At common law.*
Mortgagee may eject, without notice to quit, 494 *et seq.*, 504.
Unless he was privy to lease, 495.
Or has re-demised to mortgagor, 512.
Notice to quit now required by statute, when, 508.
Former doctrine that upon notice mortgagee became landlord, 505.
Now exploded, 505, 506.

MORTGAGOR AND MORTGAGEE—*continued.*
Tenant of mortgagor let in after mortgage—continued.
(1) *At common law*—continued.
Rule that mortgagee can become landlord only by agreement, 505, 506.
And that, if any, a *new* tenancy is created, 506.
Terms of such tenancy, how proved, 506.
Not evidenced by mere retention of possession after notice, 506, 527.
If evicted by mortgagee, can dispute mortgagor's title, 505, 507.
What is eviction, 507.
Is liable to mortgagor for rent, 507.
Unless paid to mortgagor under constraint, 507, 508.
Or mortgagee evicts before rent was due, Id.
Notice without payment or eviction no defence, 508.
Effect of paying rent to mortgagee after notice, 507, 508.
Mortgagee's right to mesne profits before entry, 496, 508.
Tenant's right to redeem mortgage, 495, 509.
Effect of mortgagee recognizing tenant's possession as lawful, 509.
What is recognition of lawful possession, 509.
Effect of mortgagee leading him to lay out money, 495.
Notice to quit now required by statute, when, 508.
(2) *Under Conveyancing Act*, 1881; 504, 509—511.
Leasing powers of mortgagor or mortgagee in possession, 510.
May be excluded or modified by agreement, 504, 510.
Mortgagee bound by lessor's covenants, 511.
Lease by mortgagor and mortgagee jointly,
Enures as lease by latter confirmed by former, 511.
On redemption, as lease by former, 511.
Effect of reserving right of entry to mortgagor alone, 512.
Effect of covenants being by or with mortgagor alone, 512.
Mortgagor in possession.
Nature of his possession, 495, 501, 525—527.
With mortgagee's consent, tenant at will, 525, 527.
But not entitled to emblements, or notice to quit, 495, 502.
Nor liable to pay rent, 501.
Called tenant at will *quodammodo*, 501, 526.
Without mortgagee's consent, tenant at sufferance, 513, 526, 527.
Re-demise to, created by affirmative covenant that he shall hold for fixed period, 512—516, 527.
But not so, where period uncertain, 513—516.
At end of re-demise, becomes tenant at sufferance, 513, 527.
Where no re-demise, Statute of Limitations runs from execution of mortgage, 514.
Mortgagee cannot sue in trespass before entry, 513, 514.
But can maintain ejectment, 513; when, 516.

MORTGAGOR AND MORTGAGEE *—continued.*
Mortgagor in possession—continued.
Modes of securing payment of interest by, 516.
By creating tenancy to mortgagee at a rent, 516—519.
Reservation of right to re-enter at will, 517, 518.
Case where tenancy to begin "at any time after default," 518.
Cases where attornment clause held not to create tenancy, 520, 521.
Device to defeat bankruptcy law, 521.
Distress applied in discharging principal, 521, 522.
By giving mortgagee personal licence to distrain, 516, 520.
By mortgagor attorning tenant to a receiver, 522, 523.
Effect of Bills of Sale Acts on attornment clauses, 523, 524.
Mortgagor's powers under Judicature Act, 1873; 503, 527.
Under Conveyancing Act, 1881; 504, 509—511.
Possession by mortgagor's heir, 519.

MORTMAIN ACTS, deeds framed to avoid, 370, 389.

MOTHER,
Of bastard, her liability to maintain it, 145.
Her maintaining it a consideration for father's promise, Id.

MUTUALITY, want of, where *plaintiff* has not signed contract within Statute of Frauds, no defence, 298, 299.

NAME,
Agent signing in his own name, effect of, 322.
No action lies for suing to execution by mistake another person of same name as intended defendant, 260.

NEGLIGENCE,
Degrees of, for which various bailees liable. See *Bailments.*
Gratuitous agent liable only for gross, 173, 183, 227.
Spondet peritiam artis, 185, 227.
Gross, what, 186.
Gross negligence, different from fraud, 469.
Essential for action for collision on highway or sea, 809, 810.
Immaterial for action for escape of dangerous thing, 789 *et seq.*
In removing support to house, whether actionable, 270.
Contributory, doctrine of, 275—278.
Of plaintiff, when a defence to action, 275.
When not, 275, 276.
Effect of knowledge of danger, 276.
In case of children, 275, 278.
Doctrine of identification, 277, 278. See *Identification.*
Of servant, master's liability for, 352 *et seq.*

NEGOTIABLE INSTRUMENT,
Definition of, 456, 457.
Must be accustomably transferable like cash by delivery, 456.
And capable of being sued on by holder, 456.
Legal right to property secured thereby passes by delivery, 456.

NEGOTIABLE INSTRUMENT—*continued.*
Right of action thereon passes by delivery, 456.
Title thereto vests in person taking *bonâ fide* and for value, 456, 468—472.
Can be acquired out of market overt from person without title, 455, 456.
Bill, or note, payable to bearer is such, 457.
So is bill, or note, payable to order, and indorsed in blank, 457.
Bill or note, specially indorsed, is not such, 457.
Effect of restrict indorsement, 457.
Of words prohibiting transfer, 458, 460.
Draft on a banker is such, 455.
Crossed cheque is such, 457, 458.
Effect of words "not negotiable," 458.
Statutory protection to bankers in case of cheques, 458.
Prussian bond held to be such, 455.
India bond held not to be such, 456.
Now negotiable by statute, 456.
Instrument on face whereof right to see limited to individual, n such, 458, 459.
Notwithstanding usage of trade, 459.
Case of bill of lading, not mentioning assigns, considered, 460, 461.
Bill, cheque, or note, payable to individual, 459.
Instrument, not accustomably transferable in this country, as cash, not such, 461, 462.
Whether so transferable, question for jury, 462.
Bond, or scrip, of foreign government, or company, when such, 462.
Must be negotiable by custom in this country, 462.
Semble, not such here, unless such where made, 462, 463.
Negotiability here evidence of negotiability there, 463.
English instrument, not such, unless by law merchant, or statute, 463.
Case of *Crouch* v. *Crédit Foncier* discussed, 463—465.
Negotiability by estoppel, 465, 466.
Choses in action not assignable at law, 466.
How far rule altered by Judicature Act, 466, 467.
Covenant under seal not negotiable, 467.
Note of corporation under its seal, whether negotiable, 467.
Inability of railway or non-trading corporation to accept bills, 467.
Unless empowered by statute or articles, 467.
Effect of negotiability on probate duty, 467, 468.
To gain title, holder must take *bonâ fide* and for value, 468.
Gross negligence may be evidence of *mala fides*, 469.
But is not the same thing, 469, 470.
Holder's title good, if he took for value and *bonâ fide*, 469—471.
Taking with notice or knowledge of fraud is *mala fides*, 470.
Meaning of "notice or knowledge," 470.
Effect of knowledge not cured by mistake of law, 471.
Taking with suspicion that something wrong is *mala fides*, 471.
Inquiry not necessary because pledgee known to be agent, 471.
But signature "*per pro*" ineffectual without authority, 471, 472.
Effect of notice that pledgee is agent with limited authority, 472.

NEGOTIABLE INSTRUMENT—*continued.*
Definition of "good faith" in Bills of Exchange Act, 472.
Effect of fraud, as regards subsequent transferee, 472.
Effect of notice of fraud before actual indorsement, 472.
Cases as to inchoate instruments fraudulently circulated, 472, 473.
Indorsement without consideration for purposes of action, 473.
Conviction of thief does not affect title of *bonâ fide* holder for value, 473.

NETS, usage to dry, on another's land, 530.

NEWSPAPER. See *Libel, Privileged Statement.*
Criminal liability of proprietor for libels in, 155.
No indemnity from editor, Id.

NON ASSUMPSIT, old meaning of plea of, 759, 779.

NONFEASANCE, not a trespass, 129, 133.

NOT POSSESSED, meaning of plea of, 344.

NOTE, PROMISSORY. See *Bill of Exchange.*

NOTICE. See *Knowledge.*
Notices by carriers, and railway companies, 205—207, 211—218, 221.
Of special conditions, 208.
By surety to principal before defending action, 150.
To justices before *certiorari*, 659.
Notice of action before suing justices, unnecessary, 645.
To tenants to pay rent to mortgagee. See *Mortgagor and Mortgagee.*
Of distress. See *Distress.*
Of fraud, to taker of negotiable instrument, 469—473.
Equitable doctrine of, as to restrictive covenants, 85 *et seq.*

NOTICE TO PRODUCE, presumption, on non-production, 354.

NOVELTY OF COMPLAINT, when no objection to action, 258.

NOXIOUS VAPOURS, liability for damage by escape of, 809, 826.

NUISANCE,
Offensive trade, 268, 269.
What is, depends on locality, 269.
Action for damaging a, 276.
Public, remedy by indictment, 274.
Remedy by action, for special damage by, 253, 274.
"Coming to," old doctrine of, 268, 269.
On land, liability of person succeeding to land, after notice, 798.
Liability for escape of mischievous thing, 789 *et seq.* See *Animal, Filth, Sparks, Water.*

NUMBER,
"1000" held, by custom, to mean "1200"; 550. See 560.
Statutory construction of words of, not to be varied, 551, 552.

OFFENCE,
May be stated in words of Act creating, 650, 651.
Exceptions need not be negatived, Id.

OFFENSIVE TRADE. See *Nuisance.*

OFFER, written offer may be good memorandum of agreement, 297.

OFFICE, statute against sale of, 7, 369.

OFFICER,
Ministerial or judicial, distinction as to liability of, 283—285.
Returning, liability for rejecting vote, 231 *et seq.*, 259, 283—285.
Of government, liability of, 629, 630.

ONUS PROBANDI,
On bailee to prove loss without default, 199, 222.
May be shifted by special terms, 220.
On bailee to prove *jus tertii*, 195.
As to foreign law, 623.
As to alteration of instrument, 784.

OPINION. Evidence when, 487 *et seq.* See *Witness.*

ORDER. See *Conviction.*
Of Q. B. to justices to do act, 643, 644.
Of justices, time allowed for drawing up, 645, 646.
Amendment of, by justice, Id.
Justice when liable for acts done under his, 632 *et seq.* See *Justice of Peace.*

ORDER AND DISPOSITION, 14.

OVERSEER,
Liability of, for omitting name from rate, 231.
Appointment of, good on face, quashed for want of jurisdiction, 663.

OWNER,
Of lands, right to enter peaceably, 133, 134.
Of goods, right to recapture, 135.
When liable to repay occupier for paying charges on land, 156 *et seq.*

OYSTER, Case, the, 276.

PARDON, promise to pay money for obtaining a, illegal, 136.

PARENT. See *Father, Mother.*

PARLIAMENT,
Wages formerly paid to members of, 249.
Action for rejecting vote, before right decided by, 231 *et seq.*, 286.
Dispute between Houses of, and law courts, 281—282, 286.
Privilege as to speech in, 265.
History of Parliamentary representation, 247—251, 252. See 238.
No general power to legislate for foreigners, 617.
Agreement by peer not to oppose railway bill upheld, 365.

PAROL EVIDENCE. See *Custom, Evidence.*
Inadmissible to vary written contract, 292, 535 *et seq.*
When admitted in cases within Statute of Frauds, 292 *et seq.*

PAROL EVIDENCE—*continued.*
Not admitted to supply either promise or consideration, 291 *et seq.*
Except, now, to supply consideration for guarantee, 292.
But not, to vary expressed consideration, 292.
Admitted to identify subjective matters of agreement, 294, 295.
Or to explain the circumstances thereof, 294.
Not admitted to connect documents, 295.
But admitted to identify one document if referred to in another, 297.
Admitted to prove assent to alteration after signature, 299, 300.
Admissible to prove contents of deed lost by accident, 753, 778.

PART PAYMENT, effect of, on Statute of Limitations, 563 *et seq.* See *Statute of Limitations.*

PART PERFORMANCE,
Does not take case out of s. 4 of Statute of Frauds, 307.
Equitable doctrine of, 308.

PARTICEPS CRIMINIS. See *Contribution.*
Dormant partner held not to be, 156.
Effect of not being *in pari delicto*, 385.

PARTIES TO ACTION,
In case of carrier, 221. See *Carrier.*
Foreign law, when binding as to, 619, 620.

PARTNERS,
No action at law for contribution between, 153.
Dormant partner held not to be *particeps criminis*, 156.
Retiring partner, when discharged from debts of firm, 332—334, 337.
Deed of dissolution between, *mala fide*, void against creditors, 19.

PASSENGER. See *Carrier, Luggage.*
Liability of carrier to, 200, 202, 224.

PATENT, 366, 392.

PAWN, 177, 191 *et seq.* See *Bailments.*

PAWNBROKER.
Statute relating to, 197.
Liability of, for loss or theft of pledges, Id.
His interest in pledges seizable in execution, Id.

PAYMENT. See *Appropriation, Money Paid, Rent, Statute of Limitations.*
By A. to B. for C. when recoverable by C., 140.
By a tenant of prior charge, &c., when a payment, 161—163.
By third person, when considered compulsory, 157, 158.
Appropriation of, 38, 39, 162.
For another, not generally a payment of debt due to him, Id.
Distinction between, and set off, *quâ* avowry, Id.
Of less than demand, when a satisfaction, 325 *et seq.*, 336 *et seq.*
Of debt by stranger, effect of, 338.
Debtor's assent, whether presumed, Id.
Of specialty debt, mode of, 341, 342.
Equivalents to, 566, 567.

PEER, agreement by, to withdraw opposition to railway bill, upheld, 365.

PENALTY. See *Conviction.*
Implies a prohibition, when, 373.
Whether it be imposed to protect subject or revenue, 374.
Contracts with persons incurring, when illegal, Id.
Contract prohibiting act under a penalty, enforced by injunction, 401.
Action for, at instance of foreign state, not entertained, 575, 629.
Cumulative, for swearing several times one day, 640.
Test, whether penalties several, Id.
Under Summary Jurisdiction Acts, 654, 655.
Imposed by statute, 285. See *Statute.*

PER PROCURATIONEM, authority to accept *per pro*, inquiry as to, 471.

PERISHABLE GOODS,
Carrier's liability for, 204, 205.
When vendor may sell, 723.

PERPETUITY,
Restrictive covenants tending to create, 82, 83.
Instruments creating, void as against public policy, 415 *et seq.*
Doctrine of, its history, 416 *et seq.*
Condition against alienation by feoffee or devisee in fee void, 416, 417.
Exception as regards *feme covert* during coverture, 417.
Enjoyment of fee may not be postponed beyond life in being and twenty-one years, 417, 418.
Estate may not be limited to unborn person for life and then to child of such person, 418.
Covenant giving unlimited right of pre-emption void, 418, 419.
Bond by feoffee in fee not to alien void, 419.
Accumulations of income, 419, 420. See *Accumulations.*

PHYSICIANS.
Right of, to recover fees, 146.
Bye-law of Royal College of, London, as to Fellows, Id.

PILOT, loss by fault of, where pilotage compulsory, 219, 605.

PLEADING. See *Accord and Satisfaction, Estoppel, Trespass, Trover.*
Instance of, matter only for information of court, 138.
When certainty should be pleaded, Id.
Defect in, when not cured by verdict, Id.
Why defendant formerly confined to one plea, 598.
In action on altered instrument, 788.

PLEDGE, 177, 191 *et seq.* See *Bailments.*
Of title deed, an equitable mortgage, 194.
Of negotiable instruments by agent, 471, 472.
By factor or agent formerly not binding on principal, 741.
Effect of Factors Acts, 741 *et seq.*

POISONOUS TREE. See *Tree.*

POLICY. See *Insurance, Public Policy.*
Evidence of custom, to explain marine policy, 541, 554, 555.
On illegal voyage, void, 370.
How far contract in unstamped, a good consideration, 374.
Assignment of life policy, assigned abroad, 614.
One beneficiary paying premiums, 142.

POOR RATES,
Irregular distress for, not now a trespass *ab initio*, 132.
Beasts of plough not privileged against distress for, 434.
Parties rated to, cannot sue justices issuing warrant, 642.

POSSESSION. See *Title.*
Of finder, supports trover by, 343.
Bare, gives sufficient title against wrong-doer, 344 *et seq.*
Quasi possession by licensee of incorp. heredit., 345 *et seq.*
Person entitled to, may enter peaceably, without ejectment, 133, 134.
Person in, his right to turn out trespassers, 134.
Is *primâ facie* evidence of title, 691.
Constructive, by consignee, of goods in carrier's hands, 726 *et seq.*
When pledge lost, by giving up, 195, 196.
Under Factors' Acts, 741.

POST OFFICE ORDER, not negotiable, 455.

POWER OF REVOCATION. See *Revocation.*

PREFERENCE,
Debtor's right to prefer one creditor to another, 17.
Subject now to Bankruptcy Act, Id.

PREROGATIVE, foreign prince cannot sue here for invasion of, 629.

PRESCRIPTION,
Effect of, on duty to fence in, 827.
Right to support of house acquired by, 269, 270.

PRESUMPTION,
Of fraud, may arise from want of possession, 1—14.
When rebutted, 12 *et seq.*
Against party wrongfully withholding evidence, 353, 354.
Of assent to act for one's benefit, 338.
As to foreign law, 623.

PRIEST. See *Clergyman.*

PRINCE. See *Sovereign Prince.*

PRINCE OF WALES, right of Attorney-General for, as to venue, 600.

PRINCIPAL AND AGENT,
Indemnity to agent, 147, 546, 548—550.
Agent, implied authority of, to follow rules of market, 147, 548—550.
Or usage of business, 147.
Gratuitous agent liable only for gross negligence, 173, 183, 227.
Spondet peritiam artis, 185, 227.

PRINCIPAL AND AGENT—*continued.*
Principal's liability for agent's acts or default, 351 *et seq.*
Test whether act within scope of agent's employment, 352.
When carrier agent for buyer, *quâ* possession, 726—730.
Powers of agents to transfer property at common law, 741 *et seq.*
Under Factors' Acts, Id.
Who an agent under Factors' Acts, 742, 743.
Pledge by agent of negotiable instrument, 471, 472.
Signature by agent "*per pro*," 471.
Delegation of duty to agent, no defence for breach, 830.

PRINCIPAL AND SURETY,
Former bound to indemnify latter, when, 149 *et seq.* See *Indemnity.*
Indorser surety for acceptor, 149.
Acceptor, when a surety, Id.
Surety, when entitled to costs of defending action, 149, 150.
Remedies of surety under 19 & 20 Vict. c. 97; 153, 154.

PRIOR'S CASE, the, 56, 57, 72, 73.

PRIVILEGE. See *Arrest, Distress, Privileged Statements.*

PRIVILEGED STATEMENTS,
What are, 262, 263.
Belief that occasion privileged does not make it so, 263.
Reports of legal proceedings, when, 263, 264.
Of Parliament, 264.
Newspaper reports of public meetings, &c., 264.
Words spoken by judge, advocate, or witness, 264, 265.
In parliament, 265, 266.
At meetings of other public bodies, 266.

PRIVITY OF CONTRACT, 139, 140. See *Contract.*

PRIVY COUNCIL, supreme resort to, in colonial cases, 587.

PROBATE DUTY, foreign instruments, when liable to, 468.

PROMISE. See *Bankrupt, Contract, Statute of Frauds.*
To pay account stated *in futuro*, when void, 147, 148.
Consideration for, required, 136 *et seq.* See *Consideration, Request.*
To pay, when implied, 142 *et seq.* See *Consideration, Request.*
Implied where act done for another's benefit, when, 142.
Express, when required where request implied, 143.
Part consideration supports express promise, when, 137, 141, 143.
To perform promise made to another, 139, 140.
To pay for services, when not implied, 142, 143, 144.
Case of barrister, 145, 146.
Case of physician, 146.
By father to pay for child's support, not implied, 144, 145.
To pay son's debt, not implied, 145.
Void for partial illegality of consideration, 372.
In restraint of marriage, when void, 367.

PROMISSORY NOTE. See *Bill of Exchange.*

PROPERTY,
Cannot be made inalienable. See *Alienation, Perpetuity.*
Passes by contract of sale, when, 148.
Passes by sale in market overt without title, 455.
Passes on delivery of negotiable instrument, 455, 456.
When passed by agent's disposition, under Factors' Acts, 741 *et seq.*
By vendor's or vendee's disposition, 745, 746.

PUBLIC AUTHORITIES PROTECTION ACT, 645.

PUBLIC POLICY. See *Perpetuity, Restraint of Trade.*
Contracts against, void, 364.
In restraint of trade, Id., 391 *et seq.* See *Restraint of Trade.*
When not void as against, 391 *et seq.*
Contracts held void for supposed tendency against, 377.
Remonstrance against tendency to hold void, Id.

PURCHASER. See *Sale, Stoppage in Transitu.*
Fraudulent conveyance void as against, 26 *et seq.* See *Fraudulent Conveyance.*
Who is a, within 27 Eliz. c. 4; 25 *et seq.*
At common law, *prior* fraudulent conveyance prevailed against, 30.
From sheriff, how far goods protected from distress, 432.

QUANTITY SURVEYOR, who pays, 546.

QUANTUM MERUIT,
Elaborate old form of, 136.
Action for, a special action of debt, 129.

QUARE IMPEDIT, whether necessary, before suing ordinary, 243, 244, 251, 255.

QUARTER SESSIONS,
Appeal to, from convictions and orders, 656.
No certiorari required, where case stated by, 661.

QUEEN. See *Crown.*

QUEEN'S ENEMIES, 169, 178, 205, 208, 220. See *Bailments, Carrier.*

QUIET ENJOYMENT,
Covenant for, does not extend to acts of wrong-doers, 175.
Covenant for, runs with land, 64, 65.
Contract for, implied from parol demise, 161.
Implied covenant for, excludes implied promise to indemnify, 158.
Express covenant for, excludes implied, 512.

RAILWAY COMPANIES. See *Carrier, Luggage, Passenger.*
When *common carriers*, when not, 200 *et seq.*, 217.
Bound by "equalities clauses," 203, 211.
Position of, under the Railway and Canal Traffic Acts, 211—218.
Under the Railway Regulation Acts, 220, 221.
Liability for goods to be carried beyond their line, 208, 224.
For goods in cloak-room, 200, 213.

RAILWAY COMPANIES—*continued.*
Authority of servant of, to arrest, 352.
Agreement by peer to withdraw opposition to bill of, upheld, 365.
When liable for damage to cattle straying on line, 445, 446.
When liable for damage by sparks from engine, 825, 828.
Power to accept bills of exchange, 467.

RAILWAY ROLLING STOCK, when not distrainable, 437.

RATIFICATION,
Doctrine of, 347 *et seq.*
When tantamount to prior command, 347—349.
Impossible, where person purported to act on his own behalf, 142, 348, 349.
Case where purport of act not avowed, 349.
Company cannot ratify acts done before its incorporation, 350.
Nor acts which it has no power to authorize, 350, 380, 381.
Not bound, if directors ratify what they cannot authorize, 350.
Shareholders may ratify acts of directors which company can authorize, 380, 381.
By personal representatives, 350.
By trustee in bankruptcy, 350.
Of action brought in ratifier's name, 350.
Must be made, while principal entitled to do the act himself, 350.
Right vested in third person cannot be divested by, 350.
Quære, whether it can make lawful acts, wrongful, 350.
How shown, 350, 351.
Not binding, unless made with knowledge of act done, 351.
Or with intention to adopt it in any event, 351.
Of criminal offences, 351.
Of stoppage in transitu, 726.

REASONABLE AND PROBABLE CAUSE,
How far question for judge, for jury, 261, 262.
Action for malicious proceedings without, 260—262.
Presumption of, from unreversed judgment, 261.

REASONABLE CARE, 186.

REASONABLE TIME,
Duty to do act within, when no particular time fixed, 223.
May be fixed by usage, 550.

RECAPTION,
By sheriff, 104, 106, 109, 110, 111.
Law of, 135, 439, 440.

RECEIPT,
In full, of debt unpaid, no estoppel between debtor and creditor, 328.
For price of goods, not a document of title, 742.

RECOUPMENT of tenant for payment of charges on land, 156 *et seq.*, 507.

REDEMPTION of mortgage by mortgagor's tenant, 495, 509.

RE-EXCHANGE, rights as to, by custom, 555, 556.

REFERENCE, effect of agreement to refer, 340, 341.

REGISTRATION,
Of bill of sale, 15.
Of transfer of British ship, Id.

RELATION,
Retro-active effect of ratification, 347.
Contract does not become illegal by, 374, 375.
Of attornment to grant of reversion, 499, 501.
None, in case of attornment by mortgagor's tenant let in *after* mortgage, 505.

RELEASE, covenant not to sue, when pleadable as a, 340.

REMAINDERMAN, his estate bound by devisee for life keeping testator's debt alive, 568.

REMEDY,
Where legal right infringed, 251, 257, 273.
Though no pecuniary damage, 252, 273.
Though action novel in the instance, 258.
Civil, whether suspended in case of felony, 278, 761.
Where statutory liability, 285, 286.

REMOTENESS of damage, when it defeats action, 280, 281.

RENT,
Apportionment of, 33, 49.
Acceptance of, when a waiver of forfeiture, 36 *et seq.* See *Condition.*
When not a revival of lease, 44.
Covenants will not run with, 89, 90.
When lost by merger of reversion, 61, 62.
Tenant may retain, for payment of charges on land, 156 *et seq.*
Such payment a *payment* of his own rent, 157, 162.
Duration of right to retain, 163—165.
Right of action for, suspended by holding distress, but not extinguished, 340.

REPAIR, covenants to, to put into, to leave in, run with land, 65.

REPLEVIN,
When sheriff may break landlord's house to retake distress, 104.
When not maintainable by bailor, 228.

REPUTED OWNERSHIP, 14.
Ousted by custom of trade, 540, 551.

REQUEST,
Executory consideration involves, 139.
Consideration must move from promisee, Id.
Executed consideration bad, unless supported by previous, 141.

REQUEST—*continued.*
Sometimes implied by law, 141 *et seq.*
1. Where plaintiff compelled to do what defendant legally compellable, 142.
Right of surety who has been damnified, 149 *et seq.*
Contribution between co-sureties, or co-contractors, 151 *et seq.*
Right of tenant compelled to pay landlord's rent, 156 *et seq.*
May deduct payment from rent, when, 161 *et seq.*
Right of person whose goods are seized for another's debt, 158 *et seq.*
Where latter liable only by special contract, 160.
Where latter ultimately liable by statute, 160, 161.
Right of lessee to be indemnified by assignees, 166.
Right of seller of shares to be indemnified by buyer, Id.
2. Where defendant adopts and enjoys benefit of consideration, 142.
Mere enjoyment of benefit insufficient, Id.
3. Where plaintiff voluntarily does what defendant legally compellable, and defendant afterwards expressly promises, 143.
4. Where plaintiff voluntarily does what defendant morally bound to do, and defendant afterwards expressly promises, Id.
To what moral obligations this rule confined, 143 *et seq.*
Legal rights debarred of remedy, 143, 144.
Effect of Acts on bankrupt's promises, 144.
None implied by law where plaintiff supports defendant's child, 144, 145.
In case of barrister, no promise to pay for services implied from request, 145, 146.
So, formerly, in case of physician, 146.
None implied where there is express covenant, 146, 147, 158.
What implied from employing agent, 147.
What is evidence of, Id.
To attempt, failure of attempt not failure of consideration, 136.
To open doors, before sheriff may break, 99 *et seq.* See *Sheriff.*
See *Consideration, Contribution, Indemnity, Landlord and Tenant, Principal and Agent, Promise, Surety, Wrong-doer.*

RESERVOIR. See *Water.*

"RESIDENCE," meaning of, 107, 110.

RESTAURANT KEEPER, when liable for guest's coat, 125, 198.

RESTRAINTS OF TRADE,
General rule that all, are *primâ facie* void, 401, 402, 406, 408.
The validity of some, considered, 391 *et seq.*
1. *Compulsory* restraints:
By grant or charter from Crown, 392, 395.
By custom, 392, 393, 395, 401.
By by-laws, 393, 395, 415.
2. *Voluntary* restraints by agreement of parties, 394, 396 *et seq.*
Are *primâ facie* void, 398, 401, 402, 406, 408.

RESTRAINTS OF TRADE—*continued.*
2. *Voluntary* restraints by agreement of parties—*continued.*
Conditions of validity:
1. Old rule requiring partiality in space, 402, 403.
Instances of partial restraints upheld, 403.
Instances of general restraints held void, 403.
Cases in which rule was not followed, 404.
Rule now changed as inapplicable to modern conditions of trade, 404, 412.
2. There must be a good consideration, 391, 394, 395, 402, 405 *et seq.*
Even though contract under seal, 391, 394, 406.
Adequacy of consideration formerly considered, 402, 405.
But not now inquired into, 405.
Reason why consideration required, 406.
What consideration necessary to support contract under seal, 407.
3. The restraint must be *reasonable*, 391, 402, 407 *et seq.*
Test of reasonableness, 407—412.
Not exceeding what is necessary for covenantee's protection, 410.
Reasonableness depends on subject-matter of contract, 410.
And on the conditions of commerce, 412.
Instances of reasonable restraints, 407—412.
Instances of restraints beneficial to the public, 397, 408, 409.
Limits of time not essential, 412.
Restraint need not be limited to covenantee's lifetime, 411.
Covenant valid, if reasonable when made, 413.
First construe covenant, then see if it is reasonable, 412.
Vague agreement not enforceable, 412.
Divisibility of covenants, when partially void, 413.
Distances, how to be measured, 404.
Meaning of "London," 412.
Who may enforce the restraint, 413, 414.
Effect of restraint under a penalty, 401.
Contract of service for life valid, 414.
Quære, whether it must be by deed, 414.
Combinations between masters, or between workmen, 415.
Combinations between traders, 415.

RETURNING OFFICER,
Liability of, to voter, for rejecting vote, 231 *et seq.*
Though his candidate elected, Id.
Not liable if voter, though registered, disqualified, 259.
Held liable, in *Ashby* v. *White*, on ground of *malice*, 282, 283.
Liability of, for false or double return, 236, 237, 238, 239, 283.
Liability of, for refusing poll to candidate, 237.
When liable to penalty, 285.
Whether a ministerial or judicial officer, 283—285.
Presiding officer under Ballot Act, 285.
His liability to candidate, 285.
Analogous offices, 231, 284.

REVENUE,
Statute to protect, avoids contracts, when, 374.
How far contract in unstamped policy a good consideration, 375.

REVERSION,
Covenant running with, described, 58.
Right to rent, &c., on severance of, 63, 511.
By estoppel, 91 *et seq.*
Right of entry of reversioner to see waste, 245, 254.

REVOCATION,
Conveyance with clause of, when void against purchasers, 6—8, 25.
When conveyance to extinguish power of, void, 8.
Of payment by A. to B. for C., when valid, 140. See *Payment.*

RIGHT. See *Title.*
Ubi jus, ibi remedium, 251, 257.
Distinction between qualified and absolute, 274.
Claim of, to oust jurisdiction to convict, 665—667.
Must be of right known to law, 665.
Origin of rule, 666.

SAILOR, may not insure wages, why, 486.

SALE,
Suppression of evidence of value, presumption from, 354.
Of specific chattel, when property passes by contract, 148.
Sale not rescinded by stoppage *in transitu*, 722.
When payment a condition to delivery of goods, 695, 708.
Contract of, when ambulatory until delivery, 682.
Rights under contract of, may be varied by usage, 545.
Second purchaser no better title than his vendor, 733.
Except where he buys *bonâ fide* in market overt, 8, 455.
Or buys document of title, 734.
By mercantile agent under Factors' Acts, 741 *et seq.*
By vendor or vendee in possession, 745, 746.
Seller on credit, when liable in trover for re-sale, 191, 695.

SATISFACTION. See *Accord and Satisfaction.*
meaning of term, 336.

SCHOOL, setting up one near another, not actionable, 267.

SCIENTER, immaterial in action of trespass, 444.

SCIENTIFIC PERSONS, their opinion, when evidence, 491.

SCOTCH BOND, English Statute of Limitations pleadable to, 615, 616.

SEA. See *High Seas.*
Encroaching, a common enemy, 266.

SECRECY, a mark of fraud, 2, 3.

SEDUCTION,
Promise to pay annuity to victim of, *nudum pactum*, 144.
Binding, if under seal, 368, 376.
Bond in consideration of past, valid, Id.
In consideration of future cohabitation, void, Id.
Of daughter, or other servant, action for, 266, 281; see 301.

SEIGNORY, no question concerning, can be tried therein, 586.

SEIZURE,
Of goods under *fi. fa.*, effect of, 113.
Of person under *ca. sa.*, effect of, Id.

SELF-DEFENCE,
Hitting A. by accident, in parrying B., actionable, 442, 444.
Against *common* enemy, 266, 823, 824. See *Common Enemy.*
Battery, in defence of your dog, justifiable, 431.
Assembly of friends in defence of house, 100.

SEPARATION DEEDS,
When void as against creditors, 18.
When void as illegal, 366.

SERVANT. See *Master.*
His implied authority to protect his master's property, 352.
To Railway Company, his authority to arrest, 352.

SET-OFF, payment by tenant of prior charges, &c., when not merely a, 162.

SETTLEMENT,
Of disputed account by payment of less, 330, 331.
By agreeing to pay part of claim, 331.
By payment of groundless claim, Id.
In account, when a payment, 384, 566.

SETTLEMENT, DEED OF. See *Fraudulent Conveyance.*
Marriage settlement, usage as to costs of, 551.

SHEAF, distrainable, 423, 429.

SHERIFF,
Effect of 13 Eliz. c. 5, upon duty of, 23, 24.
Bound to levy goods fraudulently conveyed or seized in execution, Id.
May break house to execute writ of possession, 100.
May break house to execute King's process, 100, 101, 109, 111.
But must first notify process and demand admission, Id.
Suspicion of felony when insufficient, 111.
Breaking without notice and demand, a trespass, 101, 111.
So is breaking unnecessarily, Id.
May not break defendant's house to execute civil process, 102—104, 110.
Notwithstanding request to open the door, Id.

SHERIFF—*continued.*
But may break house of stranger who harbours defendant, 104, 110.
If he has first made demand, 104, 110.
And if defendant or his goods within, 105.
If outer door open, may enter defendant's house, 102, 105.
Having entered, may break inner doors, 105, 106.
Demand unnecessary before breaking them, 106, 109.
May break door of barn or outhouse, 106, and *Addenda.*
When he may break house to retake after escape, 106, 109, 110.
Whether demand necessary, 104, 109, 110, 111.
May enter stranger's house only if defendant or his goods within, 106, 107.
Or if defendant is residing there, 107.
Or if the owner deceives him, 107, 108.
What is an entry without breaking, 108, 109.
May break out, when, 109.
May break in to re-enter after unlawful expulsion, 110, 111.
Summary of rules in Foster on Homicide, 110, 111.
Doctrine that execution good though sheriff trespass, 104, 111—113.
Semble, true as to goods, 112, 113.
But arrest of person void, Id.
Power of court to summarily set aside execution, Id.
Doctrine that seizure is satisfaction, considered, 113, 114.
Sheriff's liability, if seizure invalid, 113.
Sheriff may not take debtor when in custody under void writ, 114.
Becomes a trespasser by remaining on premises too long, 132.
Not a trespasser *ab initio* for detaining prisoner too long, 132, 133.
Creditor not liable by ratification for acts of, when, 349.
Liability of, as returning officer. See *Returning Officer.*
Not liable for taking insufficient bail, 235, 236.
When liable for escape of defendant in custody, 273, 274.
When liable for false return to writ of execution, 274.
Liability of, for delaying to execute writ, 231.

SHIP. See *Carrier, Stoppage in transitu, Wharfinger.*
Liability of owner of, as carrier, 178, 199, 218—220.
At sea, sale of, not void against creditors, for want of delivery, 15.
Transfer of British, by bill of sale, Id.
Effect of mortgage of, 194.
Owner of, may sue for damage by dangerous cargo, when, 204, 229.
Condition by, not extending to *gross* negligence, when, 219, 220.
Implied warranty of seaworthiness, 220.

SHRUBS, not distrainable, 426.

SIC UTERE TUO UT ALIENUM NON LÆDAS, application of maxim, 272, 789 *et seq.*

SIGNATURE,
What sufficient to satisfy Statute of Frauds, 298, 299, 319 *et seq.*
To satisfy Wills Act, 322—324.
Agent's, sufficient under R. & C. Traffic Act, 218.
Of agent to acknowledgment of debt, sufficient, 571.
Of agent "*per pro.*," inquiry as to authority, 471.
Of master of ship to bill of lading, 741.

SIMONY, bonds void for, 369.

SKILL, liability for not exercising, 185, 186, 227.

SLANDER,
Privileged statements, 262—266. See *Privileged Statements.*
Damage, when too remote, 280.
By "riding Skimmington," 256.

SOLDIER, when not liable to foreigners for hostile acts, 629.

SOLICITOR. See *Attorney.*

SOVEREIGN PRINCE (Foreign),
His immunity from suits for acts of state, 625, 626.
His property not liable to proceedings *in rem*, 627.
Cannot be sued personally, unless he submit to jurisdiction, 625, 627.
Cases where he is also a British subject, 625, 626.
May sue for wrongs done to his property, 628, 629.
But not for invasions of his prerogative, 629.
Counterclaim against, when permitted, 627, 628.
May be named as a defendant for some purposes, 628.
Status of, how proved, 629.
Actions between officials of, 629.

SPARKS.
Escape of sparks from engine, 825, 828.
No liability, if statute authorizes engine, *and* if no negligence, Id.
Secus, if no statute, or if negligence, Id.

SPECIAL CASE. See *Justice of Peace.*
Power and duty of justices to state, when, 670—673.

SPORTING PHRASEOLOGY, when it may explain written contract, 551.

SQUIB,
Action for damage, against original thrower, 438 *et seq.*
Statutes against squib-throwing, 439.

STAKE-HOLDER. See *Gaming, Illegality.*
Rights of parties against, on repudiation of illegal wager, 386, 387.
Not agent of winner, Id.

STAMP. See *Revenue.*
Pledge does not require mortgage stamp, 194.
Presumed, if instrument withheld, 354.
When alteration requires a new, 783.

STANDING BY, doctrine of, said to apply between mortgagee and mortgagor's tenant, 495.

STATUTE,
Creating, not liability, but special remedy, effect of, 285, 286. See 252.
Creating liability, but not providing special remedy, effect of, Id.

STATUTE—*continued.*
Creating liability, and providing special remedy, effect of, 285, 286.
Remedy for infringement of, by injunction, Id.
Explanation of, by contemporary usage, 255.
Contracts prohibited by, are void, 369 *et seq.* See *Illegality.*
Effect of statute imposing penalty, 373.
When imperative, when directory, 381, 382.
Effect of, giving fixed meaning to words of measure, &c., 551, 552.
When several acts separate offences under, 632, 640.
No liability for damage by thing authorized by, if no negligence, 828.
Case of sparks from railway engines, 825, 828.
Of water from canal, main, or sewer, Id.

STATUTE OF FRAUDS,
S. 4 requires a signed agreement or *memorandum* in case of—
A. Agreements to answer for debt of another, 287 *et seq.*, 310 *et seq.*
What agreements are such, 288 *et seq.*
The original debtor must remain liable, 288, 289.
The promise must be made to the creditor, 289, 290.
And must be to answer for debt due to him, 289, 290.
There must be no independent liability on promisor's part, 291.
The promise must be actionable at law, 290.
Agreement to give guarantee is such, 291.
Promise to pay off charge on one's own property, not such, Id.
Contracts regulating terms of employment, not such, Id.
Promise with reference to supposed future liability, 290.
What must appear in writing, 291 *et seq.*, 310 *et seq.*
The names of *both* parties, 297, 298.
The promise, 291—294.
The consideration formerly required to be in writing, 291, 310 *et seq.*
Not so now, by 19 & 20 Vict. c. 97, s. 3; 291, 310, 318.
Parol evidence admitted to *supply* the consideration, 292.
Not to *vary* it, Id.
Nor to supply the promise, 292, 293.
To identify the subject-matter of the promise, 294.
Or of the consideration, 295.
To show that the consideration was good, 294.
Guarantees construed, *ut res magis valeat quam pereat*, 296.
Parol guarantee enforced by court against its officer, 301.
B. Agreements not to be performed within one year, 303 *et seq.*
Supposed design of statute, 303, 307.
Statute does not affect agreements capable of performance within year, 303—305.
Instances of agreements within statute, 304, 305.
Of agreements not within it, 304.
Statute does not affect agreements performable on one side within year, 305, 306.
Donellan v. *Read*, discussed, 306, 308.
Statute does not affect actions upon "common money counts," 308.

STATUTE OF FRAUDS—*continued.*
C. Agreements for the sale of land,
What a sufficient description of parties, 298.
Equitable doctrine of part performance, 308, 309.
Signature by auctioneer or his clerk, 321.
The consideration, as well as the promise, must be in writing, 291.
Except, now, in case of guarantees, 292, 318.
The agreement may be collected from different documents, 296.
Provided that the connection between them appears on their face, 296, 297.
Parol evidence admitted to identify one document to which another refers, 297.
It is immaterial to whom *memorandum* was addressed, Id.
Or for what purpose it was made, 300.
Or whether made before or after contract concluded, 299.
Without writing agreement not void, but not actionable, 300.
It may be relied on as a defence, 301.
Statute affects actions whereby defendant "charged" by means of agreement, Id.
Stranger to agreement may rely upon the statute, Id.
Memorandum must exist before action brought, 302.
Signature, what a sufficient, within statute, 319 *et seq.*
Place of, immaterial, 299, 319, 320.
Provided that it governs the whole *memorandum*, 299, 320.
Cases where parties contemplated further signature, 299, 321.
Or the drawing up of a more formal document, 302.
Signature, by party or his agent, as witness, 321.
By auctioneer or his clerk, Id.
Signature by agent in his own name, 322.
Authority to sign, in various cases, Id.
One party cannot sign as agent for the other, Id.
Signature by initials, or mark, Id.
By stamped facsimile, or print, 323.
Revision after signature, parol evidence to prove assent, 300.
Parol evidence admitted to show assent to substituted mode of performance of contract, Id.
But not to prove oral alterations creating a *new* contract, Id.
Signature by party enforcing contract, unnecessary, 298.
Statute not to be made a means of fraud, 487.
Statute "a weapon of defence, not offence," 302.
Cases where parties contemplated a more formal document, Id.
Equitable doctrine of part performance, 308, 309.
Deeds not affected by statute, 299.
Statute affects contracts, though made abroad, 297.
Effect of, on foreign causes of action, 622.
Does not prevent parol evidence of custom, when, 539.

STATUTE OF LIMITATIONS (21 Jac. 1, c. 16),
Part-payment saves, when, 561 *et seq.*
Principle on which it saves, 563, 564. See 143.
Admission of whole debt, whence new promise to pay implied, 561, 563, 564.

STATUTE OF LIMITATIONS—*continued.*
Part-payment saves, when—*continued.*
Requisites of, to save, 563.
(1) paid on account of larger debt, 563, 564.
(2) paid on account of debt sued for, 563, 564.
Circumstances must not rebut promise to pay residue, 564.
Rebutted by payment with denial of debt, Id.
Or with intention to discharge whole debt, Id.
By payment into court, Id.
Or under compulsion of law, Id.
Or under composition deed, 566.
Quære, as to payment held fraudulent on bankruptcy, Id.
Must be made before action brought, 564.
May be made after debt already barred, Id.
Will save several debts, if paid on account of all, 565.
Question of fact, whether so paid, Id.
Presumed to be paid on account of debt not barred, Id.
Creditor's appropriation to barred debt does not revive it, Id.
Delivery of goods in part payment suffices, 566.
Delivery must be equivalent to payment, Id.
Open account insufficient, Id.
Effect of striking a balance, Id.
Payment by bill, note, or cheque, suffices, 567.
Subsequent dishonour immaterial, Id.
Payment to creditor's agent suffices, Id.
So may payment to third party at creditor's request, Id.
Payment to stranger, not sufficient, Id.
Maintenance of child in satisfaction of interest, held sufficient, Id.
Any facts supporting plea of payment sufficient, Id.
Payment to person acting as administrator, held sufficient, 567, 568.
Quære, as to payment to prior holder of bill, 568.
Payment must be made by debtor's authority, Id.
Primâ facie authority of partners, Id.
Effect of dissolution of partnership, Id.
Payment by devisee for life, effect of, Id.
Payment may be proved by oral acknowledgment of payment, 569.
Memorandum of payment on bill or contract now insufficient, Id.
Payment by one joint contractor does not now bind another, 563.
By one executor does not now bind another, Id.
Acknowledgment saves, when, 563, 569—571.
Principle on which it saves, 569, 570.
By joint contractor, or co-executor, now insufficient, 563.
Must now be in writing and signed, Id.
Signature by agent sufficient, 571.
Amount of debt may be proved by parol, 569.
If conditional, condition must be fulfilled, Id.
Must be made to creditor or his agent, 571.
Letter written without prejudice, *semble*, insufficient, Id.
Stamp on acknowledgment, when required, Id.
Effect of, on foreign causes of action, 615—618.
Effect of foreign statutes of limitations, 616, 617.

STATUTES CITED.

17 John, Magna Charta [25 Ed. 1, Rev. St.], c. 29 (Monopoly); 392, 395, 396.
20 Hen. 3 [St. Merton], c. 6 (Wardship); 239, 255.
51 Hen. 3, St. 4 [St. of the Exchequer] (Distress); 434.
3 Ed. 1 [St. Westm. 1], c. 5 (Elections); 252, 282.
c. 17 (Distress); 104.
13 Ed. 1 [St. Westm. 2], c. 5 (Advowsons); 244, 255.
c. 24 (New Writs); 257.
50 Ed. 3, c. 6 (Fraud. Convey.); 11.
2 Rich. 2, St. 1, c. 5 (De Scand. Magn.); 252.
2 Rich. 2, St. 2, c. 3 (Fraud. Convey.); 11.
6 Rich. 2, c. 2 (Venue); 597.
4 Hen. 4, c. 18 (Venue); 597.
8 Hen. 6, c. 7 (Elections); 247.
23 Hen. 6, c. 14 (Elections); 239.
1 Rich. 3, c. 1 (Feoffments to Uses); 4.
3 Hen. 7, c. 4 (Fraud. Convey.); 11.
27 Hen. 8, c. 10 (Uses); 3.
32 Hen. 8, c. 34 (Covenant, Reversion); 59 *et seq.*
34 & 35 Hen. 8, c. 13 (Chester, Elections); 250.
35 Hen. 8, c. 6 (Jury); 599.
5 & 6 Ed. 6, c. 16 (Sale of Offices); 7, 369.
13 Eliz. c. 5 (Transfers void against Creditors); 1 *et seq.*
27 Eliz. c. 4 (Transfers void against Purchasers); 6 *et seq.*, 24 *et seq.*
c. 6 (Jury); 599.
c. 8 (Error from Q. B.); 252.
31 Eliz. c. 6 (Simony); 369.
43 Eliz. c. 2 (Maintenance of Child); 145.
(Distress for Poor Rates); 434.
7 Jac. 1, c. 5 (Justices, Actions); 635, 636, 639.
21 Jac. 1, c. 3, s. 6 (Patents); 392.
c. 16. See *Statute of Limitations.*
c. 19 (Bankruptcy); 683, 705.
16 & 17 Car. 2, c. 8 (Jeoffails, Venue); 598.
(Jury); 599.
25 Car. 2, c. 9 (Durham, Elections); 251.
29 Car. 2, c. 3. See *Statute of Frauds*
s. 4 (Guarantee); 287 *et seq.*, 310 *et seq.*
(Contract for more than year); 303 *et seq.*
(Contract for sale of land); 298, 308, 309, 321.
s. 16 (Execution); 18.
s. 17 (Sale of Goods); 292, 300, 319.
c. 7 (Sunday); 632.
2 W. & M. sess. 1, c. 5 (Distress, Sale); 131, 423, 426, 429, 430, 499.
7 & 8 Will. 3, c. 7 (Elections); 237, 238, 239.
9 & 10 Will. 3, c. 7 (Squibs); 439.
11 & 12 Will. 3, c. 12 (Governors of Colonies); 581.
3 & 4 Ann., c. 9 [c. 8, Rev. St.] (Negotiability of Notes); 467.
4 [& 5] Ann., c. 16 [c. 3, Rev. St.]:
ss. 6, 7 (Jury to be *de* Corp. Comit.); 599.

STATUTES CITED—*continued.*

4 [& 5] Ann., c. 16, s. 9 (Attornment); 498 *et seq.*, 503.
s. 10 (Forfeiture, Notice); 50.
s. 12 (Discharge of Bond); 341.
6 Ann., c. 31 [c. 58, Rev. St.] (Fire); 272.
7 Ann., c. 12 (Ambassadors); 436, 630, 631.
c. 18 (Advowsons); 251.
8 Ann., c. 9 [c. 5, Rev. St.], s. 39 (Apprenticeship Deed); 375.
c. 14 [c. 18, Rev. St.] (Distress, Execution); 40, 432.
9 Ann., c. 14 [c. 19, Rev. St.] (Gaming); 369.
12 Ann., st. 2, c. 12 [13 Ann., c. 11, Rev. St.] (Simony); 369.
2 Geo. 2, c. 24 (Elections, Corrupt Practices); 241, 284.
4 Geo. 2, c. 28, s. 5 (Rent Charge, Distress); 430.
s. 6 (Merger); 62.
5 Geo. 2, c. 19 (Certiorari); 660.
7 Geo. 2, c. 8, s. 88 (Stock-Jobbing); 375.
c. 15 (Carriers by Water); 219.
11 Geo. 2, c. 19, s. 8 (Distress, Crops); 426, 430.
s. 19 (Distress, Tresp. *ab init.*); 132, 499.
s. 21 (General Issue); 502.
13 Geo. 2, c. 18, s. 5 (Certiorari); 659.
17 Geo. 2, c. 38, s. 8 (Distress, Poor-Rate); 132.
24 Geo. 2, c. 18 (Jury); 599.
c. 23 (New Style); 534, 553.
14 Geo. 3, c. 48 (Wager Policies); 474.
c. 78 (Insurance); 66, 272.
26 Geo. 3, c. 86 (Fire, Carriers); 218, 219.
36 Geo. 3, c. 86 (Butter); 369.
38 Geo. 3, c. 5, s. 17 (Land Tax); 163, 164.
39 & 40 Geo. 3, c. 98 (Accumulations); 419, 420.
42 Geo. 3, c. 119 (Lotteries); 369.
43 Geo. 3, c. 141 (Justices, Actions); 641.
46 Geo. 3, c. 65 (Property Tax); 163.
49 Geo. 3, c. 126, s. 4 (Sale of Offices); 369.
51 Geo. 3, c. 64, s. 4 (India Bond, negotiable); 456.
53 Geo. 3, c. 127 (Church Rate); 666.
c. 159 (Carriers by Sea); 219.
56 Geo. 3, c. 50, s. 6 (Distress); 432.
57 Geo. 3, c. lx. (Broker); 374.
3 Geo. 4, c. 23 (Justices); 646.
4 Geo. 4, c. 34 (Master and Servant); 664.
5 Geo. 4, c. 113 (Slave Trade Abolition); 617.
6 Geo. 4, c. 81, ss. 25 & 26 (Excise); 374.
c. 155, s. 53 (Pilot); 219.
7 & 8 Geo. 4, c. 25 (Simony); 369.
c. 52 (Excise), 667.
9 Geo. 4, c. 14 (Lord Tenterden's Act), s. 1; 562, 563.
s. 2; Id.
s. 3; 569, 571.
c. 94 (Simony); 369.
11 Geo. 4 & 1 Will. 4, c. 68 (Land Carriers); 206, 207.
1 Will. 4, c. 22 (Witness, Examination); 588.

STATUTES CITED—*continued.*

3 & 4 Will. 4, c. 42, s. 5 (Acknowledgment); 571.
s. 14 (Executors); 414.
s. 23 (Venue); 600.
4 & 5 Will. 4, c. 76, s. 71 (Poor); 145.
5 & 6 Will. 4, c. 41 (Gaming); 369, 373.
c. 76, s. 14 (Borough, Restraint of Trade); 393.
s. 94 (Borough, Mortgages); 372.
1 Vict. c. 26 (Wills); 322—324.
1 & 2 Vict. c. 110 (Execution); 23, 260.
2 & 3 Vict. c. 71, s. 40 (Detention of Goods); 431.
3 & 4 Vict. c. 9 (Parliament); 286.
5 & 6 Vict. c. 35 (Property Tax); 164.
6 & 7 Vict. c. 18, ss. 79, 81 (Registration, Election); 259.
ss. 82, 86, 97 (Returning Officer); 284, 285.
c. 40, s. 18 (Distress, Looms, etc.); 429.
c. 86 (London Cab-owners); 353.
c. 96, s. 7 (Libel); 155.
7 & 8 Vict. c. 76 (Real Property); 41, 158.
c. 110, s. 29 (Director of Company); 379.
8 Vict. c. 47, s. 2 (Dog stealing); 431.
8 & 9 Vict. c. 20 (Railways); 203.
c. 106 (Real Property); 41.
s. 4 ("Grant"); 64.
s. 9 (Merger); 62.
c. 109 (Gaming); 369, 373.
9 & 10 Vict. c. 93 (Death through Negligence); 267, 280.
10 & 11 Vict. c. 15, s. 14 (Distress, Gas fittings); 437.
c. 17, s. 44 (Water pipes, Distress); Id.
11 & 12 Vict. c. 42 (Jervis' Act, Indictable Offences); 648, 652.
c. 43 (Jervis' Act, Summary Jurisdiction); 646 *et seq.*
c. 44 (Jervis' Act, Protection of Justices); 642 *et seq.*
12 & 13 Vict. c. 45, s. 5 (Quarter Sessions); 644.
s. 7 (Amendment of Orders); 646.
c. 106, s. 145 (Bankruptcy, Leases); 48.
s. 204 (Promises to pay debts); 143, 144, 370.
14 & 15 Vict. c. 25, s. 1 (Emblements); 534.
s. 2 (Distress); 432.
15 & 16 Vict. c. 76 (C. L. P. Act, 1852):
ss. 41, 182 (Change of Venue); 600.
s. 81 (Pleadings); 598.
s. 210 (Ejectment); 40.
s. 212 (Relief); 51.
c. 86, s. 36 (Patent); 367.
16 & 17 Vict. c. 59, s. 19 (Bankers' Protection); 458.
17 & 18 Vict. c. 31 (Railway and Canal Traffic); 203, 210—218, 224.
c. 90 (Usury); 369.
c. 104, s. 296 (Navigation); 275.
c. 125 (C. L. P. Act, 1854):
s. 83 (Equitable defences); 339.
s. 87 (Lost Bill, Indemnity); 454.
18 & 19 Vict. c. 63, s. 40 (Friendly Societies); 672.

STATUTES CITED—*continued.*
18 & 19 Vict. c. 111 (Bill of Lading); 739—741.
c. 120 (Metropolitan Management); 284, 369, 672.
19 & 20 Vict. c. 25 (Crossed Cheque); 458.
c. 97 (Mercantile Law Amendment):
s. 1 (Execution); 18.
s. 3 (Guarantee); 292, 293, 310, 318.
s. 5 (Sureties); 153, 725.
s. 13 (Signature by agent); 571.
s. 14 (Co-Contractors; St. of Limitations, 563.
20 & 21 Vict. c. 43 (Justices, Statement of Case); 670 *et seq.*
21 & 22 Vict. c. 79 (Crossed Cheque); 458.
c. 90, s. 31 (Physicians' fees); 146.
22 & 23 Vict. c. 35 (Conditions, Forfeiture); 35 *et seq.*
s. 3 (Apportionment of Conditions); 33, 49, 60, 64.
23 Vict. c. 126 (C. L. P. Act, 1860):
s. 1 (Forfeiture, Relief); 51.
s. 23 (Replevin); 131.
23 & 24 Vict. c. 38, s. 6 (Conditions, Waiver); 35, 44.
c. 154, s. 3 (Ireland, Reversion); 97.
24 Vict. c. 11 (Ascertainment of Foreign Law); 623.
24 & 25 Vict. c. 96 (Larceny, &c.); 119.
s. 3 (Larceny by Bailee); 230.
s. 100 (Restitution of Stolen Property); 473.
c. 97, s. 52 ("Fair and reasonable" supposition); 667.
c. 100, s. 7 (Excusable homicide); 100.
s. 46 (Justices, Title to land); 667.
25 & 26 Vict. c. 89, s. 4 (Companies, Registration); 370.
ss. 6, 11, 12, 14 (Memorandum, Articles); 380, 381.
s. 163 (Distress after Winding up); 433.
26 & 27 Vict. c. 41 (Innkeepers); 119, 123.
c. 92 (Railways); 210.
c. 93, s. 14 (Water-meters, Distress); 437.
28 & 29 Vict. c. 94 (Land Carriers); 206—210, 212.
c. 104, s. 46 (Venue, Crown); 600.
30 & 31 Vict. c. 23 (Stamps on Policies); 374.
c. 29, s. 1 (Leeman's Act); 554.
31 & 32 Vict. c. 119 (Railway Regulation); 220, 221.
32 & 33 Vict. c. 62 (Imprisonment for Debt, Abolition); 113, 114.
c. 71, s. 126 (Bankruptcy, Composition); 340.
33 & 34 Vict. c. 23 (Felon's Goods); 6, 18, 100.
34 & 35 Vict. c. 41, s. 18 (Distress, Gas fittings); 437.
c. 78 (Railway Regulation); 221.
c. 79 (Lodger's Goods Protection); 436.
c. 104, s. 11 (Factories, Summ. Jurisd.); 655.
35 & 36 Vict. c. 33 (Ballot); 285.
c. 50 (Railway Rolling Stock); 437.
c. 93 (Pawnbrokers); 196, 197.
36 Vict. c. 12, s. 2 (Separation, Infant's custody); 367.
36 & 37 Vict. c. 38 (Railways); 211.

STATUTES CITED—*continued.*

36 & 37 Vict. c. 66 (Judicature Act, 1873):
s. 19 (Court of Appeal, Jurisdiction); 660.
s. 24 (Equitable defences); 339, 342.
s. 25, sub-s. 4 (Merger); 62.
sub-s. 5 (Mortgagor in possession); 503, 527.
sub-s. 6 (Choses in Action assignable); 140, 466, 769.
sub-s. 8 (Injunction); 285.
sub-s. 11 (Equity to prevail); 86, 152.
37 & 38 Vict. c. 62 (Infants' Relief Act); 143.
38 & 39 Vict. c. 17, s. 80 (Squibs); 439.
c. 55, s. 174 (Contracts by urban authority); 379.
c. 60 (Friendly Societies); 370.
39 & 40 Vict. c. 81 (Crossed Cheque); 458.
41 Vict. c. 16, s. 89 (Factories, Summ. Jurisd.); 655.
41 & 42 Vict. c. 31 (Bills of Sale); 15.
s. 6 (Attornment clauses); 523, 524.
c. 38 (Innkeepers); 119, 126.
c. 73 (Territorial Waters, Jurisdiction); 607.
42 & 43 Vict. c. 49 (Summary Jurisdiction Act, 1879); 647, 650, 651, 656.
s. 13 (Confession); 653.
s. 17 (Trial by Jury); 656.
s. 27, sub-s. 5 (Indictable Offence); 654, 656.
s. 33 (Statement of Case); 670, 672.
s. 37 (Death of Justice); 653.
s. 39 (Offence, how to be stated); 650, 651.
s. 40 (Case stated, without certiorari), 658, 661.
c. 59, s. 3 (Outlawry), 6.
44 & 45 Vict. c. 41 (Conveyancing Act, 1881):
s. 3 (Covenants); 87.
s. 10 (Lessee's Covenants); 63, 64, 510, 511.
s. 11 (Lessor's Covenants); 63, 64, 511.
s. 12 (Apportionment of conditions); 49, 63, 64.
s. 14 (Forfeiture); 50, 51.
s. 18 (Leases, Mortgagor and Mortgagee); 504, 510, 511.
s. 58 (Covenants); 64.
45 & 46 Vict. c. 39, s. 3 (Conveyancing, Notice); 87.
c. 43 (Bills of Sale); 15, 524.
c. 50, s. 247 (Free Trade, Boroughs); 393.
c. 56, s. 25 (Electric lines, Distress); 437.
c. 61 (Bills of Exchange Act, 1882):
s. 2 ("Issue"), 784.
s. 8 (Words prohibiting transfer); 458, 460.
s. 9 (Words and Figures); 784.
s. 17, sub-s. 2 (Parol acceptance insufficient); 450.
s. 19, sub-s. 2 (Special acceptance); 782.
ss. 20, 21 (Inchoate Instruments, Delivery); 472, 784.

STATUTES CITED—*continued.*

45 & 46 Vict. c. 61, s. 22 (Corporation); 467.
s. 34 (Special Indorsement); 457.
s. 35 (Restrictive Indorsement); Id.
s. 60 (Bankers' Protection); 458.
s. 62 (Renunciation of rights); 337, 338.
s. 64 (Alteration of Bill); 780—782.
s. 70 (Lost Bill, Indemnity), 454.
s. 72 (Conflict of Laws), 614, 615.
ss. 76—82 (Crossed Cheques); 457, 458.
s. 90 ("Good Faith"); 472.
s. 92 (Saving Clause); 615.
46 & 47 Vict. c. 52 (Bankruptcy):
s. 23 (Compositions); 334, 335.
s. 42 (Distress for rent); 433, 434.
s. 47 (Voluntary Settlements); 22.
s. 54 (Vesting of property); 48.
s. 55 (Disclaimer); Id.
c. 57 (Patents); 392.
c. 61, s. 45 (Distress); 435, 436.
47 & 48 Vict. c. 43 (Summary Jurisdiction, 1884); 647, 648, 655, 656.
49 & 50 Vict. c. 48, s. 6 (Physician's fees); 146.
51 & 52 Vict. c. 21 (Distress); 426, 435.
c. 25 (Railway and Canal Traffic); 203, 210, 211.
c. 43, s. 116 (County Court, Costs); 223.
s. 147 (Execution, Necessaries); 435.
s. 160 (Execution, Landlord); 432.
c. 64 (Libel); 264.
52 & 53 Vict. c. 45 (Factors' Act); 734, 741 *et seq.*
c. 49, s. 4 (Arbitration, Stay of Action); 341.
53 & 54 Vict. c. 57 (Tenants on land under mortgage); 508.
c. 71, s. 3 (Bankruptcy, Compositions); 324, 325.
s. 28 (Distress for rent); 433, 434.
55 Vict. c. 4, s. 5 (Infants); 143.
c. 9 (Gaming); 386, 388.
55 & 56 Vict. c. 15 (Forfeiture); 50, 51.
c. 44 (Railway Traffic); 211.
c. 58 (Accumulations); 420.
56 & 57 Vict. c. 21 (Voluntary Conveyances); 24.
c. 61 (Public Authorities Protection Act); 645.
c. 71 (Sale of Goods Act):
s. 21 (Sale by person not owner); 455.
s. 22 (Sale in Market overt); 455.
s. 25 (Dispositions by seller or buyer); 745, 746.
s. 26 (Execution); 18.
ss. 38, 39 (Unpaid seller's rights against goods); 719, 724, 725.
ss. 41—43 (Lien); 724.
ss. 44—48 (Stoppage in transitu; resale); 719 *et seq.*
s. 55 (Usage); 545.
57 & 58 Vict. c. 54 (Railway Traffic); 211.

STATUTES CITED—*continued.*
57 & 58 Vict. c. 60 (Merchant Shipping):
ss. 24—26 (Transfers); 15.
ss. 502, 503—509 (Limitation of Liability); 219.
ss. 156, 157 (Seaman's Wages); 480.
s. 633 (Pilotage); 219.

STOCK EXCHANGE,
Employer of broker, when bound by rules of, 147, 546, 548—550.
Of Liverpool, rule of, admitted in evidence, 550.
Custom of, when seller of shares entitled to indemnity, 166, 545, 546.
Custom on, to disregard Leeman's Act, bad, 554.

STOPPAGE IN TRANSITU,
Right of, 674 *et seq.*
Origin of, 719.
Founded in equity, adopted by law, 709, 720.
Law as to, now codified by Sale of Goods Act, 719.
Unpaid seller has right of, on buyer's insolvency, 674, 719.
Except against *bonâ fide* assignee for value of bill of lading, Id.
Meaning of insolvency, 719.
Right of, only in question when the property has passed, 737.
How distinguishable from lien, 720, 721.
Does not rescind the sale, 720—722.
Right of, entitles seller to order re-delivery to himself, 722.
Goods continue at buyer's risk, Id.
After stoppage, seller when entitled to re-sell or rescind, 722, 723.
Seller's analogous right of retention, 723, 724.
A wrongful, does not affect rights already acquired, 724.
Seller may be unpaid, though he has taken a bill, Id.
Who may exercise right of, 724—726.
By unauthorized agent, must be ratified when, 726.
Must be made before the transit ends, Id.
When goods to be deemed in course of transit, Id.
When transit ends, Id.
Effect of goods being at buyer's orders in hands of agent to keep them, 727.
Effect of goods being delivered to ship chartered by buyer, 729.
Effect of *new* agreement by carrier to hold for buyer, 729, 730.
Cases where goods sold on wharf or in dock, 730.
Effect of part delivery, 730, 732.
Cases where buyer rejects goods, 732.
Buyer may anticipate termination of transit, Id.
Carrier cannot prolong by refusal to deliver, 732, 733.
Seller's right not defeated by claims of third person against buyer, 733.
Notice of, must be given to whom, Id.
Goods sold by buyer before delivery are subject to right of, Id.
But not as against *bonâ fide* assignee for value of bill of lading, 733 *et seq.*
Nor as against assignee of any document of title, 734.
Meaning of *bona fides*, 734.
"Abbott on Shipping," on this point, Id.

STOPPAGE IN TRANSITU—*continued.*
Indorsement must be for value, 735.
Whether an antecedent debt sufficient, 735, 736.
Indorsement must be by person having authority, 736.
Assignment must be *bonâ fide*, 734, 737.
Indorsee takes subject to conditions of bill of lading, 737.
Where property in goods to vest only on conditions, Id.
Effect of making goods deliverable to shipper's order, Id.
Unless right of possession vested in consignee, no question of stoppage arises, Id.
Effect of pledge of bill of lading, 734, 737—739.
Right of stoppage continues subject to pledgee's rights, Id.
Other goods pledged applied first to discharge pledge, 738, 739.
Bill of Lading Act not to affect rights of, 740.

STRANGER. See *Covenant.*
Payment of another's debt by, when no discharge, 338.
Part-payment by, does not save St. of Limitations, 568.
Bailee, when not liable for stranger's acts, 190.
Alteration of instrument by, 749, 786.

STREAM,
Diversion of underground, when not actionable, 273.
Liability for stream diverted or tapped, in mining, 823.

SUMMARY JURISDICTION ACTS. See *Conviction, Justice of Peace*

SUNDAY,
Several acts of exercising ordinary calling on, one offence, 632 *et seq.*
A by-law against traffic on, held void, 415.

SUPPORT,
Action for removal of, 269—272, 273, 347.
For house, right to, by prescription, 269, 270.
Right to, as against neighbour digging negligently, *quære*, 270
No negligence, where no notice, Id.
Right to, as against stranger, Id.
From land to land, natural right of, 270—272.
Consequential damage to house, by infringing, 270, 271.
Subsidence, not pecuniary loss, the cause of action, 272.
Action for second subsidence, Id.
Right of, as between vendor and purchaser, Id.
Effect of excavations in intervening land, Id.
Subsidence caused by draining, when not actionable, 273.
From house to house, right of, 272.

SURETY. See *Contribution, Indemnity.*
His right of indemnity from principal, 149 *et seq.*
From co-surety, 151 *et seq.*
Remedies of, under 19 & 20 Vict. c. 97; 153, 154.

SUSPENSION,
Cannot be of vested right of action, 339, 340.
Rule not applicable to right of action for rent suspended by holding distress, 340.

SUSPENSION—*continued.*
Distinction where original right qualified, 340.
Where performance suspended by agreement, Id.
Agreement for, a ground of cross action, 339.
Whether an equitable defence, Id.
Of suit, when a consideration, 332.
Of civil remedy, where tort a felony, 278—280, 761.

TAUNTON, J., value of his *obiter dicta*, 662.

TELEGRAM, no analogy between addressee of, and consignee of goods, 222.

TENANT. See *Landlord and Tenant.*
From *year to year*, covenant with, may run, 60.
Paying charges may deduct from rent, when, 507.
Of mortgagor. See *Mortgagor and Mortgagee.*
At sufferance, 526.

TENDER,
On distress, 130, 131, 133. See *Distress.*
Of hire, when not needed, to support action against carrier, 202, 207.
Of amends before action against justices, etc., 645.
Opportunity to be given for tender, Id.
Waiver of, 334.

TENTERDEN'S (LORD) ACT [9 Geo. 4, c. 14].
Effect of, upon part payments and acknowledgments of debts, 562, 563, 569, 571.

THEATRE,
Contract to perform at unlicensed, void, 369.
Contract between manager and actress explained by usage, 550.

THISTLE SEEDS, blown on to neighbour's lands, not actionable, 272, 825.

TIME. See *Custom, Reasonable Time.*
If none fixed, reasonable time, 223.
"Six days' notice," 659.

TITHES, covenants will run with, 90.

TITLE. See *Market Overt, Negotiable Instrument.*
Covenants for, run with land, 64, 65.
May be enforced by peaceable entry, 133, 134.
Depends on law of country where acquired, 608, 611.
Possession, a sufficient title against wrongdoers, 343 *et seq.*
Quære, as to possession of incorporeal right, 345 *et seq.*
Or enjoyment of easement under licence, Id.
Under Factors Acts, 741 *et seq.*
Claim of, when ousts justices' jurisdiction, 665—667.

TORT FEASOR. See *Illegality, Wrongdoer.*

TRACTION ENGINE, liability for sparks, escaping from, 826.

TRADE. See *Custom, Restraint of Trade.*
Encouraged and favoured by the law, 395, 402.
Consists in free application of labour to free circulation of property, 415, 416.
Easy negotiation of property its life and soul, 716, 718, 771.
Expense, litigation, and delay are death to, 760.
Modern changes in the conditions of, 404, 412.
Settlement by man about to embark in, 20, 21.
Covenant not to carry on particular, runs with land, 65.
Goods sent or delivered by way of, not distrainable, 423, 427—429.
Instruments of, how far privileged from distress, 423, 424, 434, 435.

TRADE-MARK,
Liability for use of another's, though not *scienter*, 155.

TRADES UNIONS, 370, 415.

TRANSFER. See *Assignment, Fraudulent Conveyance, Sale.*
Of negotiable instrument. See *Negotiable Instrument.*

TRANSITORY ACTION,
Distinction between, and local action, 597.
Arising abroad. See *Foreign Cause of Action.*

TREES,
Poisonous, liability for overhanging branches of, 824, 825.
Secus, where branches not overhanging, 825.
Or where clippings removed without authority, 825, 829.

TRESPASS,
How defined, 444.
Distinction between action of *trespass* and on *case*, 440 *et seq.*
Trespass lies, when injury is immediate, 440, 443, 444.
Not, when it is only consequential, Id.
But consequential damages recoverable, 443.
Case must be brought, where injury only consequential, 440.
How far the distinction still of importance, 445, 446.
The case of the squib thrown into market-place, 438 *et seq.*
Of the mad ox turned loose, 439, 441.
Of the horse in Lincoln's Inn Fields, 444.
Of the football tossed into street, 441, 443.
Of stray cattle injured on railway, 445, 446.
Malus animus not essential to constitute a trespass, 439.
A lawful act may become a trespass by accident, 442, 444.
Where A. strikes C., in self-defence against B., Id.
Only justified by inevitable necessity, 442, 443, 445.
Trespass "by a mean without a personal touch," 439.
Effect of intervening acts of third party, 439, 443, 445, 446.
Act in self-defence against *common* enemy, no trespass, 266, 443, 445, 446, 824.
For assault beyond seas, action of, 572, 605—607.
Not entertained, where title to foreign land in dispute, 602, 603.

TRESPASS—*continued*.
Against sheriff for breaking house, action of, 103 *et seq.*
For arrest by unlawful housebreaking, 112, 113.
When execution good, though sheriff a trespasser, 111 *et seq.*
Action of, not maintainable by lessee before entry, 513.
Nor by mortgagee of term, 513.
Nor (*semble*) by mortgagee in fee, 513.
For *mesne profits* by mortgagee, 496, 508.

TRESPASS AB INITIO,
Abuse of authority given by law creates a, 128, 131.
Matter of replication, 127, 131.
Nonfeasance does not create a, 129, 133.
Irregularity in distress for rent, or poor-rate, no longer creates a, 132.
Sheriff, levying execution, 132.

TROVER, ACTION OF,
Against vendor for conversion of goods left with him, 191, 695.
Against bailee, 196, 228.
Possession gives title against wrong-doer, 343 *et seq.*
By bankrupt for after-acquired property, 344.
Presumption of value of goods, 343, 353.

TRUST. See *Fraudulent Conveyance*.
Trust deeds for creditors, validity of, 17.
Undertaking a, creates a duty, when, 168, 180—183.
Contract in consideration of breach of private, 375.
For accumulation, when void, 419.
Notice of a, taken at law, 771.

UBI JUS, IBI REMEDIUM, application of maxim, 251, 257.

ULTRA VIRES, doctrine of, 378 *et seq.* See *Corporation*.

UNDERGROUND STREAM, no action for diversion of, when, 273.

UNDERLEASE,
When a breach of condition, 45.
Contribution between underlessees, 156.

USAGE. See *Custom*.
To explain ancient statute, 255.

USE AND OCCUPATION, when lies, where assignment void, 98.

USER of land, natural and ordinary, no cause of action, 817, 822.

USURY,
Statutes against, repealed, 144.
Bonds infringing, before repeal, void, 369.

VALUABLE CONSIDERATION. See *Consideration*.

VENDOR. See *Sale, Stoppage in Transitu*.
Liability for conversion of goods after sale, 191, 695.
Dispositions by, after sale, 745, 746.
Right of unpaid, analogous to stoppage *in transitu*, 723, 724.
May be unpaid though bill given, 724.

VENUE (Neighbourhood).
History of law of, 596 *et seq.*
Originally the hundred or vill was the, 596.
Why necessary to lay a, 589, 590, 593, 596.
Distinction drawn between *local* and *transitory* causes, 597.
Any venue for transitory, Id.
Used to be traversable, Id.
Effect on, of local justification, Id.
Why defendant formerly confined to one plea, 598.
Verdict to stand, if trial where venue laid, 598, 599.
Jury formerly of the hundred, 598.
Rule relaxed, Id.
Jury *de corpore comitatus*, Id.
Change of, on motion, history of, 599 *et seq.*
Change of, on common affidavit, 599, 600.
In transitory actions, Id.
In local actions, under 3 & 4 Will. 4, c. 42; 600.
Not changed without judge's order, Id.
Privilege of Crown as to, Id.
Of attorney, Id.
Provisions of Judicature Act as to, 600, 601.
Local venues abolished, 601.
But jurisdiction of courts not thereby extended, 602.
Rules as to change of, 601, 602.
Substantial distinction as to, 589, 602.
When judgment formerly idle, if venue wrong, Id.
Naming a, a prayer for trial in county named, 593.
May be here for transitory cause of action arising abroad, 572, 603.
But not so, where title to foreign land in question, 602, 603.
Nor, perhaps, where subject matter of contract abroad *and* parties aliens, 603, 604.

VIS MAJOR. See *Act of God.*

VOLUNTARY CONVEYANCE,
When void against creditors under 13 Eliz. c. 5; 19—22.
Void against subsequent purchaser under 27 Eliz. c. 4; 24.
Change of law by Voluntary Conveyances Act, 1893; Id.
A will is, 26.
An assignment of leaseholds, when not, under 27 Eliz.; Id.
Conveyance for inadequate value is, when, Id.

VOLUNTEERS, 28, 29.

VOTER. See *Returning Officer.*
Right to vote was inseparable from freehold, 247, 248.
Of members of corporation by charter or prescription, 248—250.
Sale of vote criminal, 245.

VOYAGE, policy on illegal, void, 370.

WAGER. See *Gaming.*

WAGGONER, liability of, 199.

WAIVER. See *Exoneration and Discharge.*
Of contract not under seal, before breach, 336, 337.
Secus, of contract under seal, 341.
Of tender, 334.
Of breach of condition. See *Condition.*
Of forfeiture, Ibid.

WAR,
Soldier not liable to foreigner for acts of, when, 629.
Liability *inter se* of persons taking part in, 630.

WAREHOUSE-KEEPER'S CERTIFICATE, a document of title, 742.

WAREHOUSEMAN,
His liability as bailee, 198, 199.
Carrier's liability for goods warehoused by him, 225–227.

WARRANT. See *Justice of Peace.*
Defects in, when immaterial, 648.
When ground for adjournment, Id.
Issue of warrant by justice, 642, 643, 647, 652.
Of warrants of distress, 644.
Grant of, upon conviction by another justice, 643.
Not avoided by death of justice granting, 652, 653.
Necessary, before breaking house on suspicion of felony, 111.

WARRANTY,
Of quiet enjoyment, not title, when implied, 64, 65, 158.
Consideration for, 170.

WASTE,
Reversioner's right of entry, to view, 245, 254.
Action of, for feeding deer, 430.

WATER,
Artificially stored, liability for escape of, 789 *et seq.*
Though competent contractor employed, Id., 830.
Person storing for his own purposes, must keep at his peril, 803, 819, 822.
Excused, if escape caused by plaintiff's default, 803, 829.
Or by act of God, Id.
Or by act of stranger, when, 829.
Person storing for common benefit, not liable unless negligent, 824.
So, where authorized by statute to store, 828.
Or bound by duty imposed by custom, 829.
Mine-owner, mining properly, not liable for percolating, 820, 822.
But liable for water pumped into neighbour's mine, Id.
Or if he diverts a stream, when, 823.
Or taps a river, Id.
Case where mine-owner held not to have appropriated, Id.
Householder held liable for water collected in cellar, Id.
Liable for escape from common cistern, &c., when, 824.
Liability for flow of, by artificial erections on land, 823.
Floods, distinction between keeping out, and getting rid of, 823, 824.

WAYGOING CROP,
When tenant entitled to, by custom, 528.
Plea of right to, Id.
When possession of land remains in him, if so entitled, Id.

WELL,
Draining another's, when not actionable, 273.
Polluting another's, when actionable, 826.

WHARFINGER,
His liability as bailee, 198.
For damage to vessels, Id.

WIFE. See *Husband and Wife.*

WILL,
A voluntary conveyance within 27 Eliz. c. 4; 26.
Alteration of, presumably after execution, 784.
Signature, by initials, mark, or stamped facsimile, 322—324
Where hand of person signing guided by another, 323.
Holograph will terminating with testator's name, 324.
Tracing with dry pen, insufficient, 323.
Acknowledgment of signature, insufficient, 324.

WINDOW,
Arrest through broken pane of, 109, 110.
Entry through open, to distrain, 108.

WITNESS,
No action lies against, for slander, or perjury, 265.
Opinion of, generally not evidence, 474, 486.
Of expert, may be, 491.
On subjects requiring course of habit or study, Id.
Of policy broker, may be, 488 *et seq.*
Unable to attend trial, mode of procedure, 588.
Not compellable to attend for defence, terms put on prosecution, 587, 588.
When justices may enforce attendance of, 648.
And commit, Id.

WORD,
Ordinary meaning of, varied by custom. See *Custom.*
Statutory construction of, not to be varied, 551, 552.

WORDS. *Expressions, Phrases, and Terms.*
"About," 547.
"Across country" (Sporting), 551.
"Assignee," of reversion, &c., 56, 60, 61.
"At 100s." in hop trade, 547.
"Bale," Id.
"*Bonâ fide*," 2, 16, 469 *et seq.*, 472, 734.
"*Concessi*," 54, 57, 64.
"Decision," 644.
"*Demisi*," 54, 57, 64, 158.

WORDS—*continued.*
"Directory," 381, 382.
"Domestic animal," 432.
"Free on board," 728.
"Full and complete" cargo, of sugar at Trinidad, 547.
"Give" (*Dedi*), 54.
"Good" barley, 546.
"Goods supplied" (construed as "*to be* supplied"), 295.
"Grant" (*Dedi*), 54, 57, 158.
"Gross negligence," 185, 186.
"Guest," 124.
"Gulf of Finland," 546.
"I will see you paid," 288.
"In consideration of your having this day," 294.
"In consideration of your being in advance," Id.
"Insolvency," 21, 719.
"In turn to deliver," 547.
"Issued," 784.
"Knowledge," 470. See 208.
"Lady Day," 552.
"Liverpool" in charter-party, 547.
"London," 412, 547.
"Lodger," 436.
"Martinmas," 553.
"Michaelmas," 552, 553.
"More or less," 560.
"Next two months," in iron trade, 547.
"No St. Lawrence," in policy, Id.
"Not elsewhere," in acceptance of bill, 782.
"Not insured," 551.
"Not negotiable," 458.
"Notice," 86, 470.
"Owner's risk," 218.
"Package," 207.
"Payment," 162, 336.
"*Per Proc.*," 471.
"Prime singed bacon," 554.
"Product," other, 426.
"Public trade," 178, 427.
"1000 rabbits," 550.
"Residence," 107.
"Running days," in charter-party, 547.
"Servant," 209, 353.
"Special contract," and "conditions," 214, 215.
"Statuary," in carrying trade, 547.
"There only," in acceptance of bill, 782.
"To charge," in Statute of Frauds, 301.
"To load in regular turn," 547.
"Usage of trade," 539.
"Wet oil," 547.

WRIT. See *Arrest, Execution, Fi. Fa., Sheriff.*

WRITTEN INSTRUMENT,
Explained, or added to, by custom, 528 *et seq.* See *Custom.*
Alteration in, effect of, 747 *et seq.* See *Alteration.*
Larceny of, 119.

WRONGDOER,
No contribution or indemnity between, 154—156, 383 *et seq.*
Qualifications of rule, Id., 390.
Possession sufficient against, 343. See *Possession.*

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